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NORTH CAROLINA REPORTS

Vol. 273

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1968

APPELLATE DIVISION REPORTER:
WILSON B. PARTIN, JR.

ASSISTANT APPELLATE DIVISION REPORTER:
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RALEIGH:
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1968

CITATION OF REPORTS.

Rule 62 of the Supreme Court is as follows:

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

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

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

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

THE SUPREME COURT
OF
NORTH CAROLINA

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HARRY C. MARTIN	Twenty-eighth	Asheville.
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[1]Appointed 7 October 1968.

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SUPERIOR COURT, FALL SESSIONS, 1968.

FIRST DIVISION

First District—Judge Fountain.
Camden—Sept. 23; Dec. 9†.
Chowan—Sept. 9; Nov. 25.
Currituck—Sept. 2; Dec. 2†.
Dare—Oct. 21.
Gates—Oct. 14.
Pasquotank—Sept. 16†; Oct. 7†; Nov. 4†; Nov. 11*.
Perquimans—Oct. 28.

Second District—Judge Cowper.
Beaufort—Aug. 19*; Aug. 26†(2); Sept. 16*; Oct. 14†(2); Nov. 4†; Dec. 2*; Dec. 16.
Hyde—Oct. 7; Oct. 28†.
Martin—Sept. 23*; Nov. 18†(2); Dec. 9.
Tyrrell—Sept. 30.
Washington—Sept. 9; Nov. 11†.

Third District—Judge Cohoon.
Carteret—Aug. 19†(A)(2); Oct. 14†; Nov. 4; Nov. 25†(A).
Craven—Sept. 2(2); Sept. 30†(2); Nov. 11; Nov. 25†(2); Dec. 16*.
Pamlico—Sept. 16(A); Oct. 21.
Pitt—Aug. 19(2); Sept. 16†(2); Oct. 7 (A); Oct. 21†(A); Oct. 28(A); Nov. 18; Dec. 9.

Fourth District—Judge Peel.
Duplin—Aug. 26; Sept. 30†; Oct. 7; Nov. 4*; Dec. 2†(A)(2).
Jones—Sept. 23; Oct. 28†; Nov. 25.
Onslow—July 15(A); July 29†(2); Sept. 23(A)(2); Oct. 14†(A)(2); Nov. 11†; Dec. 2; Dec. 9†(2).
Sampson—Aug. 5*(A); Aug. 12; Sept. 2†(2); Oct. 14*; Oct. 21†; Nov. 18†; Nov. 25(A).

Fifth District—Judge Bundy.
New Hanover—July 22†(A)(2); Aug. 5* (2); Aug. 19†(2); Sept. 2†(A); Sept. 9† (2); Sept. 23†(A); Sept. 30*(A)(2); Oct. 14†(2); Oct. 28*(2); Nov. 11†(3); Dec. 2* (2); Dec. 16†.
Pender—Sept. 2†; Sept. 23; Sept. 30†; Nov. 11(A).

Sixth District—Judge Hubbard.
Bertie—Sept. 16; Nov. 18(2).
Halifax—Aug. 12(2); Sept. 30†(2); Oct. 21*; Dec. 16.
Hertford—July 22(A); Oct. 14; Dec. 2 †(2).
Northampton—Aug. 5; Oct. 28(2).

Seventh District—Judge Mintz.
Edgecombe—Aug. 12*; Sept. 2†(A); Sept. 30*(A); Oct. 28†(2); Nov. 11*; Dec. 16*.
Nash—Aug. 5†(A); Aug. 19*; Sept. 9† (2); Oct. 7*(A); Oct. 14†(2); Nov. 18*(A) (2); Dec. 9†.
Wilson—July 15*; Aug. 26*(2); Sept. 23† (2); Oct. 14*(A)(2); Nov. 18†(2); Dec. 2*.

Eighth District—Judge Parker.
Greene—Oct. 7†; Oct. 14*(A); Dec. 2.
Lenoir—Aug. 5†(A)(2); Aug. 19*(A); Sept. 2(A); Sept. 9†(2); Oct. 14†; Oct. 21*(2); Nov. 11†(A); Nov. 25†; Dec. 9.
Wayne—July 29*(3); Aug. 26†(2); Sept. 23†(2); Oct. 21†(A); Nov. 4*(2); Dec. 2† (A)(2); Dec. 16*.

SECOND DIVISION

Ninth District—Judge Carr.
Franklin—Sept. 16(2); Oct. 14*; Nov. 25†.
Granville—July 15; Oct. 7†(A); Nov. 11 (2).
Person—Sept. 9; Sept. 30†(A)(2); Oct. 28; Dec. 2†.
Vance—Sept. 30*; Nov. 4†; Dec. 9†; Dec. 16*.
Warren—Sept. 2*; Oct. 21†.

Tenth District—Wake.
Schedule "A"—Judge McKinnon.
July 8*(2); Aug. 5†(A)(2); Aug. 19*(2); Sept. 2*(2); Sept. 16†(2); Sept. 30*(2); Oct. 21*(2); Nov. 4*(2); Nov. 18†(2); Dec. 2*(3).

Schedule "B"—Judge Hobgood.
July 8†(A)(2); July 29*(A)(2); Aug. 12 (A)(2); Aug. 19†(2); Sept. 2†(2); Sept. 9 (A)(2); Sept. 16*(2); Sept. 30†(2); Oct. 7 (A)(2); Oct. 21†(2); Nov. 4†(2); Nov. 11 (A)(2); Nov. 18*(2); Dec. 2†(3); Dec. 9 (A).

Eleventh District—Judge Bickett.
Harnett—Aug. 12†(A)(2); Aug. 26*; Sept. 9†(A)(2); Oct. 7†(2); Nov. 4*(2); Dec. 16†.
Johnston—Aug. 12; Aug. 19†; Sept. 23† (2); Oct. 14†(A); Oct. 21; Nov. 4†(A)(2); Dec. 2(2).
Lee—July 29*; Aug. 5†; Sept. 9†(2); Oct. 7†(A); Oct. 28*; Nov. 25†; Dec. 2†(A).

Twelfth District—
Schedule "A"—Judge Canaday.
Cumberland—Aug. 26†(2); Sept. 23(2); Oct. 14*(2); Nov. 25*(2).

Schedule "B"—Judge Braswell.
Cumberland — Aug. 12*; Aug. 26*(2); Sept. 9†(2); Sept. 23*(2); Oct. 7†; Oct. 21 †2; Nov. 4*(2); Nov. 25†(2); Dec. 9*(2).
Hoke—Aug. 19; Nov. 18.

Thirteenth District—Judge Brewer.
Bladen—Aug. 19; Oct. 14*(A); Nov. 11†.
Brunswick—Aug. 26†; Sept. 16; Oct. 21†; Dec. 2†(2).
Columbus—Sept. 2*(2); Sept. 23†(2); Oct. 7*; Oct. 28†(2); Nov. 18*(2); Dec. 9 †(A)(2).

Fourteenth District—Judge Clark.
Durham—July 8*(2); July 22†(A); Aug. 26*(2); Sept. 9†(2); Sept. 9*(A)(2); Sept. 30*(2); Sept. 30†(A); Oct. 14†(2); Oct. 28 *(2); Nov. 11†(2); Nov. 25*(2); Dec. 9*; Dec. 16†.

Fifteenth District—Judge Hall.
Alamance—July 15†(A); July 29†; Aug. 12*(2); Sept. 9†(2); Oct. 14*(2); Nov. 11 †(2); Dec. 2*; Dec. 16.
Chatham—Aug. 26†; Sept. 2; Oct. 28† (2); Nov. 25.
Orange—Aug. 5*(A); Sept. 16*(A); Sept. 23†(2); Nov. 4*(A); Nov. 11†(A)(2); Dec. 9.

Sixteenth District—Judge Bailey.
Robeson—July 8*(2); Aug. 12*(A); Aug. 26†; Sept. 2*(2); Sept. 16†(2); Oct. 7*; Oct. 14†; Oct. 21*(2); Nov. 11†; Nov. 18*(2).
Scotland—July 22†; Aug. 19(A); Nov. 4†; Dec. 2.

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

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

THIRD DIVISION

Seventeenth District—Judge Gambill.
Caswell—Oct. 28(A); Dec. 2†.
Rockingham—July 22†(A)(2); Aug. 19 *(2); Sept. 16†(2); Oct. 14(A)(2); Oct. 28†; Nov. 18†(2); Dec. 9*(2).
Stokes—Sept. 30; Oct. 7(A).
Surry—Aug. 5*(2); Sept. 2†(2); Oct. 7† (2); Nov. 4*(2); Dec. 2(A).

Eighteenth District—
Schedule "A"—Judge Gwyn.
Greensboro—July 8*(2); July 22#; Aug. 19#; Sept. 9†(3); Sept. 30*(2); Oct. 14*(2); Oct. 28*(2); Oct. 28#(A); Nov. 11; Nov. 18 *(2); Dec. 9†(2).
High Point—Dec. 2†.

Schedule "B"—Judge Shaw.
Greensboro—Aug. 26*(2); Sept. 30†(3); Nov. 18†(2); Dec. 2*(3).
High Point—July 15*; Aug. 19†; Sept. 9 †(2); Sept. 23*; Oct. 21†; Oct. 28*; Nov. 4†(2).

Schedule "C"—Judge Lupton.
Greensboro—July 8†(2); Aug. 12*; Aug. 26†(2); Sept. 9*(2); Sept. 23†; Sept. 30#; Oct. 7; Oct. 28†(2); Nov. 25#; Dec. 16#.
High Point—Nov. 18*; Dec. 9*.

Nineteenth District
Schedule "A"—Judge Crissman.
Cabarrus—Sept. 9†(2); Oct. 7(2); Nov. 4 †(2); Dec. 9†.
Randolph—Sept. 23†(2); Nov. 25*; Dec. 2†.
Rowan—Oct. 21†(2); Dec. 9*.

Schedule "B"—Judge Exum.
Cabarrus—Aug. 5†(A); Aug. 19*(A); Nov. 18*; Dec. 16*.
Montgomery—July 8; Aug. 12†(A); Oct. 7.
Randolph—July 22†(A)(2); Sept. 2*(A); Oct. 21†(2); Nov. 4†(2).
Rowan—July 15†; Sept. 9(2); Sept. 23† (2); Nov. 25†(2).

Twentieth District—Judge Seay.
Anson—Sept. 16*; Sept. 23†; Nov. 18†.
Moore—Aug. 12*; Sept. 2†(2); Nov. 11.
Richmond—July 15†(A); July 22*(A); Aug. 26†(A); Sept. 30†; Oct. 7*; Nov. 4† (A); Dec. 2†(2).
Stanly—July 8(A); Oct. 14†; Nov. 25.
Union—Aug. 19†; Aug. 26; Oct. 28(2).

Twenty-First District—Forsyth.
Schedule "A"—Judge Armstrong.
July 8†(3); July 29(A)(3); Sept. 2†(3); Sept. 9(A); Sept. 23(3); Oct. 14†(A); Oct. 21†(2); Nov. 4†(3); Nov. 25(2); Dec. 9†(2).

Schedule "B"—Judge McConnell.
July 29†(2); Aug. 26(3); Sept. 16†(3); Oct. 7†(2); Oct. 21†(A); Oct. 28(3); Nov. 18†(3); Dec. 9(2).

Twenty-Second District—Judge Johnston
Alexander—Sept. 23.
Davidson—July 8†(A)(2); Aug. 19; Sept. 9†(2); Sept. 23(A)(2); Oct. 7†; Oct. 21† (A)(2); Nov. 4(2); Dec. 2†(A); Dec. 9†(2).
Davie—Aug. 5; Sept. 30†; Nov. 4(A).
Iredell—Aug. 26; Sept. 2†; Oct. 14†(A); Oct. 21(2); Nov. 25†(2); Dec. 16(A).

Twenty-Third Distict—Judge Collier.
Alleghany—Aug. 26; Sept. 30.
Ashe—July 15(A); Sept. 9†; Oct. 28.
Wilkes—Aug. 12(2); Sept. 16†(2); Oct. 7; Nov. 4†(2); Dec. 9.
Yadkin—Sept. 2*; Nov. 18†(2); Dec. 2.

FOURTH DIVISION

Twenty-Fourth District—Judge Bryson.
Avery—Oct. 14(2).
Madison—Aug. 26†(2); Sept. 30*; Oct. 28†; Dec. 2*.
Mitchell—Sept. 9(2).
Watauga—Sept. 23; Nov. 11†.
Yancey—Aug. 5; Aug. 12†(2); Nov. 25.

Twenty-Fifth District—Judge Anglin.
Burke—Aug. 12; Sept. 30; Oct. 14; Nov. 18(2); Dec. 16(A).
Caldwell—Aug. 19(2); Sept. 16†(2); Oct. 7*(A); Oct. 21†(2); Dec. 2(2).
Catawba—July 22(A)(2); Aug. 5; Sept. 2†(2); Sept. 16(A); Nov. 4(2); Dec. 16.

Twenty-Sixth District—Mecklenburg.
Schedule "A"—Judge Falls.
Aug. 5*(2); Sept. 2*(2); Sept. 16†(2); Sept. 30*(2); Oct. 21*(2); Nov. 4*(2); Nov. 18†(2); Dec. 2*(3).

Schedule "B"—Judge Ervin.
July 8*(2); Aug. 5†(A); Sept. 2†(2); Sept. 16†(2); Sept. 30†(2); Oct. 14†(2); Oct. 28†(2); Nov. 11†(A); Nov. 18†(2); Dec. 2†(3).

Schedule "C"—Judge Hasty.
July 8*(2); Aug. 5*(2); Sept. 2*(2); Sept. 23*; Sept. 30*(2); Oct. 14†; Oct. 21*(2); Nov. 4*(2); Nov. 18†(2); Dec. 2* (3).

Schedule "D"—Judge to be Assigned.
July 8†(A); Sept. 2*(A)(2); Sept. 2† (A)(2); Sept. 30†(A)(2); Oct. 14†(A)(2); Oct. 28†(A)(2); Nov. 11†(A)(3); Nov. 18 *(A)(2); Dec. 2†(A)(3).

Twenty-Seventh District—
Schedule "A"—Judge Grist.
Cleveland—Oct. 21*(2); Nov. 25†(2).
Gaston—July 8†(2); July 22*(2); Sept. 2*(2); Sept. 16†(2); Sept. 30*(2); Nov. 4*; Nov. 11†(2); Dec. 9†(2).

Schedule "B"—Judge Snepp.
Cleveland—July 8(2); Sept. 23†(2).
Gaston — July 22*(2); Aug. 5†(A)(2); Aug. 19†(A)(2); Sept. 2*; Oct. 7*; Oct. 14 †(2); Oct. 28*(2); Nov. 18†; Nov. 25*(2); Dec. 9†(2).
Lincoln—Sept. 9(2).

Twenty-Eighth District—Buncombe.
Schedule "A"—Judge Froneberger.
July 8*(3); July 29*(A); Aug. 5†(A)#; Aug. 12*(A)(2); Aug. 26*(2); Sept. 9†#; Sept. 16†(2); Sept. 30*(2); Oct. 21*(2); Nov. 4†(2); Nov. 18†#; Nov. 25†(2); Dec. 9†(2).

Schedule "B"—Judge McLean.
July 8†(3); July 29†(3); Aug. 19†(2); Sept. 2†(2); Sept. 16*(2); Oct. 7†#; Oct. 14†(3); Nov. 4*(2); Nov. 18†(A)(2); Dec. 2*(A)(3).

Twenty-Ninth District—Judge Martin.
Henderson—Aug. 12†(2); Oct. 14; Dec. 16.
McDowell—Sept. 2(2); Sept. 30†(2).
Polk—Aug. 26.
Rutherford — Aug. 12*†(A); Sept. 16†* (2); Nov. 4*†(2).
Transylvania—July 8(2); Oct. 21(A)(2).

Thirtieth District—Judge Jackson.
Cherokee—July 29; Nov. 4(2).
Clay—Sept. 30.
Graham—Sept. 9.
Haywood—July 8(2); Sept. 16†(2); Nov. 18(2).
Jackson—Oct. 7(2).
Macon—Aug. 5; Dec. 2(2).
Swain—July 22; Oct. 21.

LICENSED ATTORNEYS.

I, B. E. James, Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 16th day of August, 1968, and said persons have been issued certificates of this Board.

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HENRY LONDON ANDERSON, JR. .... Fayetteville
WILLIAM EDWARD ANDERSON .... Asheville
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Ladson Frederick Hart .... Brevard
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Fred Allen Hicks .... Wise
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Given over my hand and the seal of the Board of Law Examiners, this 9th day of September, 1968.

/s/ B. E. JAMES

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CASES REPORTED.

PAGE

A

Attorney General v. Enterprises, Inc. 399

B

Bass, King v. 353
Bates, City of Durham v. 336
Beaufort County Board of Education, Dilday v. 679
Becker v. Becker 65
Board of Architecture, Snow v. 559
Board of Education, Dilday v. 679
Board of Elders v. Jones 174
Board of Orange County Commissioners, Freeland v. 452
Brady v. Brady 299
Bray, Williams v. 198
Bray, Williams v. 207
Broadcasting Corp., *In re* Appeal of 571
Bowers, S. v. 652
Browning v. Griswold 18
Bruton, Attorney General v. Enterprises, Inc. 399
Bryson, Homes, Inc. v. 84

C

Cannon Aircraft Executive Terminal, Inc., Mills, Inc. v. 519
Cannon, S. v. 215
Cantrell v. Woodhill Enterprises, Inc. 490
Capital Outdoor Advertising, Inc., Stein v. 77
Capune v. Robbins 581
Cemetery, Inc. v. Rockingham County 467
Charlotte, Cheek v. 293
Charlotte, Freeman v. 113
Charlotte Motor Speedway, Inc., Pardue v. 314
Cheek v. City of Charlotte 293
City of Charlotte, Cheek v. 293
City of Charlotte, Freeman v. 113
City of Durham v. Bates 336
City of High Point Redevelopment Comm. v. Panel Co. 368

PAGE

City of Raleigh, Hollman v. 240
City of Raleigh v. Ingle 343
City of Wilmington, Zopfi v. 430
Clyburn, S. v. 284
Cofield, Knutton v. 355
Cohen v. Griswold 18
Collins, S. v. 479
Combs v. Combs 462
Commissioners of Orange County, Freeland v. 452
Cook, S. v. 377
Cooper, S. v. 51
County of Beaufort Board of Education, Dilday v. 679
County of Orange, Freeland v. 452
County of Rockingham, Cemetery, Inc. v. 467
County of Wake v. Ingle 343
Covington, S. v. 690
Creswell, McRorie v. 615
Cummings v. Dosam, Inc. 28

D

Dale, Dixie Container Corp. v. 624
Davis, S. v. 349
Davis v. State 533
Denny Roll and Panel Company, Redevelopment Comm. v. 368
Dickinson v. Griswold 18
Dilday v. Board of Education 679
Dixie Container Corp v. Dale 624
Dosam, Inc., Cummings v. 28
Durham v. Bates 336

E

Edmundson, *In re* 92
Enterprises, Inc., Bruton v. 399
Eubanks v. Eubanks 189

F

Fay, Inc., Hendricks v. 59
Finance Co., Henderson v. 253
Financing Authority, Mitchell v. 137
Flying "W" Enterprises, Bruton v. 399
Freeland v. Orange County 452
Freeman v. City of Charlotte 113
Freight Carriers, Roberts v. 600

PAGE
French v. Highway Commission...... 108
Fritts v. Gerukos...... 116
Ford, S. v...... 620
Fryer, S. v...... 284
Fulcher v. Nelson...... 221
Furr, S. v...... 377

G

Gainey, S. v...... 620
Gas Co. v. Leggett...... 547
Gaskins v. Gaskins...... 133
Gay, S. v...... 125
Gerukos, Fritts v...... 116
Givens v. Sellars...... 44
Goines, S. v...... 509
Goodson, S. v...... 128
Gray v. Gray...... 319
Griffin, S. v...... 333
Griswold, Browning v...... 18
Griswold, Cohen v...... 18
Griswold, Dickinson v...... 18
Griswold, Lane v...... 1
Griswold, Lane v...... 18

H

Harris, *In re* Appeal of...... 20
Hayes, S. v...... 712
Hemphill, S. v...... 388
Hendricks v. Fay, Inc...... 59
Henderson v. Finance Co...... 253
Hendricks v. Hendricks...... 733
High Point Redevelopment
Comm. v. Panel Co...... 368
Highway Commission, French v...... 108
Highway Commission, Mason v...... 36
Hinshaw, Kanoy v...... 418
Hollman v. City of Raleigh...... 240
Holsomback v. Holsomback...... 728
Homes, Inc., v. Bryson...... 84
Hoyle, S. v...... 215
Hughes, Strickland v...... 481

I

Industrial Development Financing
Authority, Mitchell v...... 137
Ingle, City of Raleigh v...... 343
Ingle, Wake County v...... 343
Ingram, S. v...... 620
In re Appeal of Broadcasting Corp. 571
In re Appeal of Harris...... 20
In re Edmundson...... 92
In re Michal...... 504

PAGE
In re Oil Company...... 383
In re Watson...... 629
Insurance Company of North
America, King v...... 396
Insurance Co., Robinson v...... 391

J

Johnson v. Lamb...... 701
Jones, Board of Elders v...... 174

K

Kanoy v. Hinshaw...... 418
Kekelis v. Machine Works...... 439
Kellum, S. v...... 348
Key v. Welding Supplies...... 609
King v. Bass...... 353
King Homes, Inc. v. Bryson...... 84
King v. Insurance Co...... 396
Kirby, S. v...... 306
Knutton v. Cofield...... 355

L

Lamb, Johnson v...... 701
Lane v. Griswold...... 1
Lane v. Griswold...... 18
Lawrence, S. v...... 351
Leggett, Gas Co. v...... 547
Leslie Fay, Inc., Hendricks v...... 59
Lewis, Warren v...... 457
Lilly, Redmond v...... 446
Lions Club, Sneed v...... 98
L & M Gas Company, Inc.
v. Leggett...... 547

Mc

McCall, S. v...... 135
McRorie v. Creswell...... 615
McVay, S. v...... 284
McWilliams v. Parham...... 592

M

Machine Works, Kekelis v...... 439
Mason v. Highway Commission...... 36
Massey, S. v...... 721
Merritt-Holland Welding
Supplies, Key v...... 609
Michal, *In re*...... 504
Miller v. Miller...... 228
Mills, Inc. v. Terminal, Inc...... 519
Mitchell v. Financing Authority...... 137

PAGE

Mobley, S. v. 471
Moore, S. v. 132
Moravian Church, Board of Elders of, v. Jones 174
Murphy Lions Club, Sneed v. 98

N

Nationwide Insurance Company, Robinson v. 391
Nelson, Fulcher v. 221
Newson Oil Company, *In re* 383
N. C. Attorney General v. Enterprises, Inc. 399
N. C. Board of Architecture, Snow v. 559
N. C. Industrial Development Financing Authority, Mitchell v. 137
N. C. State Highway Comm., French v. 108
N. C. State Highway Comm., Mason v. 36

O

Oil Company, *In re* 383
Olan Mills, Inc. v. Terminal, Inc. 519
O'Neal, S. v. 514
Orange County, Freeland v. 452
Outdoor Advertising, Inc., Stein v. 77
Over-Look Cemetery, Inc. v. Rockingham County 467
Owens, S. v. 377

P

Panel Co., Redevelopment Comm. v. 368
Pardue v. Speedway, Inc. 314
Parham, McWilliams v. 592
Parrish, S. v. 477
Pike, S. v. 102
Pilot Freight Carriers, Inc., Roberts v. 600
Provincial Elders of the Moravian Church v. Jones 174

R

Raleigh, Holman v. 240
Raleigh v. Ingle 343
Ramey, S. v. 325
Randolph, S. v. 120
Redevelopment Comm. v. Panel Co. 368
Redmond v. Lilly 446

PAGE

Reeves Broadcasting Corp, *In re* Appeal of 571
Robbins, Capune v. 581
Roberts v. Freight Carriers 600
Robinson v. Insurance Co. 391
Rockingham County, Cemetery, Inc. v. 467
Rogers, S. v. 208
Rogers, S. v. 330
Ross, S. v. 498

S

Schloss v. Schloss 266
Security Mortgage and Finance Co., Henderson v. 253
Sellars, Givens v. 44
Sellers, S. v. 641
Shepherd v. Shepherd 71
Shoemaker, S. v. 475
Sigmund Sternberger Foundation, Inc. v. Tannenbaum 658
Sneed v. Lions Club 98
Snow v. Board of Architecture 559
Speedway, Inc., Pardue v. 314
Speller v. Speller 340
S. v. Bowers 652
S. v. Cannon 215
S. v. Clyburn 284
S. v. Collins 479
S. v. Cook 377
S. v. Cooper 51
S. v. Covington 690
S. v. Davis 349
S., Davis v. 533
S. v. Ford 620
S. v. Fryer 284
S. v. Furr 377
S. v. Gainey 620
S. v. Gay 125
S. v. Goines 509
S. v. Goodson 128
S. v. Griffin 333
S. v. Hayes 712
S. v. Hemphill 388
S. v. Hoyle 215
S. v. Ingram 620
S. v. Kellum 348
S. v. Kirby 306
S. v. Lawrence 351
S. v. McCall 135
S. v. McVay 284
S. v. Massey 721
S. v. Mobley 471
S. v. Moore 132

PAGE
S. v. O'Neal ... 514
S. v. Owens ... 377
S. v. Parrish ... 477
S. v. Pike ... 102
S. v. Ramey ... 325
S. v. Randolph ... 120
S. v. Rogers ... 208
S. v. Rogers ... 330
S. v. Ross ... 498
S. v. Sellers ... 641
S. v. Shoemaker ... 475
S. v. Wall ... 130
S. v. Weston ... 275
S. v. White ... 736
S. *ex rel.* Attorney General v. Enterprises, Inc. ... 399
State Board of Architecture, Snow v. ... 559
State Highway Comm., French v. ... 108
State Highway Comm., Mason v. ... 36
State Industrial Development Financing Authority, Mitchell v. ... 137
Stein v. Outdoor Advertising ... 77
Sternberger v. Tannenbaum ... 658
Strickland v. Hughes ... 481

PAGE

T

Tannenbaum, Sternberger v. ... 658
Terminal, Inc., Mills, Inc. v. ... 519

W

Wake County v. Ingle ... 343
Wall, S. v. ... 130
Warren v. Lewis ... 457
Watson, *In re* ... 629
Welding Supplies, Key v. ... 609
Weston, S. v. ... 275
White, S. v. ... 736
Whitin Machine Works, Kekelis v. ... 439
Williams v. Bray ... 198
Williams v. Bray ... 207
Wilmington, Zopfi v. ... 430
Woodhill Enterprises, Inc., Cantrell v. ... 490

Z

Zopfi v. City of Wilmington ... 430

DECISIONS OF THE SUPREME COURT OF NORTH CAROLINA UPON REVIEW BY THE SUPREME COURT OF THE UNITED STATES.

State v. Williams, 271 N.C. 23. Petition for *certiorari* granted 17 June 1968. Judgment vacated and remanded 17 June 1968.

Housing Authority v. Thorpe, 271 N.C. 468. Petition for *certiorari* granted 4 March 1968.

State v. McDaniel, 272 N.C. 556. Petition for *certiorari* granted 17 June 1968. Judgment vacated and remanded 17 June 1968.

State v. Peele, 274 N.C. 106. Petition for *certiorari* pending.

CASES CITED.

A

Case	Citation	Page
Abbitt v. Gregory	201 N.C. 577	424
Abdalla v. Highway Comm.	261 N.C. 114	112
Abernathy, *In re*	259 N.C. 190	634
Acceptance Corp. v. Spencer	268 N.C. 1	260
Adams v. Enka Corp.	202 N.C. 767	102
Aiken v. Sanderford	236 N.C. 760	13
Alberts v. Alberts	217 N.C. 443	95
Allen v. Strickland	100 N.C. 225	25
Aman v. Walker	165 N.C. 224	549
Anderson v. Atkinson	235 N.C. 300	17
Anderson v. Construction Co.	265 N.C. 431	249
Anderson v. Motor Co.	233 N.C. 372	250
Anderson v. Office Supplies	236 N.C. 519	611
Andrews v. Bruton	242 N.C. 93	115
Arey v. Lemons	232 N.C. 531	360
Armstrong v. McInnis	264 N.C. 616	438
Arrington v. Arrington	114 N.C. 151	549
Askew v. Tire Co.	264 N.C. 168	245
Atkins v. McAden	229 N.C. 752	685
Austin v. Staten	126 N.C. 783	549
Auto Co. v. Insurance Co.	239 N.C. 416	97

B

Case	Citation	Page
Bailey v. Bailey	243 N.C. 412	135
Bailey v. Dept. of Mental Health	272 N.C. 680	42, 43
Bailey v. McLain	215 N.C. 150	674, 675
Bailey v. R. R.	149 N.C. 169	50
Bailey v. Wilson	21 N.C. 182	675, 676
Baker v. R. R.	232 N.C. 523	318
Baker v. Varser	239 N.C. 180	570
Ball v. McCormack	172 N.C. 677	710
Ballew v. R. R.	186 N.C. 704	50
Bank v. Adrian	166 N.C. 537	554
Bank v. Construction Co.	203 N.C. 100	354
Bank v. Hackney	266 N.C. 17	95
Bank v. Weaver	213 N.C. 767	506
Bank v. Winder	198 N.C. 18	91
Bank v. Wysong & Miles Co.	177 N.C. 380	263
Barber v. Wooten	234 N.C. 107	7
Barfoot v. Willis	178 N.C. 200	587
Barnes v. Highway Comm.	250 N.C. 378	371
Barnette v. Woody	242 N.C. 424	359
Barrier v. Randolph	260 N.C. 741	32
Basnight v. Wilson	245 N.C. 548	461
Bassinov v. Finkle	261 N.C. 109	17
Beal v. Robeson	30 N.C. 276	381
Beam v. Almond	271 N.C. 509	13
Beck v. Wilkins	179 N.C. 231	521, 523, 530

Belks Department Store,
Inc., v. Guilford County....222 N.C. 441....579, 580
Bell v. Smith....171 N.C. 116.... 588
Belvin, *In re* Will of....261 N.C. 275.... 674
Bennett v. R. R....245 N.C. 261.... 526
Benson v. Sawyer....257 N.C. 765.... 513
Betts v. Jones....203 N.C. 590.... 49
Betts v. Jones....208 N.C. 410.... 49
Binder v. Acceptance Corp....222 N.C. 512.... 606
Bissett v. Bailey....176 N.C. 43.... 735
Bivins v. Gosnell....141 N.C. 341.... 532
Blakenship v. Blakenship....256 N.C. 638.... 69
Blevins v. France....244 N.C. 334.... 50
Bogen v. Bogen....219 N.C. 51.... 95
Bond v. Wool....107 N.C. 139.... 588
Bondurant v. Mastin....252 N.C. 190.... 710
Bowling v. Bowling....252 N.C. 527.... 465
Bradford v. Kelly....260 N.C. 382.... 489
Bradshaw v. Millikin....173 N.C. 432....360, 361
Brannon v. Ellis....240 N.C. 81....382, 611
Brauff, *In re* Will of....247 N.C. 92.... 94
Brewer v. Ring and Valk....177 N.C. 476.... 531
Brewer v. University....110 N.C. 26.... 675
Briggs v. Raleigh....195 N.C. 223....144, 161
Brinson v. Kirby....251 N.C. 73....466, 551
Bristol v. Hallyburton.... 93 N.C. 384.... 558
Britt v. Wilmington....235 N.C. 446.... 144
Broadhurst v. Blythe Bros. Co....220 N.C. 464.... 49
Broadway v. Asheboro....250 N.C. 232.... 48
Brown v. Hillsboro....185 N.C. 368.... 709
Bruce v. Nicholson....109 N.C. 202....550, 553, 558
Bruton v. Bland....260 N.C. 429.... 450
Bruton v. Enterprises, Inc....273 N.C. 399.... 587
Burton v. Reidsville....240 N.C. 577.... 7
Bryant v. Bryant....193 N.C. 372.... 551
Bryant v. Shields....220 N.C. 628.... 550
Buick Co. v. Motors....254 N.C. 117.... 360
Bullin v. Moore....256 N.C. 82.... 735
Butler v. Butler....226 N.C. 594....271, 272, 304, 306
Butts v. Montague Bros....208 N.C. 186.... 40
Byerly v. Kepley.... 46 N.C. 35.... 497
Byerly v. Tolbert....250 N.C. 27.... 196
Bynum v. Wicker....141 N.C. 95.... 558
Byrd v. Lumber Co....207 N.C. 253....40, 41
Byrd v. Piedmont Aviation....256 N.C. 684.... 635

C

Caddell v. Caddell....236 N.C. 686....135, 271
Callaham v. Arenson....239 N.C. 619.... 32
Cameron v. McDonald....216 N.C. 712....338, 339
Cannon v. Cannon....228 N.C. 211....94, 95
Cannon v. Wilmington....242 N.C. 711.... 48
Carmichael v. Telephone Co....157 N.C. 21.... 398
Carroll v. Board of Trade....259 N.C. 692....181, 182, 183

Carrow v. Weston.....247 N.C. 735..... 450
Cecil v. Henderson.....121 N.C. 244..... 706
Cemetery Association v. Raleigh.....235 N.C. 509.....470, 471
Chandler v. Chemical Co.....270 N.C. 395..... 709
Cherry v. Woolard.....244 N.C. 603..... 205
Childers v. Powell.....243 N.C. 711..... 485
Church v. College.....254 N.C. 717..... 180
Clayton v. Burch.....239 N.C. 386..... 620
Clinton v. Oil Co.....193 N.C. 432.....298, 299
Clothing Store v. Ellis Stone & Co. 233 N.C. 126..... 65
Coach Co. v. Lee.....218 N.C. 320..... 354
Cocke v. Duke University.....260 N.C. 1..... 674
Colbert v. Collins.....227 N.C. 395..... 485
Collins v. Lamb.....215 N.C. 719..... 314
Comrs. v. Jennings.....181 N.C. 393..... 526
Conference v. Creech.....256 N.C. 128.....180, 181, 182
Conner v. Ridley.....248 N.C. 714..... 342
Construction Co. v.
Electrical Workers Union.....246 N.C. 481..... 201
Convent v. Winston-Salem.....243 N.C. 316..... 338
Cotton v. Fisheries Co., Inc.....181 N.C. 151..... 398
Cotton Mills v. Local 578.....251 N.C. 218.....77, 115
Cover v. McAden.....183 N.C. 641..... 119
Cowan v. Transfer Co.....262 N.C. 550..... 460
Cox v. Cox.....246 N.C. 528.....69, 74
Crain v. Hutchins.....226 N.C. 642..... 354
Craven County v. Trust Co.....237 N.C. 502..... 32
Crawford v. Allen.....189 N.C. 434..... 366
Creech v. Creech.....256 N.C. 356..... 271
Crew v. Crew.....236 N.C. 528..... 7
Crosby v. Crosby.....272 N.C. 235..... 324
Cutter v. Trust Co.....213 N.C. 686..... 674

D

Daniels v. Montgomery
Ward & Co.....217 N.C. 768..... 318
Davison v. Gregory.....132 N.C. 389..... 8
Davis v. Bass.....188 N.C. 200.....465, 554, 558
Davis v. Davis.....223 N.C. 36..... 735
Davis v. Davis.....269 N.C. 120.....271, 274
Davis v. Granite Corp.....259 N.C. 672..... 387
Davis v. Highway Comm.....271 N.C. 405..... 50
Davis v. Jessup.....257 N.C. 215..... 423
Davis v. Rhodes.....231 N.C. 71..... 498
Davis v. Robinson.....189 N.C. 589..... 32
Davis v. Vaughn.....243 N.C. 486..... 466
Deal v. Deal.....259 N.C. 489.....271, 274
Deans v. Deans.....241 N.C. 1..... 33
Deaton v. Thomas.....262 N.C. 565.....203, 204
Deese v. Deese.....176 N.C. 527..... 467
Dellinger v. Bridges.....259 N.C. 90.....521, 522, 530
Dennis v. Albemarle.....242 N.C. 263..... 363
Dennis v. Raleigh.....223 N.C. 400.....144, 145, 158
Development Co. v. Parmele.....235 N.C. 689..... 412

Dickson v. Coach Co. .... 233 N.C. 167 710
Dixon v. Brockwell .... 227 N.C. 567 422
Dorsey v. Kirkland .... 177 N.C. 520 558
Doster v. English .... 152 N.C. 339 263
Douglas v. Mallison .... 265 N.C. 362 .... 438, 460
Drum v. Bisaner .... 252 N.C. 305 443
Duckett v. Lyda .... 223 N.C. 356 466
Dunes Club v. Ins. Co. .... 259 N.C. 294 532
Duplin County v. Jones .... 267 N.C. 68 554
Durham v. Trucking Co. .... 247 N.C. 204 115
Duvall v. Rollins .... 71 N.C. 218 556

E

Eason v. Spence .... 232 N.C. 579 76
Edmisten v. Edmisten .... 265 N.C. 488 194
Edney v. Powers .... 224 N.C. 441 32
Edwards v. Batts .... 245 N.C. 693 465
Edwards v. Board of Education .... 235 N.C. 345 380
Edwards' Estate, *In re* .... 234 N.C. 202 76
Edwards v. Edwards .... 261 N.C. 445 732
Edwards v. Hamill .... 262 N.C. 528 .... 62, 628
Eggleston v. Eggleston .... 228 N.C. 668 135
Electric Corp. v. Aero Co. .... 263 N.C. 437 .... 521, 522, 530
Elizabeth City v. Aydlett .... 201 N.C. 602 436
Elledge v. Welch .... 238 N.C. 61 466
Ellison v. Hunsinger .... 237 N.C. 619 91
Employment Security Comm., *In re* .... 234 N.C. 651 571
Erickson v. Starling .... 235 N.C. 643 7
Etheridge v. Etheridge .... 222 N.C. 616 .... 442, 443
Everett v. Goodwin .... 201 N.C. 734 .... 596, 597, 599
Everett v. Receivers .... 121 N.C. 519 50
Ewell v. Ewell .... 163 N.C. 233 197

F

Fashion Co. v. Grant .... 165 N.C. 453 360
Fawcett v. Mt. Airy .... 134 N.C. 125 .... 144, 145, 160
Ferebee v. R. R. .... 163 N.C. 351 526
Finch v. Honeycutt .... 246 N.C. 91 618
Fisher v. Motor Co. .... 249 N.C. 617 .... 7, 195
Fisher v. Rogers .... 251 N.C. 610 709
Flake v. News Co. .... 212 N.C. 780 394
Fleming v. Holleman .... 190 N.C. 449 422
Fogartie v. Fogartie .... 236 N.C. 188 .... 271, 274, 304
Ford v. Bank .... 249 N.C. 141 324
Foster v. Hyman .... 197 N.C. 189 49
Foust v. Durham .... 239 N.C. 306 8
Freight Carriers, *In re* .... 263 N.C. 345 579
Frye & Sons, Inc., v. Francis .... 242 N.C. 107 42
Fuchs v. Fuchs .... 260 N.C. 635 194
Fulp v. Fulp .... 264 N.C. 20 196
Furtick v. Cotton Mills .... 217 N.C. 516 318

G

Gaither v. Hospital....235 N.C. 431.... 588
Gallimore v. Highway Comm....241 N.C. 350.... 370
Garner v. Garner....270 N.C. 293....304, 306
Garrett v. Rose....236 N.C. 299.... 485
Garris v. Tripp....192 N.C. 211.... 466
Garrison v. Williams....150 N.C. 674.... 13
Ghormley v. Hyatt....208 N.C. 478.... 264
Gibbons, *In re*....245 N.C. 24....76, 77
Gillis v. Tea Co....223 N.C. 470.... 707
Gillis v. Transit Corp....193 N.C. 346.... 317
Gillispie v. Service Stores....258 N.C. 487....48, 51
Glover v. Brotherhood....250 N.C. 35.... 550
Goins v. McLoud....231 N.C. 655....195, 734
Grabenhofer v. Garrett....260 N.C. 118....550, 554
Grant v. Artis....253 N.C. 226.... 727
Green v. Chrismon....232 N.C. 724....203, 205
Greensboro v. Garrison....190 N.C. 577.... 381
Greensboro v. Smith....241 N.C. 363.... 632
Greenville v. Gornto....161 N.C. 341.... 558
Griffith v. Griffith....265 N.C. 521....273, 304, 305
Griffin v. Insurance Co....225 N.C. 684.... 706
Griffin & Vose, Inc., v. Minerals Corp....225 N.C. 434.... 485
Griggs v. Griggs....213 N.C. 624.... 317
Gruber v. Eubank....197 N.C. 280.... 33
Guano v. Walston....187 N.C. 667.... 632
Guaranty Co. v. Motor Express....220 N.C. 721....51, 606
Gupton, *In re* Custody of....238 N.C. 303.... 75

H

Hahn v. Perkins....228 N.C. 727.... 101
Haley v. Picklesimer....261 N.C. 293.... 673
Hall v. Chevrolet Co....263 N.C. 569.... 41
Hall, *In re* Will of....252 N.C. 70.... 427
Hall v. Morganton....268 N.C. 599.... 183
Hampton v. Griggs....184 N.C. 13.... 618
Hanes v. Shapiro....168 N.C. 24.... 521
Hansley v. Tilton....234 N.C. 3.... 49
Hardee v. Mitchell....230 N.C. 40.... 74
Hardy v. Neville....261 N.C. 454.... 261
Harrell v. Harrell....253 N.C. 758....274, 305
Harrington & Co. v. Renner....236 N.C. 321.... 433
Harris v. Board of Education....216 N.C. 147.... 570
Harrison v. Guilford County....218 N.C. 718....346, 469
Harris v. Harris....258 N.C. 121.... 273
Harris, *In re* Appeal of....273 N.C. 20.... 732
Harris v. Mangum....183 N.C. 235.... 443
Hart v. Curry....238 N.C. 448.... 710
Hatch v. R. R....183 N.C. 617....205, 207
Hauser v. Craft....134 N.C. 319....619, 620
Hawkins v. Finance Corp....238 N.C. 174....89, 90, 91
Hayes v. Wilmington....243 N.C. 525....7, 65, 471
Heating Co. v. Construction Co....268 N.C. 23.... 706

Hege v. Sellers..........241 N.C. 240.......... 32
Helms v. Charlotte..........255 N.C. 647.......... 436
Henry v. Leather Co..........231 N.C. 477.......... 43
Herndon v. Autry..........181 N.C. 271.......... 25
Hertford v. Harris..........263 N.C. 776.......... 581
Hetfield v. Baum.......... 35 N.C. 394.......... 411
Higdon v. Jaffa..........231 N.C. 242.......... 88
Highway Comm. v. Coggins..........262 N.C. 25.......... 371
Highway Comm. v. Conrad..........263 N.C. 394.......... 371
Highway Comm. v. Hartley..........218 N.C. 438.......... 502
Highway Comm. v. Hemphill..........269 N.C. 535.......... 632
Highway Comm. v. Myers..........270 N.C. 258.......... 554
Highway Comm. v. Nuckles..........271 N.C. 1.......... 112
Highway Comm. v. Pearce..........261 N.C. 760.......... 371
Highway Comm. v. Reynolds Co.....272 N.C. 618..........49, 673
Highway Comm. v. Thornton..........271 N.C. 227.......... 163
Hinsdale v. Phillips..........199 N.C. 563.......... 343
Hinson v. Morgan..........225 N.C. 740.......... 342
Hill v. Lindsay..........210 N.C. 694.......... 264
Hill v. Parker..........248 N.C. 662.......... 7
Hill v. R. R..........186 N.C. 475.......... 381
Hobbs v. Moore Co..........267 N.C. 665.......... 172
Hodges v. Hodges..........257 N.C. 774.......... 359
Hoke v. Greyhound Corp..........227 N.C. 374.......... 18
Holcomb v. Holcomb..........192 N.C. 504.......... 201
Holloway v. Holloway..........214 N.C. 662.......... 271
Honeycutt v. Bank..........242 N.C. 734.......... 466
Horner v. Chamber of Commerce..231 N.C. 440.......... 143
Horton v. Perry..........229 N.C. 319.......... 424
Hosiery Co. v. Express Co..........184 N.C. 478.......... 354
Hospital v. Wilmington..........235 N.C. 597.......... 570
Howard v. Melvin..........262 N.C. 569.......... 461
Howell v. Howell.......... 29 N.C. 491.......... 465
Howell v. Indemnity Co..........237 N.C. 227.......... 487
Hudson v. Greensboro..........185 N.C. 502..........144, 157
Huffman v. Aircraft Co..........260 N.C. 308.......... 245
Hullett v. Grayson..........265 N.C. 453.......... 32
Hunt v. Bradshaw..........242 N.C. 517.......... 708
Hunt v. Davis..........248 N.C. 69.......... 438
Hunt v. Eure..........189 N.C. 482.......... 523
Hunt v. Wooten..........238 N.C. 42.......... 460
Hunter v. Trust Co..........232 N.C. 69.......... 675
Huskins v. Hospital..........238 N.C. 357..........181, 182
Hutchins v. Taylor-Buick Co..........198 N.C. 777..........523, 530
Hutchinson v. R. R..........140 N.C. 123.......... 398

I

Ice Cream Co. v. Ice Cream Co.......238 N.C. 317.......... 13
Ingle v. Stubbins..........240 N.C. 382..........32, 182
Ingle v. Transfer Corp..........271 N.C. 276..........461, 608
Ingram v. Easley..........227 N.C. 442..........466, 467
Ingram v. Ins. Co..........258 N.C. 632.......... 65
Ipock v. Ipock..........233 N.C. 387.......... 272
In re Abernathy..........259 N.C. 190.......... 634

In re Appeal of Harris....................273 N.C. 20.. 732
In re Appeal of Parker....................214 N.C. 51..434, 436
In re Assessment of Sales Tax........259 N.C. 289.. 571
In re Assessment of Sales Tax........259 N.C. 589..................................23, 27, 571
In re Custody of Gupton...................238 N.C. 303.. 75
In re Custody of Sauls....................270 N.C. 180.. 69
In re Edwards' Estate....................234 N.C. 202.. 76
In re Employment Security Comm. 234 N.C. 651.. 571
In re Estate of Smith....................200 N.C. 272.. 508
In re Freight Carriers....................263 N.C. 345.. 579
In re Gibbons....................245 N.C. 24..76, 77
In re Markham....................259 N.C. 566..............................434, 436, 437
In re Miller....................243 N.C. 509........................635, 636, 638, 640
In re Oil Co....................263 N.C. 520.. 386
In re Pine Raleigh Corp....................258 N.C. 398................................579, 580, 581
In re Reynolds....................206 N.C. 276.. 674
In re Scarborough....................261 N.C. 565.. 94
In re Simmons....................266 N.C. 702.. 507
In re Wallace....................267 N.C. 204..359, 581
In re Will of Belvin....................261 N.C. 275.. 674
In re Will of Brauff....................247 N.C. 92.. 94
In re Will of Hall....................252 N.C. 70.. 427
In re Will of Knight....................250 N.C. 634.. 532
In re Will of Wilson....................258 N.C. 310.. 611
Ins. Co. v. Ins. Co....................269 N.C. 358.. 487
Insurance Co. v. Lambeth....................250 N.C. 1.. 359
Insurance Co. v. Motors, Inc....................240 N.C. 183................................521, 523, 530
Ins. Co. v. Roberts....................261 N.C. 285.. 490
Insurance Co. v. Storage Co....................267 N.C. 679.. 88
Irvin v. Harris....................182 N.C. 647.. 450

J

Jackson v. Beard....................162 N.C. 105.. 195
Jacobs v. Highway Comm....................254 N.C. 200.. 48
Jenkins v. Castelloe....................208 N.C. 406.. 69
Jenkins v. Dept. of Motor Vehicles 244 N.C. 560.. 50
Jenkins v. Electric Co....................254 N.C. 553.. 426
Johnson v. Johnson....................259 N.C. 430.. 8
Johnson v. Leavitt....................188 N.C. 682................................550, 551, 554
Johnson v. Owens....................263 N.C. 754.. 343
Johnson v. R. R....................140 N.C. 574.. 607
Johnson v. R. R....................163 N.C. 431.. 42
Johnson v. R. R....................184 N.C. 101.. 239
Johnson v. Wagner....................219 N.C. 235.. 673
Jones v. Bagwell....................207 N.C. 378.. 599
Jones v. Board of Education....................185 N.C. 303.. 634
Jones v. Griggs....................219 N.C. 700.. 485
Jones v. Ins. Co....................270 N.C. 454.. 487
Jones v. Lewis....................243 N.C. 259.. 194
Jones v. Turlington....................243 N.C. 681.. 588
Jordan v. Blackwelder....................250 N.C. 189.. 429
Joyner v. Joyner....................264 N.C. 27.. 194
Julian v. Lawton....................240 N.C. 436.. 32

K

Keen v. Parker 217 N.C. 378 733
Keeter v. Lake Lure 264 N.C. 252 144
Keith v. Wilder 241 N.C. 672 343
Kindley v. Privette 241 N.C. 140 394
King v. King 225 N.C. 639 733
King v. Powell 220 N.C. 511 735
Kinston v. Suddreth 266 N.C. 618 361
Kiser v. Kiser 203 N.C. 428 272
Kornegay v. Goldsboro 180 N.C. 441 172

L

Lamb v. Perry 169 N.C. 436 735
Lambros v. Zrakas 234 N.C. 287 115
Lamica v. Gerdes 270 N.C. 85 32
Lamm v. Crumpler 240 N.C. 35 8
Land Co. v. Hotel 132 N.C. 517 587
Lane v. Dorney 250 N.C. 15 101
Lane v. Dorney 252 N.C. 90 101, 445
Lane v. Drivers Assoc. 253 N.C. 764 317
Langley v. Langley 268 N.C. 415 74
Lassiter v. Roper 114 N.C. 17 317
Latta v. Trustees of the General Assembly of the Presbyterian Church 213 N.C. 462 675
Lawrence v. Power Co. 190 N.C. 664 526
Lawson v. Bennett 240 N.C. 52 194
Lee v. Rhodes 230 N.C. 190 194
Lewis v. Harris 238 N.C. 642 181
Lewis v. Hunter 212 N.C. 504 49
Lewis v. Pate 212 N.C. 253 552, 554, 558
Lichtenfels v. Bank 268 N.C. 467 674
Lieb v. Mayer 244 N.C. 613 239
Long v. Smitherman 251 N.C. 682 387
Lowe v. Jackson 263 N.C. 634 581
Lumber Co. v. Construction Co. 249 N.C. 680 706
Lumberton v. Hood 204 N.C. 171 628

Mc

McClure v. Fellows 131 N.C. 509 202
McCullen v. Durham 229 N.C. 418 466
McCulloh v. Catawba College 266 N.C. 513 42
McCrillis v. Enterprises 270 N.C. 637 363
McDaris v. "T" Corporation 265 N.C. 298 33
McDevitt v. Chandler 241 N.C. 677 734, 735
McDonald v. MacArthur 154 N.C. 11 426
McDowell v. McDowell 243 N.C. 286 305
McDowell v. Blythe Bros. 236 N.C. 396 8
McGill v. Lumberton 215 N.C. 752 249
McIntyre v. Austin 232 N.C. 189 205
McIntyre v. Clarkson 254 N.C. 510 144
McKinley v. Hinnant 242 N.C. 245 48
McKinney v. High Point 237 N.C. 66 8
McKinney v. High Point 239 N.C. 232 434

McKinney v. Patterson....174 N.C. 483.... 49
McLean v. McLean....233 N.C. 139.... 69
McNeill v. R. R....117 N.C. 642.... 25
McWilliams v. Parham....269 N.C. 162....596, 599

M

Machine Co. v. Tobacco Co....141 N.C. 284.... 362
Mar-Hof Co. v. Rosenbacker....176 N.C. 330.... 360
Markham, *In re*....259 N.C. 566....434, 436, 437
Marren v. Gamble....237 N.C. 680....433, 434
Marshall v. Telephone Co....181 N.C. 292.... 381
Martin v. Martin....263 N.C. 86.... 272
Mason v. Gilliken....256 N.C. 527.... 461
Maurer v. Salem Co....266 N.C. 381.... 245
Maynor v. Pressley....256 N.C. 483.... 460
Mayo v. Commissioners....122 N.C. 5.... 160
Mercer v. Mercer....253 N.C. 164....273, 274
Messick v. Hickory....211 N.C. 531.... 382
Messick v. Turnage....240 N.C. 625.... 460
Myers v. Myers....270 N.C. 263....271, 274
Midgett v. Highway Comm....260 N.C. 241....50, 525
Midgett v. Highway Comm....265 N.C. 373.... 239
Milk Comm. v. Food Stores....270 N.C. 323.... 180
Miller, *In re*....243 N.C. 509....635, 636, 638, 640
Miller v. Jones....224 N.C. 783.... 49
Miller v. Lash....85 N.C. 51.... 471
Miller v. Miller....270 N.C. 140.... 273
Millsaps v. Estes....137 N.C. 535.... 195
Mintz v. R. R....236 N.C. 109.... 513
Mobley v. Griffin....104 N.C. 112.... 115
Moore v. Boone....231 N.C. 494.... 237
Moore v. Hobbs....79 N.C. 535.... 317
Moore v. Ins. Co....266 N.C. 440.... 43
Moore v. Owens....255 N.C. 336.... 673
Moore v. State....200 N.C. 300.... 97
Moore v. W.O.O.W., Inc....253 N.C. 1.... 8
Morgan v. Bank....190 N.C. 209....523, 530
Mortgage Co. v. Zion Church....219 N.C. 395.... 264
Moss v. Bowers....216 N.C. 546.... 318
Moss v. Knitting Mills....190 N.C. 644....496, 497
Motley v. Board of
Barber Examiners....228 N.C. 337.... 299
Motley v. Motley....255 N.C. 190.... 195
Motor Co. v. Wood....237 N.C. 318....90, 91
Motor Co. v. Wood....238 N.C. 468.... 43
Mullen v. Louisburg....225 N.C. 53.... 485
Muncie v. Ins. Co....253 N.C. 74.... 471
Murchison v. Powell....269 N.C. 656.... 710
Murphy v. Murphy....261 N.C. 95.... 69
Myers v. Myers....270 N.C. 263....304, 306

N

Nash v. Tarboro....227 N.C. 283....144, 145, 156, 157
Nationwide Homes v. Trust Co....267 N.C. 528.... 506

New Bern v. White....251 N.C. 65.... 97
Nixon v. Nixon....260 N.C. 251.... 88

O

O'Briant v. O'Briant....239 N.C. 101.... 706
O'Brien v. O'Brien....266 N.C. 502.... 194
O'Brient v. Lee....214 N.C. 723.... 261
Oil Co., *In re*....263 N.C. 520.... 386
Oil Co. v. Iron Works....211 N.C. 668....523, 530
Oil Co. v. Richardson....271 N.C. 696.... 397
Oldham v. Oldham....225 N.C. 476.... 304
Oliver v. Oliver....219 N.C. 299.... 274
Oliver v. Piner....224 N.C. 215.... 262
Ollis v. Ollis....241 N.C. 709.... 271
O'Neil v. O'Neil....271 N.C. 106....674, 675
O'Neal v. Rollinson....212 N.C. 83.... 588
Osborne v. Wilkes....108 N.C. 651.... 427

P

Pack v. Newman....232 N.C. 397.... 424
Parker, *In re* Appeal of....214 N.C. 51....434, 436
Parker v. White....235 N.C. 680.... 343
Paris v. Aggregates, Inc....271 N.C. 471.... 502
Peeples v. R. R....228 N.C. 590.... 423
Penick v. Bank....218 N.C. 686.... 674
Peterson v. Power Co....183 N.C. 243.... 445
Petroleum Marketers
v. Highway Comm....269 N.C. 411....110, 111, 112
Phillips v. Gilbert....248 N.C. 183.... 617
Phillips v. R. R....257 N.C. 239.... 428
Pilkington v. West....246 N.C. 575.... 466
Pine Raleigh Corp., *In re*....258 N.C. 398....579, 580, 581
Pinyan v. Settle....263 N.C. 578.... 598
Poindexter v. Bank....244 N.C. 191....91, 101
Ponder v. Cobb....257 N.C. 281.... 735
Porter v. Bank....249 N.C. 173.... 70
Ports Authority v. Trust Co....242 N.C. 416.... 157
Potts v. Howser....267 N.C. 484.... 238
Preyer v. Parker....257 N.C. 440.... 263
Priddy v. Lumber Co....258 N.C. 1.... 359
Proctor v. Highway Comm....230 N.C. 687.... 370
Pruett v. Inman....252 N.C. 520.... 529
Pruett v. Pruett....247 N.C. 13.... 271
Pue v. Hood, Comr. of Banks....222 N.C. 310.... 570
Purser v. Ledbetter....227 N.C. 1.... 160

Q

Queen v. DeHart....209 N.C. 414.... 390

R

R. R. v. R. R....236 N.C. 247.... 627
R. R. v. Way....172 N.C. 774.... 587
Ramsey v. Veterans Comm....261 N.C. 645....298, 339

Raper v. Berrier....246 N.C. 193.... 77
Raper v. Byrum....265 N.C. 269.... 461
Raper v. McCrory-McLellan Corp....259 N.C. 199.... 88
Ratliff v. Power Co....268 N.C. 605.... 709
Ray v. Ray....219 N.C. 217.... 197
Realty Co. v. Batson....256 N.C. 298....496, 498
Realty Co. v. Hobbs....261 N.C. 414.... 31
Realty Co. v. Planning Board....243 N.C. 648.... 570
Reavis v. Reavis....271 N.C. 707.... 306
Redevelopment Comm. v. Bank....252 N.C. 595....144, 159, 161
Redevelopment Comm. v. Smith....272 N.C. 250.... 370
Redwine v. Clodfelter....226 N.C. 366....674, 675
Reidsville v. Burton....269 N.C. 206.... 7
Remsen v. Edwards....236 N.C. 427.... 7
Restaurant, Inc. v. Charlotte....252 N.C. 324.... 180
Reynolds v. Cotton Mills....177 N.C. 412.... 488
Reynolds, *In re*....206 N.C. 276.... 674
Reynolds v. Reynolds....208 N.C. 578.... 674
Rhyne v. Hoffman.... 59 N.C. 335.... 197
Rice v. Trust Co....232 N.C. 222.... 675
Richardson v. R. R....126 N.C. 100.... 398
Richardson v. Richardson....268 N.C. 538....196, 271, 304
Ridge v. R. R....167 N.C. 510....443, 526
Ring v. Mayberry....168 N.C. 563.... 32
Robbins v. Robbins....229 N.C. 430.... 69
Roberson v. Williams....240 N.C. 696....223, 363
Roberts v. McAlhaney....216 N.C. 674.... 69
Robinson v. Transportation Co....214 N.C. 489.... 424
Rodgers v. Thompson....256 N.C. 265.... 460
Roller v. Allen....245 N.C. 516....172, 296
Ross v. Cotton Mills....140 N.C. 115.... 523
Rosser v. Smith....260 N.C. 647.... 461
Rouse v. Peterson....261 N.C. 600.... 599
Rouse v. Rouse....238 N.C. 568.... 732
Rubber Co. v. Distributors....253 N.C. 459.... 706
Ryan v. Batdorf....225 N.C. 228.... 207

S

Speas v. Bank....188 N.C. 524.... 523
Speas v. Woodhouse....162 N.C. 66.... 467
Springs v. Doll....197 N.C. 240....443, 523
Sprinkle v. Ponder....233 N.C. 312.... 272
Sprinkle v. Spainhour....149 N.C. 223.... 467
Stamey v. Membership Corp....247 N.C. 640.... 497
Stanback v. Haywood....209 N.C. 798.... 706
Stanback v. Stanback....266 N.C. 72.... 74
Stanback v. Stanback....270 N.C. 497.... 274
Starnes v. Tyson....226 N.C. 395.... 69
Sale v. Johnson, Comr. of Revenue 258 N.C. 749.... 632
Sales Tax, *In re*
Assessment of....259 N.C. 589....23, 27, 571
Sanders v. Chavis....243 N.C. 380.... 487
Sandlin v. Weaver....240 N.C. 703.... 465
Sanford v. Oil Co....244 N.C. 388.... 571

Sauls, *In re* Custody of....270 N.C. 180.... 69
Sayland v. Sayland....267 N.C. 378....272, 273, 304, 306
Scarborough, *In re*....261 N.C. 565.... 94
Scarborough v. Veneer Co....244 N.C. 1.... 101
Schloss v. Jamison....262 N.C. 108....434, 436
Schloss v. Schloss....273 N.C. 266.... 303
Schrum v. Catawba
Upholstering Co....214 N.C. 353....244, 251
Sedberry v. Parsons....232 N.C. 707.... 34
Seminary, Inc. v. Wake County....251 N.C. 775....346, 469
Sguros v. Sguros....252 N.C. 408.... 273
Shepherd v. Sellers....182 N.C. 701.... 381
Sherrill v. Boyce....265 N.C. 560.... 359
Shimer v. Traub....244 N.C. 466.... 119
Shives v. Sample....238 N.C. 724....317, 318, 319, 497
Shoe Co. v. Department Store....212 N.C. 75.... 360
Shuford v. Oil Co....243 N.C. 636.... 32
Simmons, *In re*....266 N.C. 702.... 507
Simms v. Sampson....221 N.C. 379.... 485
Simonton v. Cornelius.... 98 N.C. 433.... 554
Simrel v. Meeler....238 N.C. 668.... 606
Skipper v. Yow....249 N.C. 49.... 115
Sloan v. Insurance Co....189 N.C. 690.... 264
Smith v. Corsat....260 N.C. 92....88, 607
Smith v. Hefner....235 N.C. 1.... 49
Smith, *In re* Estate of....200 N.C. 272.... 508
Smith v. Smith....119 N.C. 311.... 25
Smith v. Smith....249 N.C. 669....342, 465
Snotherly v. Jenrette....232 N.C. 605.... 48
S. v. Abernathy....265 N.C. 724.... 213
S. v. Acrey....262 N.C. 90....654, 725
S. v. Adams....245 N.C. 344.... 514
S. v. Agnew....202 N.C. 755.... 281
S. v. Alston....215 N.C. 713.... 107
S. v. Anderson....222 N.C. 148.... 329
S. v. Anderson....259 N.C. 499.... 211
S. v. Anderson....265 N.C. 548.... 714
S. v. Andrew.... 61 N.C. 205.... 107
S. v. Andrews....246 N.C. 561.... 724
S. v. Arnold....107 N.C. 861.... 651
S. v. Arrington.... 7 N.C. 571.... 390
S. v. Artis....227 N.C. 371.... 309
S. v. Ayers....226 N.C. 579.... 651
S. v. Baker....213 N.C. 524....720, 721
S. v. Ballance....229 N.C. 764.... 296
S. v. Banks....247 N.C. 745.... 650
S. v. Barksdale....181 N.C. 621.... 456
S. v. Barnes....264 N.C. 517....106, 289
S. v. Bass....253 N.C. 318.... 292
S. v. Bass....255 N.C. 42....284, 297
S. v. Baxter....208 N.C. 90.... 645
S. v. Bazemore....193 N.C. 336....390, 538
S. v. Beasley....226 N.C. 580.... 651
S. v. Bell.... 65 N.C. 313.... 212
S. v. Bell....228 N.C. 659....214, 215

S. v. Benton .... 19 N.C. 196.. 333
S. v. Biggs ....133 N.C. 729.. 296
S. v. Birchfield ....235 N.C. 410.. 727
S. v. Bishop ....272 N.C. 283.. 291
S. v. Blackwelder ....182 N.C. 899.. 291
S. v. Blake ....198 N.C. 547.. 107
S. v. Booker ....250 N.C. 272.. 725
S. v. Bowers ....273 N.C. 652.. 726
S. v. Bradley ....210 N.C. 290.. 645
S. v. Braxton ....230 N.C. 312.. 726
S. v. Bridgers ....233 N.C. 577.. 518
S. v. Brodie ....190 N.C. 554.. 380
S. v. Brooks ....260 N.C. 186.. 335
S. v. Broome ....269 N.C. 661...389, 714
S. v. Brown ....113 N.C. 645.. 212
S. v. Brown ....150 N.C. 867.. 725
S. v. Brown ....204 N.C. 392.. 546
S. v. Brown ....266 N.C. 55.. 650
S. v. Bruce ....268 N.C. 174.. 479
S. v. Bruton ....264 N.C. 488.. 291
S. v. Bryant ....231 N.C. 106.. 311
S. v. Bullins ....226 N.C. 142.. 727
S. v. Burgess ....1 N.C.App. 142.. 646
S. v. Burke .... 73 N.C. 83.. 212
S. v. Burney ....215 N.C. 598.. 333
S. v. Bynum ....117 N.C. 749.. 725
S. v. Cade ....268 N.C. 438.. 382
S. v. Cameron ....223 N.C. 449.. 725
S. v. Case ....253 N.C. 130.. 514
S. v. Cephus ....241 N.C. 562...390, 541
S. v. Chamberlain ....263 N.C. 406.. 289
S. v. Chase ....231 N.C. 589...214, 726
S. v. Chavis ....270 N.C. 306.. 292
S. v. Choate ....228 N.C. 491.. 714
S. v. Coal Co. ....210 N.C. 742.. 531
S. v. Cody .... 60 N.C. 197.. 214
S. v. Cody ....225 N.C. 38.. 539
S. v. Cole ....132 N.C. 1069.. 333
S. v. Cole ....270 N.C. 382...91, 330
S. v. Colonial Club ....154 N.C. 177.. 9
S. v. Colson ....222 N.C. 28...382, 611
S. v. Cook ....273 N.C. 377.. 513
S. v. Cooke ....270 N.C. 644.. 124
S. v. Cooper ....238 N.C. 241.. 651
S. v. Cooper ....256 N.C. 372......................390, 653, 656, 714, 725
S. v. Cooper ....273 N.C. 51.. 327
S. v. Cope ....204 N.C. 28...................................280, 283, 291
S. v. Cope ....240 N.C. 244.. 291
S. v. Cornelius ....265 N.C. 452.. 514
S. v. Covington ....267 N.C. 292.. 713
S. v. Cox ....153 N.C. 638.. 58
S. v. Cox ....201 N.C. 357.. 215
S. v. Crutchfield ....187 N.C. 607.. 280
S. v. Cummings ....267 N.C. 300.. 474
S. v. Cutler ....271 N.C. 379...................................291, 382, 513

S. v. Davis ....203 N.C. 47.... 645
S. v. Davis ....253 N.C. 224.... 473
S. v. Davis ....265 N.C. 720....534, 539
S. v. DeGraffenreid ....223 N.C. 461.... 329
S. v. Dixon ....215 N.C. 161.... 172
S. v. Doughtie ....238 N.C. 228.... 651
S. v. Dove ....222 N.C. 162.... 655
S. v. Dow ....246 N.C. 644.... 541
S. v. Eason ....242 N.C. 59.... 211
S. v. Edwards ....224 N.C. 577.... 292
S. v. Ellison ....226 N.C. 628.... 329
S. v. Everhardt ....203 N.C. 610.... 646
S. v. Falkner ....182 N.C. 793.... 354
S. v. Felton ....239 N.C. 575.... 144
S. v. Ferguson ....261 N.C. 558.... 501
S. v. Flinchem ....247 N.C. 118.... 381
S. v. Fogleman ....204 N.C. 401.... 105
S. v. Ford ....266 N.C. 743.... 654
S. v. Foust ....258 N.C. 453.... 335
S. v. Fowler ....151 N.C. 731.... 215
S. v. Fowler ....250 N.C. 595.... 310
S. v. Fowler ....266 N.C. 667....654, 726
S. v. Francis ....252 N.C. 57.... 311
S. v. Fulkerson .... 61 N.C. 233.... 333
S. v. Furmage ....250 N.C. 616.... 144
S. v. Garris ....265 N.C. 711....136, 447
S. v. Gash ....177 N.C. 595.... 280
S. v. Gaskill ....256 N.C. 652.... 124
S. v. Gatlin ....241 N.C. 175....389, 390, 537, 538, 546
S. v. Gibson ....216 N.C. 535.... 107
S. v. Glenn ....198 N.C. 79.... 58
S. v. Glidden Co. ....228 N.C. 664....298, 299
S. v. Glover ....270 N.C. 319.... 57
S. v. Godwin ....260 N.C. 580.... 537
S. v. Goffney ....157 N.C. 624.... 650
S. v. Goode ....249 N.C. 632.... 311
S. v. Gordon ....225 N.C. 241.... 76
S. v. Gordon ....241 N.C. 356....58, 327
S. v. Gosnell ....208 N.C. 401.... 289
S. v. Gray ....180 N.C. 697.... 280
S. v. Gray ....268 N.C. 69....106, 289
S. v. Green ....151 N.C. 729.... 127
S. v. Green ....210 N.C. 162.... 197
S. v. Green ....251 N.C. 40....126, 310
S. v. Gregory ....153 N.C. 646.... 539
S. v. Gregory ....203 N.C. 528.... 57
S. v. Griffin ....239 N.C. 41....655, 725
S. v. Guffey ....252 N.C. 60.... 292
S. v. Guffey ....261 N.C. 322.... 289
S. v. Guffey ....265 N.C. 331.... 213
S. v. Hackney ....240 N.C. 230.... 127
S. v. Haddock ....254 N.C. 162.... 349
S. v. Hall ....264 N.C. 559....107, 221
S. v. Hammond ....229 N.C. 108.... 290
S. v. Hancock ....248 N.C. 432.... 281

S. v. Hanes ....268 N.C. 335.... 291
S. v. Hare ....243 N.C. 262.... 726
S. v. Harper ....235 N.C. 62.... 105
S. v. Harrington ....176 N.C. 716.... 720
S. v. Harrington ....258 N.C. 529.... 517
S. v. Harris ....119 N.C. 811.... 725
S. v. Harris ....145 N.C. 456.... 127
S. v. Harris ....195 N.C. 306.... 212
S. v. Harris ....216 N.C. 746.... 297
S. v. Hartsfield ....188 N.C. 357.... 339
S. v. Hawley ....229 N.C. 167.... 727
S. v. Hendrick ....232 N.C. 447.... 335
S. v. Hewell .... 90 N.C. 705.... 622
S. v. Hines ....266 N.C. 1.... 289
S. v. Holbrook ....223 N.C. 622....720, 721
S. v. Holder ....252 N.C. 121.... 514
S. v. Hollingsworth ....263 N.C. 158.... 473
S. v. Holloway ....262 N.C. 753.... 720
S. v. Holt ....192 N.C. 490.... 214
S. v. Honeycutt ....250 N.C. 229.... 336
S. v. Horton ....139 N.C. 588.... 281
S. v. Hovis ....233 N.C. 359.... 335
S. v. Howard ....222 N.C. 291.... 313
S. v. Howell ....218 N.C. 280.... 329
S. v. Jaynes .... 78 N.C. 504.... 518
S. v. Jenkins ....238 N.C. 396.... 127
S. v. Jessup ....183 N.C. 771.... 280
S. v. Johnson ....226 N.C. 266.... 645
S. v. Jones ....227 N.C. 47.... 538
S. v. Jones ....227 N.C. 402.... 214
S. v. Jones ....258 N.C. 89.... 501
S. v. Keller ....214 N.C. 447.... 700
S. v. Kimrey ....236 N.C. 313.... 309
S. v. Kluckhohn ....243 N.C. 306....382, 611
S. v. Knight ....261 N.C. 17....646, 650
S. v. Law ....227 N.C. 103.... 212
S. v. Lawrence ....196 N.C. 562.... 291
S. v. Lawrence ....262 N.C. 162.... 211
S. v. Leonard ....195 N.C. 242.... 280
S. v. Lentz ....270 N.C. 122.... 518
S. v. LePard ....270 N.C. 157....136, 284, 477
S. v. Levy ....200 N.C. 586.... 131
S. v. Limerick ....146 N.C. 649.... 281
S. v. Litteral ....227 N.C. 527.... 107
S. v. Locklear ....226 N.C. 410.... 655
S. v. Logner ....266 N.C. 238.... 290
S. v. Lowther ....265 N.C. 315.... 349
S. v. Lumber Co. ....153 N.C. 610.... 49
S. v. Lunsford ....150 N.C. 862.... 127
S. v. Lyerly ....169 N.C. 377.... 655
S. v. McDonald ....249 N.C. 419.... 58
S. v. McDowell ....101 N.C. 734.... 197
S. v. McFalls ....221 N.C. 22.... 721
S. v. McGirt ....263 N.C. 527.... 58
S. v. McKay ....150 N.C. 813.... 390

S. v. McKnight ....196 N.C. 259.... 645
S. v. McLamb ....235 N.C. 251.... 328
S. v. McManus .... 89 N.C. 555.... 623
S. v. McMilliam ....243 N.C. 771.... 221
S. v. MacRae ....111 N.C. 665.... 655
S. v. Mabry ....269 N.C. 293.... 382
S. v. Mace .... 86 N.C. 668.... 651
S. v. Mangum ....245 N.C. 323....57, 58
S. v. Manning ....221 N.C. 70.... 215
S. v. Manuel .... 20 N.C. 154.... 162
S. v. Marsh ....132 N.C. 1000.... 645
S. v. Marshall ....208 N.C. 127.... 310
S. v. Matthews ....142 N.C. 621.... 215
S. v. Matthews ....270 N.C. 35.... 127
S. v. Meadows ....272 N.C. 327.... 717
S. v. Mehaffey ....132 N.C. 1062.... 513
S. v. Miller ....220 N.C. 660.... 281
S. v. Minton ....228 N.C. 15.... 329
S. v. Minton ....234 N.C. 716.... 518
S. v. Moore ....211 N.C. 748.... 214
S. v. Moore ....214 N.C. 658.... 311
S. v. Moore ....268 N.C. 124.... 328
S. v. Mooring ....115 N.C. 709.... 698
S. v. Morgan ....268 N.C. 214.... 654
S. v. Mosley ....213 N.C. 304.... 58
S. v. Mull ....224 N.C. 574.... 212
S. v. Mumford ....227 N.C. 132.... 650
S. v. Myers ....266 N.C. 581.... 105
S. v. Noland ....204 N.C. 329.... 390
S. v. Norggins ....215 N.C. 220....383, 513
S. v. Norkett ....269 N.C. 679.... 129
S. v. Norman ....237 N.C. 205.... 473
S. v. Nunley ....224 N.C. 96.... 212
S. v. Old ....271 N.C. 341.... 503
S. v. Outing ....255 N.C. 468....106, 289, 290
S. v. Overman ....269 N.C. 453....382, 513
S. v. Owen ....242 N.C. 525.... 434
S. v. Owens ....243 N.C. 673.... 472
S. v. Palmer ....197 N.C. 135.... 280
S. v. Palmer ....230 N.C. 205.... 335
S. v. Parker ....262 N.C. 679.... 211
S. v. Partlow ....272 N.C. 60.... 211
S. v. Payne ....263 N.C. 77.... 651
S. v. Peacock ....236 N.C. 137.... 727
S. v. Pearce ....266 N.C. 234.... 655
S. v. Peede ....256 N.C 460....352, 473
S. v. Perry ....120 N.C. 580.... 622
S. v. Perry ....225 N.C. 174....390, 538
S. v. Petry ....226 N.C. 78.... 512
S. v. Phelps ....242 N.C. 540.... 57
S. v. Phillips ....264 N.C. 508....57, 58, 327
S. v. Pinyatello ....272 N.C. 312.... 58
S. v. Pope ....252 N.C. 356.... 336
S. v. Powell ....264 N.C. 73....123, 474
S. v. Ramsey ....241 N.C. 181.... 720

S. v. Ray ....212 N.C. 725.... 129
S. v. Razook ....179 N.C. 708.... 126
S. v. Redman ....217 N.C. 483.... 329
S. v. Register ....244 N.C. 480.... 472
S. v. Revis ....193 N.C. 192.... 162
S. v. Rhinehart ....267 N.C. 470....389, 390, 538
S. v. Roberts ....270 N.C. 449.... 656
S. v. Robinson ....271 N.C. 448.... 478
S. v. Rogers ....233 N.C. 390....106, 107, 289
S. v. Rogers ....260 N.C. 406.... 197
S. v. Ross ....268 N.C. 282.... 700
S. v. Ross ....269 N.C. 739.... 500
S. v. Rountree ....181 N.C. 535.... 280
S. v. Rowland ....263 N.C. 353.... 383
S. v. Satterfield ....198 N.C. 682.... 281
S. v. Sawyer ....224 N.C. 61....212, 215
S. v. Sears ....235 N.C. 623....545, 546
S. v. Secrest .... 80 N.C. 450.... 532
S. v. Sheffield ....206 N.C. 374.... 333
S. v. Sheffield ....251 N.C. 309.... 129
S. v. Shemwell ....180 N.C. 718.... 651
S. v. Simmons ....240 N.C. 780.... 57
S. v. Smith ....213 N.C. 299....106, 107
S. v. Smith ....226 N.C. 738.... 539
S. v. Smith ....251 N.C. 328.... 380
S. v. Smith ....266 N.C. 747.... 654
S. v. Smith ....264 N.C. 575.... 473
S. v. Spencer ....209 N.C. 827.... 283
S. v. Spencer ....256 N.C. 487.... 518
S. v. Spruill ....214 N.C. 123.... 623
S. v. Squires ....272 N.C. 402....91, 101
S. v. Stallings ....267 N.C. 405.... 107
S. v. Stansell ....203 N.C. 69.... 281
S. v. Starnes ....220 N.C. 384.... 283
S. v. Stevens ....252 N.C. 331....653, 654
S. v. Stevens ....264 N.C. 737.... 221
S. v. Stewart ....255 N.C. 571....211, 700
S. v. Stitt ....146 N.C. 643.... 281
S. v. Strickland ....243 N.C. 100.... 211
S. v. Strickland ....254 N.C. 658....91, 358, 359
S. v. Sudderth ....184 N.C. 753....280, 281
S. v. Sultan ....142 N.C. 569.... 127
S. v. Sutton ....244 N.C. 679.... 473
S. v. Taft ....256 N.C. 441.... 125
S. v. Tankersley ....172 N.C. 955.... 281
S. v. Tedder ....258 N.C. 64.... 197
S. v. Terrell ....212 N.C. 145.... 58
S. v. Tessnear ....254 N.C. 211.... 725
S. v. Thomas ....236 N.C. 454.... 126
S. v. Thomas ....241 N.C. 337.... 291
S. v. Thompson ....256 N.C. 593....284, 293
S. v. Thompson ....257 N.C. 452.... 539
S. v. Tilley ....272 N.C. 408.... 539
S. v. Todd ....264 N.C. 524.... 58
S. v. Trantham ....230 N.C. 641.... 298

S. v. Trexler .... 4 N.C. 188 213
S. v. Trollinger .... 162 N.C. 618 281
S. v. Trott .... 190 N.C. 674 .... 280, 281
S. v. Turnage .... 138 N.C. 566 .... 281, 335
S. v. Turner .... 268 N.C. 225 131
S. v. Utley .... 126 N.C. 997 291
S. v. Vincent .... 4 N.C. 105 651
S. v. Vines .... 262 N.C. 747 650
S. v. Virgil .... 263 N.C. 73 292
S. v. Wade .... 264 N.C. 144 197
S. v. Wagoner .... 249 N.C. 637 57
S. v. Walker .... 266 N.C. 269 292
S. v. Walls .... 211 N.C. 487 .... 541, 546
S. v. Warren .... 252 N.C. 690 172
S. v. Weinstein .... 224 N.C. 645 .... 212, 725
S. v. Whaley .... 191 N.C. 387 280
S. v. Whitehurst .... 212 N.C. 300 .... 346, 469
S. v. Whittemore .... 255 N.C. 583 .... 106, 291
S. v. Whitener .... 93 N.C. 590 49
S. v. Whitener .... 191 N.C. 659 107
S. v. Williams .... 121 N.C. 628 512
S. v. Williams .... 210 N.C. 159 646
S. v. Wilson .... 218 N.C. 556 .... 542, 545, 546
S. v. Wilson .... 270 N.C. 299 650
S. v. Wilson .... 251 N.C. 174 651
S. v. Withers .... 271 N.C. 364 514
S. v. Wolfe .... 227 N.C. 461 389
S. v. Worley .... 268 N.C. 687 477
S. v. Wynne .... 151 N.C. 644 213
S. v. Yarboro .... 194 N.C. 498 162
S. v. Young .... 77 N.C. 498 541
Stedman v. Winston-Salem .... 204 N.C. 203 386
Steele v. Coxe .... 225 N.C. 726 710
Steele v. Hauling Co .... 260 N.C. 486 65
Summerlin v. R. R. .... 133 N.C. 551 531
Supply Corp. v. Scott .... 267 N.C. 145 549
Surety Corp. v. Sharpe .... 232 N.C. 98 76
Surplus Co. v. Pleasants .... 263 N.C. 587 7
Swain v. Motor Co .... 207 N.C. 755 .... 523, 530
Swartzberg v. Ins. Co .... 252 N.C. 150 97
Swicegood v. Swicegood .... 270 N.C. 278 69
Swinton v. Realty Co .... 236 N.C. 723 398

T

Taylor v. Green .... 242 N.C. 156 489
Taylor v. Honeycutt .... 240 N.C. 105 .... 617, 618, 620
Taylor v. Taylor .... 197 N.C. 197 197
Taylor v. Taylor .... 257 N.C. 130 196
Taney v. Brown .... 262 N.C. 438 359
Teague v. Power Co .... 258 N.C. 759 .... 531, 532
Temple v. Hay Co .... 184 N.C. 239 485
Terrace, Inc. v. Indemnity Co .... 241 N.C. 473 43
Terrell v. Ins. Co .... 269 N.C. 259 735
Thomas v. Board of Elections .... 256 N.C. 401 570
Thomas & Howard Co. v. Ins. Co. .... 241 N.C. 109 8

Thomas v. Morgan....262 N.C. 292.... 101
Thomas v. Thomas....259 N.C. 461....74, 75
Thomason v. R. R....142 N.C. 318....318, 319
Thompson v. Funeral Home....208 N.C. 178.... 41
Thompson v. Umberger....221 N.C. 178....33, 34
Thurston v. Thurston....256 N.C. 663....271, 304
Tindall v. Furniture Co....216 N.C. 306.... 40
Tippite v. R. R....234 N.C. 641.... 354
Topping v. Sadler.... 50 N.C. 357.... 465
Towery v. Dairy....237 N.C. 544.... 8
Trantham v. Furniture Co....194 N.C. 615.... 427
Travis v. Duckworth....237 N.C. 471.... 523
Trucking Co. v. Payne....233 N.C. 637.... 606
Trust Co. v. Buchan....256 N.C. 142.... 673
Trust Co. v. Finance Corp....238 N.C. 478.... 359
Trust Co. v. Foster....211 N.C. 331.... 35
Trust Co. v. Hood....206 N.C. 268.... 456
Trust Co. v. Ins. Co....204 N.C. 282....382, 611
Trust Co. v. Redwine....204 N.C. 125.... 264
Trust Co. v. Snowden....267 N.C. 749.... 445
Trust Co. v. Wilson....182 N.C. 166.... 8
Tucker v. Lowdermilk....233 N.C. 185.... 245
Turner v. Glenn....220 N.C. 620....32, 34
Tynch v. Briggs....230 N.C. 603.... 618
Tyndall v. Hines Co....226 N.C. 620.... 513
Tynes v. Davis....244 N.C. 528.... 359
Tyson v. Ford....228 N.C. 778.... 461

U

Upchurch v. Funeral Home....263 N.C. 560.... 426
Union Trust Co. v. Wilson....182 N.C. 166.... 7

V

Vance v. Guy....224 N.C. 607.... 523
Vance v. Hampton....256 N.C. 557....581, 727
Van Every v. Van Every....265 N.C. 506.... 194
Vincent v. Woody....238 N.C. 118....521, 523, 530

W

Wagner v. Honbaier....248 N.C. 363....674, 675
Walker v. Elkin....254 N.C. 85....434, 436
Wall v. Colvard, Inc....268 N.C. 43.... 260
Wallace, *In re*....267 N.C. 204....359, 581
Wallin v. Rice....170 N.C. 417.... 466
Warren v. Maxwell....223 N.C. 604.... 570
Waters v. Harris....250 N.C. 701.... 460
Watson v. Durham....207 N.C. 624.... 513
Watson v. Lee County....224 N.C. 508.... 13
Watson v. Stallings....270 N.C. 187.... 611
Watt v. Crews....261 N.C. 143....354, 612
Watts v. Brewer....243 N.C. 422.... 244
Watts v. Crews....261 N.C. 143.... 88
Weavil v. Myers....243 N.C. 386.... 234

Webb v. Gaskins....255 N.C. 281.... 41
Webb v. R. R....268 N.C. 552.... 207
Webster v. Sharpe....116 N.C. 466....202, 203
Weinstein v. Griffin....241 N.C. 161....365, 366
Wellington-Sears Co. v.
Finishing Works....231 N.C. 96....523, 530
Wells v. Clayton....236 N.C. 102.... 707
Wells v. Housing Authority....213 N.C. 744....144, 157
Wells v. Wells....227 N.C. 614.... 324
West v. Murphy....197 N.C. 488.... 619
West v. R. R....140 N.C. 620.... 554
West v. Woolworth Co....215 N.C. 211.... 707
Westmoreland v. R. R....253 N.C. 197.... 197
Whaley v. Taxi Company....252 N.C. 586.... 181
Whitaker v. Hamilton....126 N.C. 465.... 735
White v. Dickerson, Inc....248 N.C. 723.... 710
Whitehurst v. FCX
Fruit and Vegetable Service....224 N.C. 628.... 260
Whitfield v. Garris....134 N.C. 24.... 619
Winchester v. Gaddy.... 72 N.C. 115.... 556
Williams v. Bray....273 N.C. 198.... 207
Williams v. Boulerice....268 N.C. 62.... 710
Williams v. Highway Comm....252 N.C. 141.... 50
Williams v. Highway Comm....252 N.C. 772.... 112
Williams v. Hunter....257 N.C. 754.... 397
Williams v. McLean....220 N.C. 504.... 495
Williams v. Strickland....251 N.C. 767.... 317
Williams v. Williams....261 N.C. 48.... 304
Wilson v. Finance Co....239 N.C. 349....89, 450
Wilson, *In re* Will of....258 N.C. 310.... 611
Wilson v. McClenny....262 N.C. 121.... 83
Wilson v. Wilson....261 N.C. 40.... 271
Winborne v. Lloyd....209 N.C. 483.... 735
Winchester-Simmons Co. v. Cutler..199 N.C. 709.... 557
Wirth v. Bracey....258 N.C. 505.... 50
Wood v. Kincaid....144 N.C. 393.... 7
Woodruff v. Ins. Co....260 N.C. 723.... 7
Woody v. Bank....194 N.C. 549.... 506
Woody v. Pickelsimer....248 N.C. 599.... 51
Woolard v. Smith....244 N.C. 489....551, 558
Wooten v. Cagle....268 N.C. 366.... 611
Wright v. Casualty Co....270 N.C. 577.... 51
Wright v. Credit Co....212 N.C. 87.... 394
Wyatt v. Equipment Co....253 N.C. 355.... 443

Y

Yarborough v. Park Commission....196 N.C. 284....144, 162
Yates v. Body Co....258 N.C. 16.... 497
Yates v. Chappell....263 N.C. 461.... 445
Young v. Anchor Co....239 N.C. 288.... 443
Young v. Roberts....252 N.C. 9.... 570

Z

Zager v. Stezer....242 N.C. 493.... 498

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1968

JANICE H. LANE v. ALEXANDER BROWN GRISWOLD, BENJAMIN H. GRISWOLD, III, CHARLES S. GARLAND, F. GRAINGER MARBURG, WILLIAM J. PRICE, III, J. CREIGHTON RIEPE, Y. E. BOOKER, JAMES McHENRY, F. BARTON HARVEY, JOSEPH L. TURNER, PHILLIP H. WATTS, BENJAMIN S. WILLIS, NORMAN FARQUHER, JAMES E. HOLMES, JR., W. JAMES PRICE, IV, S. BONSAL WHITE, JR., AND R. GERARD WILLSE, JR., T/D/B/A ALEX BROWN & SONS, A PARTNERSHIP.

(Filed 28 February, 1968.)

1. **Pleadings § 30—**

   A motion for judgment on the pleadings on the ground that the complaint fails to state a cause of action is tantamount to a demurrer, and upon the hearing of such motion the court is limited solely to a consideration of the pleadings.

2. **Corporations § 18; Sales § 1—**

   The word "sale" as used in the North Carolina Securities Law, G.S. 78-2(f), will be presumed, in the absence of a contrary intent in the statute, to have its usual meaning of a transfer of property from one person to another for a valuable consideration.

3. **Corporations § 18; Sales § 13— Unsolicited purchase of nonregistered stock by an agent stockbroker is not a voidable sale under the Securities Law.**

   In an action by the purchaser of stock to render void a contract of stock purchase and recover the purchase price thereof, allegations that plaintiff in this State placed an unsolicited order for the purchase of stock with defendant stockbrokers in another state and that this order was filed by defendants, as agent for plaintiff, through its own office or

clearinghouse in another state, *are held* ineffectual to allege a sale or an offer for sale of unregistered securities within the purview of G.S. 78-6 and G.S. 78-22, since it appears from the complaint that defendants were acting solely as the agent of plaintiff and not as a seller of the securities or as seller's agent.

4. Corporations § 18; Sales § 13; Courts § 21—

Allegations that defendant stockbrokers, as agent for plaintiff, purchased shares of stock through its office or clearinghouse in another state and that the stock was subsequently delivered to plaintiff upon plaintiff's payment in this State of a sight draft attached to the securities, *are held* ineffectual to allege a sale of unregistered securities in this State within the meaning of G.S. 78-6 and G.S. 78-22, since the sale was consummated in the other state upon the purchase of the stock, the title having vested immediately in the plaintiff.

5. Principal and Agent § 1; Brokers and Factors § 1—

The ordinary relationship of a stockbroker to his customer is that of principal and agent.

6. Pleadings § 30—

Upon the hearing of a motion for judgment on the pleadings, error by the trial court in considering facts stipulated by the parties *is held* not prejudicial when the facts stipulated are within the scope of the factual allegations in the complaint and no objection was entered to the consideration thereof.

7. Appeal and Error § 55—

Technical errors by the trial court in ruling on matters of pleading do not justify reversal when the complaint states a defective cause of action.

8. Pleadings § 25—

Motion to amend a complaint made after trial is properly denied where the amendment sets up a wholly different cause of action or an inconsistent cause. G.S. 1-163.

9. Appeal and Error § 16—

An appeal from a final judgment *eo instanti* removes the case from the Superior Court and transfers jurisdiction to the Supreme Court, and thereafter the Superior Court is *functus officio* to permit an amendment to the pleadings.

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

APPEAL by plaintiff from *Gambill, J.*, 6 March 1967 Civil Session of FORSYTH. Docketed and argued as Case No. 446, Fall Term 1967, and docketed as Case No. 442, Spring Term 1968.

Civil action for recovery under the provisions of G.S. 78-22 of the sum of $5,500 allegedly paid for 10,000 shares of the stock of the Hydramotive Corporation, which stock was not registered under the Securities Law of North Carolina as required by G.S. 78-6, heard

upon a demurrer to the complaint and a motion by defendants for judgment on the pleadings.

This is a summary in substance of the essential facts alleged in plaintiff's complaint, except when quoted: Plaintiff is a citizen and resident of Mecklenburg County, North Carolina. Defendants are a partnership and registered dealers in securities in the State of North Carolina, with its principal office in the city of Baltimore, Maryland, and with offices in the city of Winston-Salem, Forsyth County, North Carolina, and in Washington, D. C.

"On or about July 10, 1961, the plaintiff, in Mecklenburg County, North Carolina, placed an order by telephone with the Washington, D. C. office of the defendants; * * * for ten thousand (10,000) shares of Hydramotive Corporation at the price of $5,500.00; that this *'unsolicited'* order was *filled by the defendants, as agent,* through its own offices or through its clearinghouse in New York, New York." (Emphasis ours.) Later the shares of said securities were mailed by defendants to the Bank of Charlotte, Charlotte, North Carolina, with sight draft attached. The Bank of Charlotte delivered said securities to the plaintiff after payment had been made in full of the sight draft by plaintiff at the Bank of Charlotte, Charlotte, North Carolina. Plaintiff alleges upon advice and belief that the sale of said securities took place in the State of North Carolina, and that the title to said securities was transferred to the plaintiff at the time of the payment by the plaintiff of the sight draft attached to said securities. Said securities were not registered for sale in North Carolina under the North Carolina Securities Law or exempt from registration under the provisions of G.S. 78-3 or G.S. 78-4 of the North Carolina Securities Law. The sale of said securities in North Carolina was in violation of the provisions of the North Carolina Securities Law, and in particular G.S. 78-6. Plaintiff tendered to the defendants the securities sold and made written demand upon defendants for the full amount paid by the purchaser plus interest at 6% from the settlement date in order to avoid the sales. Defendants refused to pay to the plaintiff the full amount paid by her plus interest at 6%. Under the provisions of G.S. 78-22, the sale of said securities was void at the election of plaintiff, and defendants are liable jointly and severally to plaintiff for the full amount of said purchase price paid to defendants by plaintiff together with interest at the rate of 6%.

Defendants filed an answer in substance as follows: Defendants admit that plaintiff is a resident of Mecklenburg County, North Carolina; that they are registered dealers in securities in the State of North Carolina with their principal office in the city of Baltimore,

Maryland, and with offices in the city of Winston-Salem, North Carolina, and in Washington, D. C.; and that they were at the time herein complained of doing business in the city of Winston-Salem, North Carolina. Defendants further admit that on 10 July 1961 plaintiff in Charlotte, North Carolina, placed an order by telephone with their Washington, D. C., office requesting defendants to purchase for her 10,000 shares of Hydramotive Corporation. Such request was unsolicited by defendants, and pursuant to such request defendants purchased 10,000 shares of Hydramotive Corporation from third parties while acting as agent for the plaintiff; such purchase was made on the open market and upon purchase of said securities on the account and risk of plaintiff, defendants mailed said securities to the Bank of Charlotte, Charlotte, North Carolina, with a sight draft attached. Defendants deny that plaintiff ever paid, in part or in full, for said securities, the true facts being that said securities were in fact paid for and delivered to Southeastern Corporation, a corporation of which plaintiff was an employee. Defendants deny that any sale of said securities took place in the State of North Carolina. Defendants admit that said securities were not registered for sale in North Carolina under any provisions of the North Carolina Securities Law. Defendants further deny that the sales of said securities were in violation of the provisions of the North Carolina Securities Law, and in particular G.S. 78-6. They also deny that plaintiff tendered to them the securities sold and made written demand upon defendants for the full amount paid by the purchaser plus interest at 6%. Defendants' answer contains three further answers and defenses which are not set forth here because they are not relevant on this appeal.

Defendants demurred to the complaint on the ground that it failed to allege facts sufficient to state a cause of action, and further moved for judgment on the pleadings.

When the demurrer and motion by defendants for judgment on the pleadings came on to be heard before Judge Gambill, the parties stipulated and agreed in substance as follows: The transaction alleged in the complaint was initiated by the plaintiff by placing a telephone call with defendants' office in Washington, D. C., for the purpose of giving an unsolicited order by telephone for the purchase of a specified quantity of the stock alleged in the complaint. By telephone defendants agreed to purchase the stock in question for plaintiff, and the purchases were thereafter executed by defendants through its office in Baltimore, Maryland, *as agent for the purchaser.* After the purchase had been executed, a written confirmation of its execution was sent to the plaintiff by defendants. The parties stipulated

and agreed that these stipulations may be considered by the court upon the demurrer and motion by defendants for judgment on the pleadings.

When the matter came on for hearing before Judge Gambill, the court granted leave to defendants to file an amended demurrer and motion for judgment on the pleadings as follows: (1) The transaction in question did not involve a "sale" of securities from defendants to plaintiff within the meaning of G.S. 78-6; (2) defendants were not "sellers" or "agents for the sellers" within the meaning of G.S. 78-22; (3) the transaction was not solicited by defendants but on the contrary was initiated and brought about by plaintiff herself, and accordingly did not even involve a prohibited offer for sale within the meaning of G.S. 78-6; and (4) the transaction did not occur within the State of North Carolina and therefore does not come within the coverage of G.S. 78-6.

Judge Gambill on 15 March 1967 entered judgment in substance as follows: This matter came on to be heard upon the demurrer to the complaint and motion for judgment on the pleadings filed by the defendants and the amended demurrer and motion for judgment on the pleadings and stipulations filed by the parties. The court found the following facts: (1) The transaction alleged in the complaint was initiated by the plaintiff by placing a telephone call to defendants at its Washington, D. C., office, for the purpose of giving an unsolicited order by telephone for the purchase of the stock alleged in the complaint; and (2) that pursuant to the telephone message defendants executed the order for the purchase of said stock through its office in Baltimore, Maryland, as agent for the purchaser. After the purchase had been executed, a written confirmation of such purchase was sent to plaintiff by defendants from their Baltimore office. The Court having heard arguments of counsel on both sides and having considered said arguments, the pleadings, and stipulations, concluded as a matter of law that the purchase of the stock alleged in the complaint did not involve a "sale" of securities from defendants to plaintiff within the meaning of G.S. 78-6, nor was said purchase an offer for sale within the meaning of G.S. 78-6; that the defendants were not sellers or agents for the sellers within the meaning of G.S. 78-22; that the Securities Law of North Carolina does not cover this said transaction alleged in the complaint and does not impose any liability upon the defendants under the allegations of the complaint and the stipulated facts; that the plaintiff is not entitled to recover of defendants anything; and that the amended demurrer and motion by defendants for judgment on the pleadings are sustained and allowed. The court ordered and adjudged that the ac-

tion be dismissed with the costs taxed against plaintiff. Immediately upon the signing of the judgment by Judge Gambill on 15 March 1967, plaintiff excepted and in open court appealed to the Supreme Court. These appeal entries were signed by Judge Gambill on 15 March 1967, but they were filed on 5 April 1967.

Thereafter, plaintiff moved orally without setting forth any reasons, according to the record before us, that the judge in his discretion grant the plaintiff leave to amend her complaint. The date of this oral motion is not set forth in the record. The court being of opinion that the plaintiff had a defective cause of action denied the request. Later on 29 March 1967 plaintiff filed a written motion setting forth the oral motion to amend the complaint in substance as follows: To strike from the complaint the following: ". . . (T)hat the shares of said securities were mailed or caused to be mailed by the defendant to the Bank of Charlotte, Charlotte, North Carolina, with sight draft attached; that the Bank of Charlotte delivered the said securities to the plaintiff after payment had been made in full by the plaintiff at the Bank of Charlotte, Mecklenburg County, North Carolina," and to substitute in lieu thereof the following: "The defendants purchased said shares of securities from a dealer or dealers and paid or agreed to pay said dealer or dealers the purchase price of said securities; that the defendants, acting as agent of the selling dealer or dealers mailed the certificates or caused the certificates to be mailed to the Bank of Charlotte, Charlotte, North Carolina, with sight draft attached; that it was the intention of the plaintiff and the defendants that the certificates be delivered to the plaintiff upon the payment by the plaintiff of the sight draft; that the plaintiff paid the sight draft in full; that the Bank of Charlotte, acting as agent of the defendants, collected the full amount due from the plaintiff, and the Bank of Charlotte acting as agent of the defendants remitted to the defendants the amount of payment collected on said sight draft and delivered the certificates to the plaintiff at the Bank of Charlotte, Charlotte, North Carolina."

After the filing of this written motion, Judge Gambill on 29 March 1967 denied plaintiff's motion to amend her complaint. Plaintiff appealed to the Supreme Court.

Herbert, James & Williams by Henry James, Jr., and Jordan, Wright, Henson & Nichols by Karl N. Hill, Jr., for plaintiff appellant.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson by R. M. Stockton, Jr., and W. F. Maready, and Covington & Burling by David B. Isbell for defendant appellees.

PARKER, C.J. Defendants filed a demurrer to the complaint, and made a motion for judgment on the pleadings. A motion for judgment on the pleadings by defendants is tantamount to a demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action. *Woodruff v. Insurance Co.*, 260 N.C. 723, 133 S.E. 2d 704; *Fisher v. Motor Co.*, 249 N.C. 617, 107 S.E. 2d 94; *Hill v. Parker,* 248 N.C. 662, 104 S.E. 2d 848; 3 Strong, N. C. Index, Pleadings, § 30, and Supplement to *ibid;* 71 C.J.S., Pleading, § 425(b). In *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384, Ervin, J., said for the Court:

> "A demurrer and a motion for judgment on the pleadings are somewhat related procedural devices. Each denies the legal sufficiency of the pleading of an adversary and raises an issue of law upon the facts stated in such pleading. The scope of a motion for judgment on the pleadings surpasses that of a demurrer, however, in that the former is an application for an immediate judgment in the movant's favor. 71 C.J.S., Pleading, section 425. . . .
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> * * *
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> "When a party moves for judgment on the pleadings, he admits these two things for the purpose of his motion, namely: (1) The truth of all well-pleaded facts in the pleading of his adversary, together with all fair inferences to be drawn from such facts; and (2) the untruth of his own allegations in so far as they are controverted by the pleading of his adversary."

In *Burton v. Reidsville,* 240 N.C. 577, 581, 83 S.E. 2d 651, 654, it is said: "Moreover, if good in any respect or to any extent, a plea will not be overthrown by motion for judgment on the pleadings."

On a motion for judgment on the pleadings it is error for the court to hear evidence and find facts in support of its judgment, since only the pleadings themselves may be considered. *Reidsville v. Burton,* 269 N.C. 206, 152 S.E. 2d 147; *Crew v. Crew,* 236 N.C. 528, 73 S.E. 2d 309; *Remsen v. Edwards,* 236 N.C. 427, 72 S.E. 2d 879; *Erickson v. Starling, supra.*

In *Surplus Co. v. Pleasants,* 263 N.C. 587, 139 S.E. 2d 892, the Court said:

> "'On demurrer we take the case as made by the complaint.' *Barber v. Wooten,* 234 N.C. 107, 66 S.E. 2d 690. The Court said in *Hayes v. Wilmington,* 243 N.C. 525, 538, 91 S.E. 2d 673, 683: 'It is elemental that a demurrer may not call to its aid facts not appearing on the face of the challenged pleading. *Union Trust Co. v. Wilson,* 182 N.C. 166, 108 S.E. 500; *Wood v. Kincaid,*

144 N.C. 393, 57 S.E. 4; *Davison v. Gregory,* 132 N.C. 389, 43 S.E. 916.'

"It is a general and fundamental rule of pleading that on a hearing of a demurrer to a pleading the court ordinarily is limited to a consideration of the pleading demurred to, and an instrument or instruments expressly made a part of the pleading by apt words, and cannot consider evidence, documents, or instruments *aliunde* of the challenged pleading, such as affidavits and stipulations of the parties. *Moore v. W.O.O.W., Inc.,* 253 N.C. 1, 116 S.E. 2d 186; *Lamm v. Crumpler,* 240 N.C. 35, 81 S.E. 2d 138; *Foust v. Durham,* 239 N.C. 306, 79 S.E. 2d 519; *Towery v. Dairy,* 237 N.C. 544, 75 S.E. 2d 534; *McDowell v. Blythe Bros.,* 236 N.C. 396, 72 S.E. 2d 860; *Trust Co. v. Wilson,* 182 N.C. 166, 108 S.E. 500; *Davison v. Gregory,* 132 N.C. 389, 43 S.E. 916; 71 C.J.S., Pleading, § 257; 41 Am. Jur., Pleading, § 246.

" 'According to the weight of authority, matters extrinsic to a pleading may not be considered on the hearing of a demurrer thereto, even though the parties stipulate or agree that such matters may be considered by the court in determining the demurrer.' 41 Am. Jur., Pleading, § 246, p. 466. To the same effect Anno. 137 A.L.R. 483.

"It is familiar learning that a demurrer admits, for the purpose of testing the sufficiency of the pleading, the truth of factual averments therein well stated and such relevant inferences as may be deduced therefrom, but it does not admit any legal inferences or conclusions of law asserted by the pleader. *McKinney v. High Point,* 237 N.C. 66, 74 S.E. 2d 440. While G.S. 1-151 requires us to construe liberally the allegations of a challenged pleading, we are not permitted to read into it facts which it does not contain. *Thomas & Howard Co. v. Insurance Co.,* 241 N.C. 109, 84 S.E. 2d 337; *Johnson v. Johnson,* 259 N.C. 430, 130 S.E. 2d 876."

The relevant provisions of the North Carolina Securities Law are G.S. 78-2, G.S. 78-6, and G.S. 78-22.

G.S. 78-2 defines the terms "offer to sell" or "offer for sale": "(d) Offer to Sell, etc. — 'Offer to sell' or 'offer for sale' shall mean every attempt or offer to dispose of, or solicitation of an order or offer to buy, a security or interest in a security for value." The rest of this subsection of the statute is not relevant here. "(f) Sale, etc. — 'Sale' or 'sell' shall mean every sale or other disposition of a security or interest in a security for value, and every contract to

make any such sale or disposition." The concluding sentence of this subsection is not relevant here.

G.S. 78-6 sets out the prohibition which plaintiff contends was violated here: "No securities . . . shall be offered for sale or sold within this State unless such securities shall have been registered by notification or by qualification as hereinafter defined. . . ." This statute contains exceptions which are not relevant here.

G.S. 78-22 sets forth the remedy which plaintiff by this action seeks to invoke: "Every sale or contract for sale made in violation of any of the provisions of this chapter shall be voidable at the election of the purchaser and the person making such sale or contract for sale, and every director, officer or agent of or for such seller, if such director, officer or agent shall have participated or aided in any way in making such sale shall be jointly and severally liable to such purchaser in an action at law in any court of competent jurisdiction upon tender to the seller of the securities sold or of the contract made for the full amount paid by such purchaser." This section of the statute contains provisos not relevant here.

G.S. 78-2(f) defines a "sale" as a " 'sale' . . . shall mean every sale or other disposition of a security or interest in a security for value, and every contract to make any such sale or disposition." In *State v. Colonial Club,* 154 N.C. 177, 69 S.E. 771, the Court said: "The word sale is thus defined: 'A sale is a transmutation of property from one man to another in consideration of some price or recompense in value.' 2 Blk. Com. 446." In *Commissioner of Internal Revenue v. Freihofer,* 102 F. 2d 787, 125 A.L.R. 761, the Court said: "Blackstone defined a sale as 'a transmutation of property from one man to another in consideration of some price or recompense in value' 2 Bl. 446. It is a contract for the transfer of property from one person to another for a valuable consideration. See 7 Words and Phrases, First series, Sale, page 6291. There must be parties standing to each other in the relation of buyer and seller, their minds must assent to the same proposition, and a consideration must pass." In accord Black's Law Dictionary, 4th Ed., definition of "sale."

Where the word "sale" is used in G.S. 78-2(f), in the absence of anything to the contrary appearing in the statute, it will be assumed that the word is intended to have its usual signification. *Commissioner of Internal Revenue v. Freihofer, supra.*

The complaint in the instant case alleges in substance: On 10 July 1961 plaintiff in Mecklenburg County, North Carolina, placed an *"unsolicited" order* by telephone with defendants in Washington, D. C., to purchase 10,000 shares of Hydramotive Corporation at the price of $5,500, and this *"unsolicited" order* was filled by defend-

ants, as agent, through its own offices or through its clearinghouse in New York City. There is nothing in the complaint or answer to suggest or show that defendants had ever heard of the Hydramotive Corporation before receiving the *"unsolicited" order* from plaintiff to buy. The only reasonable inference to be drawn from the language of the complaint is that in buying this stock for plaintiff, defendants were acting as her agent. It is true that there was a sale here, but it was a sale made by the selling securities dealer, or, if he was acting as broker, by his customer to plaintiff as purchaser for whom defendants here as buyer and broker were acting as agent for plaintiff. At this point title passed directly from the seller to the purchaser, the plaintiff, for whom the defendants were acting as agent and broker in purchasing the securities.

In 12 Am. Jur. 2d, Brokers, § 131, it is said:

> "According to most of the cases, the title to securities purchased by a stockbroker vests immediately in the customer, whether the purchase is on margin or otherwise, and even though the broker retains possession of the stock certificate or the customer has paid nothing on the purchase price. Under this rule, the customer for whom a broker purchases stock is the owner thereof from the time of purchase, whether purchased in his name or not."

In 12 C.J.S., Brokers, § 29, it is said:

> "Ordinarily, however, the title to, or ownership of, stock or other securities bought by a broker for a client on margin or otherwise, whether or not purchased in his own name, vests in the customer upon the purchase and notification thereof to him, notwithstanding nondelivery of the certificate. The customer's title or ownership, however, is subject to the right of the broker to hold the stock as security for the payment of his lien for advances and commissions, he being regarded as a pledgee of the stock. . . ."

Disregarding the conclusions of law alleged in the complaint, it is manifest from the factual allegations in the complaint that the relationship of defendants with the plaintiff was that of principal and agent. It is so alleged in the complaint and is so admitted in the answer. "The ordinary relationship of a stockbroker to his customer is that of principal and agent." 12 Am. Jur. 2d, Brokers, § 113. Accord 12 C.J.S., Brokers, § 11. It is manifest from the factual allegations in the complaint that there was not a "sale" from defendants to plaintiff, nor can the defendants be properly termed the

"seller," because defendants were acting as agent for the plaintiff. There is nothing in the complaint or answer to show that defendants were an agent for the seller of the 10,000 shares of Hydramotive Corporation. It seems clear from the language of G.S. 78-22 that it does not apply to an agent for the purchase of securities. There was not between defendants and plaintiff any sale prohibited by G.S. 78-6 and therefore voidable under G.S. 78-22 (and potentially punishable by criminal sanctions under G.S. 78-23(b)); nor were defendants either the seller or an agent for the seller so as to be subject to suit under G.S. 78-22, for the complaint specifically alleges that this unsolicited order was filled by the defendants as agent for the plaintiff. It might be argued that even a broker's execution of the purchase order as agent for the purchaser would be subject to rescission under G.S. 78-22 if the customer's order had been solicited by the broker. Such an argument would rest on the fact that G.S. 78-6 prohibits not only sales but also offers for sale, which are defined by G.S. 78-2(d) to include "solicitation of an order or offer to buy." Such an argument is untenable here, because the complaint states that her order to defendants to purchase for her 10,000 shares of Hydramotive Corporation at the price of $5,500 was an *"unsolicited" order.*

G.S. 78-6 states: "No securities . . . shall be offered for sale or sold within this State. . . ." The operative language of that section confines its prohibition and prescribes the jurisdictional limitations of the statute to sales within North Carolina. This allegation in the complaint is a conclusion of law and not a factual averment: "That the plaintiff is advised and believes, and upon such advice and belief alleges, that the sale of said securities took place in the State of North Carolina, and the title was transferred to the plaintiff at the time of the payment by the plaintiff in accordance with the sight draft attached to said securities, which were delivered to the Bank of Charlotte, Mecklenburg County, North Carolina." The reasonable inference to be drawn from the factual allegations of the complaint is that the defendants as agent for plaintiff purchased the 10,000 shares of Hydramotive Corporation stock at the price of $5,500 at its office in Washington, D. C., or through its own clearinghouse in New York City. When this stock was purchased by defendants as agent for plaintiff either in New York City or Washington, D. C., title to this stock passed directly and immediately to the customer. Any increase in the value of the stock, from that time forth, belonged to plaintiff and any decrease in value was his loss. *Eddy v. Schiebel,* 112 Conn. 248, 152 A. 66; *Murphy v. Sincere,* 299 Ill. App. 580, 20 N.E. 2d 610; 12 Am. Jur. 2d, Brokers, § 131; 12

C.J.S., Brokers, § 29; 14 Fletcher, Cyclopedia Corporations, Perm. Ed., § 6742. The last act necessary to make the contract complete between plaintiff and defendants for the purchase of this stock took place in Washington, D. C., or New York City and not in the State of North Carolina. If a customer could place an unsolicited order with a dealer in registered securities by telephone in New York City and successfully contend that title did not pass to him and that the contract was not complete until he paid for the stock in North Carolina, it would permit a customer if the stock fell to repudiate the transaction, which would have a disastrous effect upon the whole business of lawful and legitimate dealing in securities. If under such circumstances the price of the stock advances, there would seem to be no question but that the purchaser would compel the broker to deliver the stock by suit or otherwise. It is manifest from the factual allegations of the complaint and the factual allegations of the complaint admitted in the answer that defendants did not offer for sale nor sell 10,000 shares of Hydramotive Corporation stock to plaintiff within the limits of the State of North Carolina.

Doherty v. Bartlett, 81 F. 2d 920, involved separate actions brought in the District Court of New Hampshire for money had and received by Fred G. Bartlett, Leon S. Knowlton, and Joseph O. Tremblay, all of Manchester in the state of New Hampshire, against Henry L. Doherty of the city of New York and state of New York, doing business under the name and style of Henry L. Doherty & Co. In each action the plaintiff seeks to recover money paid for stocks, which it is alleged were illegally sold in New Hampshire in violation of chapter 202 of the Session Laws of 1917, entitled "An Act to protect the public against the sale of worthless securities." The Court held that the effect of this conference over the telephone was not a violation of New Hampshire statute, no act of the salesman, either of solicitation or offer of sale, taking place in New Hampshire, and no contract of sale being entered into by such salesman while in New Hampshire. This is true even though the consummation of the transaction was the acceptance by telephone by the buyer in New Hampshire, the solicitation and offer to sell the stock being made by the salesman in Massachusetts.

Judge Gambill committed error in considering the stipulated facts and also in finding facts. In *Erickson v. Starling, supra,* the Court said:

> "On a motion for judgment on the pleadings, the presiding judge should consider the pleadings, and nothing else. . . . He should not hear extrinsic evidence, or make findings of fact. . . ."

The error committed by Judge Gambill in considering the stipulated facts was harmless and nonprejudicial, for the reason that the stipulated facts are generally within the scope of the factual allegations in the complaint and do not radically depart therefrom. There are no essential or ultimate facts stated in the stipulations which are not also contained in or inferred by plaintiff's allegations. We are fortified in this result by the fact that Judge Gambill's consideration of these stipulations was not excepted to nor assigned as error by the plaintiff. The court was correct in entering judgment to the effect that the transactions alleged did not involve a "sale" of securities from the defendants to the plaintiff within the meaning of G.S. 78-6; that said transactions did not amount to an offer for sale within the meaning of G.S. 78-6; that the defendants were not sellers nor agents for the sellers within the meaning of G.S. 78-22; that the Securities Law of North Carolina does not cover the said transactions alleged in the complaint; that the plaintiff is not entitled to recover of defendants under the provisions of the Securities Law of North Carolina, and in sustaining the demurrer and motion for judgment on the pleadings. Judge Gambill's findings of fact will be considered as surplusage and improvidently made, but not prejudicial. We are confirmed in this opinion that the findings of fact were not prejudicial for the reason that plaintiff has not assigned them as error.

In spite of the technical errors made by Judge Gambill in considering the stipulations and in making findings of fact, the complaint itself contains insufficient allegations to withstand the challenge by demurrer and for a judgment on the pleadings. "If the cause of action as stated by the plaintiff is inherently bad, why permit him to proceed further in the case for if he proves everything that he alleges he must eventually fail in the action." *Garrison v. Williams*, 150 N.C. 674, 64 S.E. 783; *Watson v. Lee County*, 224 N.C. 508, 31 S.E. 2d 535; *Aiken v. Sanderford*, 236 N.C. 760, 73 S.E. 2d 911; *Ice Cream Co. v. Ice Cream Co.*, 238 N.C. 317, 77 S.E. 2d 910; *Beam v. Almond*, 271 N.C. 509, 157 S.E. 2d 215. This is another accepted rule in appellate practice: "Regardless of whether review is by appeal or *certiorari*, the lower court's ruling will not be disturbed where it does not result in prejudice or harm. . . ." 1 Strong, N. C. Index 2d, Appeal and Error, § 55.

From reading our Securities Act, it is apparent that the Legislature has shown no intent to include both principal and agent transactions within the word "sale." The North Carolina Securities Act is typical of similar statutes in other states. Comparable statutes of

Massachusetts, Georgia, and Illinois are in many ways identical with our Act. After a diligent search, we have found few cases in point which would seem to be some evidence that claims such as made here are unusual. We have found no applicable decision in North Carolina.

In *Gill v. Hornblower,* 294 Mass. 26, 200 N.E. 376, the Court held as correctly summarized in the second headnote in the North Eastern Reporter:

> "Transaction whereby buyer obtained stock through an order given to stockbrokers, the transaction being for cash rather than on margin, *held* not a 'sale' by stockbrokers within statute so as to authorize rescission of transaction because stock had not been subject of notice of intention to offer for sale, the essence of the transaction being a purchase for buyer by the stockbrokers."

In its opinion the Court used this language:

> "It is daily practice for a stockbroker to be asked to buy for a customer, often in some stock exchange in another and possibly remote state or country, some security not commonly bought and sold on the market here. Often neither the corporation issuing the security nor any dealer or stockbroker has any substantial interest in qualifying the security under our sales of securities act. If a stockbroker in Massachusetts could not execute such an order without first causing the security to be so qualified, that would tend to make it impossible for a resident of Massachusetts to buy such a security without employing a broker in another State for the purpose.
>
> "In ordinary speech, the transaction in question would not be described as a 'sale' of stock by the defendants to the plaintiff's testatrix. Rather, the defendants were her agents to buy stock. Reported cases tend to show that the law takes the same view of the transaction. [Citing numerous authority.]"

In *Herscot v. Gerold,* 346 Mass. 611, 195 N.E. 2d 70 (1964), the Court held that a stock brokerage firm whose business was limited to buying and selling stock on orders of customers on commission basis did not make a "sale" of security within the Blue Sky Law when it filled a customer's order for a designated stock, no shares of which were owned by firm members, by securing the stock from another firm. In its opinion the Court used this language:

> "The judge correctly ruled that the case is governed by *Gill*

v. Hornblower, 294 Mass. 26, 200 N.E. 376, the facts of which are indistinguishable from those in the case at bar. There the plaintiff's testatrix gave to the defendants, a firm of Boston stockbrokers, an order to buy 500 shares of Electric Bond and Share Company. The defendants were in no way interested in promoting the sale of that stock, and had not given notice of intention to sell under G. L. c. 110A, § 5. Purchase was made on the New York Curb Exchange, of which the defendants were members, and certificates in the name of the plaintiff's testatrix were delivered to her in Boston. In deciding for the defendants it was said: 'In ordinary speech, the transaction * * * would not be described as a "sale" of stock by the defendants to the plaintiff's testatrix. Rather, the defendants were her agents to buy stock. Reported cases tend to show that the law takes the same view of the transaction * * *. [T]he essence of the transaction was a purchase for the plaintiff's testatrix and not a sale by the defendants to her.' "

Weisbrod v. Lowitz, 282 Ill. App. 252 (1935), involved an action under the Illinois Blue Sky Laws against licensed stockbrokers for the purchase price of certain unregistered securities which plaintiff alleged were *sold* to him by these brokers. The evidence indicated that plaintiff telephoned one defendant inquiring as to general market quotations. During the course of the conversation, defendant mentioned the Electric Bond and Share Company stating that it would be a good buy at $30 a share. Plaintiff then instructed defendant to purchase 1,000 shares if they could be gotten at that price. Defendants forwarded the order to their New York office which in turn transmitted the order to brokers on the floor of the New York Curb Exchange who made the purchase according to plaintiff's instructions sending a report thereof back to defendants who sent a confirmation to plaintiff showing the purchase price of $30,000 and defendants' brokerage commission of $150. The shares were then transferred to plaintiff by being first delivered to the banks which had lent plaintiff the purchase money which delivery procedure may have some similarity to that employed in the instant case. In upholding the lower court's conclusion that defendants acted solely as plaintiff's agents in purchasing the stock on his order and for his account and that hence plaintiff was not entitled to recover, the court spoke as follows in language clearly apposite to the present situation:

"The sellers of the stock were the undisclosed principals of

the New York brokers who made the sale to defendants' brokers on the floor of the New York Curb Exchange.

* * *

> "In every transaction of this nature there are two parties — a buyer and a seller. Plaintiff's argument that the act applies to anyone participating in the transaction, even as the agent for the buyer, ignores any distinction or difference between a buyer and a seller. Clearly the legislature did not intend to penalize the buyer in such a transaction, and it would be illogical and abnormal to penalize the buyer's agent who was acting for his principal.
>
> "It should be remembered that in a transaction of this sort there is only one change of ownership, namely, from the seller to the buyer. The New York owners of the stock under consideration did not sell to their brokers but their brokers represented the owners in making the sale. And so plaintiff was not purchasing from his brokers, who were acting as his agents in the matter. The sale was from the New York owners to the plaintiff through the medium of their respective brokers."

In holding that there was no evidence to show that defendants had solicited plaintiff's order, this Illinois Appellate court said that the fact that the broker had told plaintiff it was a "'good buy' at $30 a share" was "not of controlling importance." Plaintiff had sought information and defendant was merely attempting to supply it.

In *Fine v. Bradford,* 109 Ga. App. 380, 136 S.E. 2d 147, the Court held as summarized in a syllabus by the Court:

> "A dealer duly registered under the Georgia Securities Act who in the stated capacity of agent for a Georgia purchaser, through the medium of its New York branch office, contracts with and obtains from a New Jersey broker the stock in question and thereafter delivers it to the purchaser in Georgia has not sold securities within this State in contravention of Code Ann. § 97-104 or § 97-113."

Plaintiff relies on two cases: *First State Bank of Pineville v. Wilson,* 246 Ky. 635, 55 S.W. 2d 657, and *Hardy v. Musicraft Records,* 93 Cal. App. 2d 698, 209 P. 2d 839. These cases are distinguishable from the case at bar. In the *Wilson* case and in a companion case, *First State Bank of Pineville v. Taylor* — both cases being reported as one — it appeared from the evidence that the two doctors purchased from the bank collateral trust bonds issued by the Central Securities Company of Asheville, North Carolina, and that

the defendant bank was acting as the agent of the Central Securities Company of Asheville and was receiving a commission from it for its services. The *Hardy* case is also distinguishable from the case at Bar in that, *inter alia,* the defendant was the seller of its own securities.

According to the record before us, after the judgment was signed on 15 March 1967, and plaintiff had given notice in open court of appeal to the Supreme Court and the appeal entries were signed by Judge Gambill on 15 March 1967, the plaintiff later moved orally that the judge in his discretion give the plaintiff leave to amend her complaint. The court was of the opinion that the plaintiff had a defective cause of action and therefore denied leave to amend the complaint. Thereafter the plaintiff filed a written motion on 29 March 1967 setting forth with details the oral motion, and a hearing was had upon the plaintiff's motion to amend her complaint. The court, being of the opinion that the motion to amend the complaint should not be allowed, entered an order denying her motion to amend the complaint. The plaintiff excepted and assigns as error the denial by the court of her motion to amend her complaint.

The court's denial of the motion to amend the complaint was correct for two reasons: First, G.S. 1-163 permits an amendment in the discretion of the court when the amendment does not change substantially the claim or defense. 1 McIntosh, N. C. Practice and Procedure, 2d Ed., § 1285. The Court said in *Perkins v. Langdon,* 233 N.C. 240, 63 S.E. 2d 565: "An analysis of this statute lends support to the view that the scope of the court's power to allow amendments is broader when dealing with amendments proposed before trial than during or after trial." The motion for the proposed amendment here came after judgment had been signed dismissing the plaintiff's case and after plaintiff had appealed in open court to the Supreme Court. The Court said in *Bassinov v. Finkle,* 261 N.C. 109, 134 S.E. 2d 130: "But the court may not permit a litigant to set up by amendment a wholly different cause of action or an inconsistent cause." In *Anderson v. Atkinson,* 235 N.C. 300, 69 S.E. 2d 603, the Court said: "The right to amend pleadings does not permit the litigant to set up a wholly different cause of action or change substantially the form of the action originally sued upon." In the complaint plaintiff alleged that "on or about July 10, 1961, the plaintiff, in Mecklenburg County, North Carolina, placed an order by telephone with the Washington, D. C. office of the defendants; that this order was for ten thousand (10,000) shares of Hydramotive Corporation at the price of $5,500.00; that this 'unsolicited' order was filed by the defendants, as agent,

through its own offices or through its clearinghouse in New York, New York." The plaintiff has specifically alleged in the complaint that defendants acted as her agent. Among other things in their proposed amendment they allege that defendants acted "as agent of the selling dealer or dealers." If the proposed amendment does not set up a wholly different cause of action, it is certain that it changed substantially the form of the action originally sued upon. It is manifest that the proposed amendment seeks to allege a cause inconsistent with the allegations of the complaint.

Plaintiff cannot be heard to complain of the refusal of Judge Gambill to amend her complaint for the reason that it was made after she had appealed from a final judgment in open court to the Supreme Court, and that appeal *eo instanti* transferred jurisdiction to the Supreme Court, and thereafter the Superior Court was *functus officio* to permit an amendment to the pleadings. 1 Strong, N. C. Index 2d, Appeal and Error, § 16. The exceptions to the general rule that pending an appeal the Superior Court is *functus officio* are set forth in *Hoke v. Greyhound Corp.*, 227 N.C. 374, 42 S.E. 2d 407, which exceptions are not relevant here.

The judgment below is
Affirmed.

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

JANICE H. LANE v. ALEXANDER BROWN GRISWOLD, BENJAMIN H. GRISWOLD, III, CHARLES S. GARLAND, F. GRAINGER MARBURG, WILLIAM J. PRICE, III, J. CREIGHTON RIEPE, Y. E. BOOKER, JAMES McHENRY, F. BARTON HARVEY, JOSEPH L. TURNER, PHILLIP H. WATTS, BENJAMIN S. WILLIS, NORMAN FARQUHER, JAMES E. HOLMES, JR., W. JAMES PRICE, IV, S. BONSAL WHITE, JR., AND R. GERALD WILLSE, JR., T/D/B/A ALEX BROWN & SONS, A PARTNERSHIP

AND

LESLIE B. COHEN v. ALEXANDER BROWN GRISWOLD, BENJAMIN H. GRISWOLD, III, CHARLES S. GARLAND, F. GRAINGER MARBURG, WILLIAM J. PRICE, III, J. CREIGHTON RIEPE, Y. E. BOOKER, JAMES McHENRY, F. BARTON HARVEY, JOSEPH L. TURNER, PHILLIP H. WATTS, BENJAMIN S. WILLIS, NORMAN FARQUHER, JAMES E. HOLMES, JR., W. JAMES PRICE, IV, S. BONSAL WHITE, JR., AND R. GERARD WILLSE, JR., T/D/B/A ALEX BROWN & SONS, A PARTNERSHIP

AND

DIANE A. DICKINSON v. ALEXANDER BROWN GRISWOLD, BENJAMIN H. GRISWOLD, III, CHARLES S. GARLAND, F. GRAINGER MARBURG, WILLIAM J. PRICE, III, J. CREIGHTON RIEPE, Y. E. BOOKER, JAMES MCHENRY, F. BARTON HARVEY, JOSEPH L. TURNER, PHILLIP H. WATTS, BENJAMIN S. WILLIS, NORMAN FARQUHER, JAMES E. HOLMES, JR., W. JAMES PRICE, IV, S. BONSAL WHITE, JR., AND R. GERARD WILLSE, JR., T/D/B/A ALEX BROWN & SONS, A PARTNERSHIP.

AND

HOWARD M. BROWNING v. ALEXANDER BROWN GRISWOLD, BENJAMIN H. GRISWOLD, III, CHARLES S. GARLAND, F. GRAINGER MARBURG, WILLIAM J. PRICE, III, J. CREIGHTON RIEPE, Y. E. BOOKER, JAMES MCHENRY, F. BARTON HARVEY, JOSEPH L. TURNER, PHILLIP H. WATTS, BENJAMIN S. WILLIS, NORMAN FARQUHER, JAMES E. HOLMES, JR., W. JAMES PRICE, IV, S. BONSAL WHITE, JR., AND R. GERARD WILLSE, JR., T/D/B/A ALEX BROWN & SONS, A PARTNERSHIP.

(Filed 28 February, 1968.)

APPEALS by plaintiffs from *Gambill, J.*, 6 March 1967 Civil Session of FORSYTH. These cases were docketed and argued as cases Nos. 447, 448, 449, and 450, Fall Term 1967, and docketed as cases Nos. 443, 444, 445, and 446, Spring Term 1968.

Herbert, James & Williams by Henry James, Jr., and Jordan, Wright, Henson & Nichols by Karl N. Hill, Jr., for plaintiff appellants.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson by R. M. Stockton, Jr., and W. F. Maready, and Covington & Burling by David B. Isbell for defendant appellees.

PER CURIAM. These four cases were argued in the Supreme Court at the same time the case of *Janice H. Lane v. Alexander Brown Griswold, et al.*, Case No. 446, Fall Term 1967, Case No. 442, Spring Term 1968, was argued, the opinion in which was filed this day. The plaintiffs in all five cases filed one joint brief, and defendants in all five cases filed one joint brief.

This is said in the joint brief filed by plaintiffs:

> "The brief in this case will cover all five cases, in that the points of law are substantially the same in all five cases and the facts of all five cases involved in this appeal are substantially identical except as to the dates and subject matter of the stock transactions alleged in each complaint. For that reason, the plaintiff will refer to each plaintiff and the defendants will refer to all the defendants as the same defendants are involved in each case."

This is said in the joint brief filed by defendants:

> "These are civil actions for the recovery, under G.S. 78-22, of the price of certain stock purchased by the plaintiffs/appellants through defendants/appellees, as their agents, which stock was not registered under the Securities Law for sale in North Carolina. The five cases are for all material purposes identical and have therefore been consolidated both in this Court and in the court below. 1/
>
> "1/ This Court, on September 20, 1967, granted the motion of plaintiffs and defendants in all of these cases that they each be permitted to file a single brief for all five cases, the motion having been based on the fact that the questions raised in the cases are substantially identical. The records in the cases are also substantially identical."

The decision in these four cases is controlled by the decision in *Janice H. Lane v. Alexander Brown Griswold, et al.*, Case No. 446, Fall Term 1967, and Case No. 442, Spring Term 1968, which was filed this day. Upon the authority of that case, the judgments of Judge Gambill in each and every one of the present four cases will be upheld.

Affirmed.

HUSKINS, J., took no part in the consideration or decision of these cases.

IN THE MATTER OF THE APPEAL OF JAMES J. HARRIS AND WIFE, ANGELIA M. HARRIS, FROM THE VALUATION PLACED ON THEIR PROPERTY FOR MECKLENBURG COUNTY FOR 1963.

(Filed 28 February, 1968.)

1. Administrative Law § 5—

A county is a party aggrieved and entitled to appeal from a decision of the State Board of Assessment reducing the valuation of property appraised by the county for tax purposes. G.S. 143-307.

2. Notice § 2—

Ordinarily, where a specified mode of giving notice is prescribed by statute, that method must be strictly followed.

3. Administrative Law § 5—

G.S. Chapter 143, Article 33, which confers upon a party aggrieved the right to the judicial review of an administrative decision, should be

liberally construed in favor of the party seeking review in order to preserve and effectuate such right.

4. Same; Notice § 2—

The failure of a party aggrieved to file a petition for the judicial review of an administrative order not later than 30 days after a written copy of the order had been served upon him by regular mail, *is held* not to constitute a waiver or forfeiture of the party's right to petition for review pursuant to G.S. 143-309, since the right of review under the statute continues until 30 days have expired from service of the order by personal service or by rgeistered mail, return receipt requested.

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

APPEAL by Meckenburg County from *Bailey, J.*, August 7, 1967 Schedule A, Second Week, of WAKE, docketed and argued as No. 530 at Fall Term 1967.

In the 1963 revaluation of all real property in Mecklenburg County for *ad valorem* taxation, the initial revaluation of each of eleven tracts owned by James J. Harris and wife, Angelia M. Harris, hereafter called taxpayers, was made by appraisers. See G.S. 105-278; G.S. 105-294; G.S. 105-295. The County Board of Equalization and Review reappraised these properties and increased the valuations placed thereon by the appraisers. See G.S. 105-327.

The taxpayers appealed (G.S. 105-329) to the State Board of Assessment which, on November 3-5, 1965, in Raleigh, N. C., after a hearing at which "both parties presented extensive testimony and documentary exhibits," entered an Administrative Order bearing date of May 17, 1966, which, as to six tracts, sustained the valuations of the County Board of Equalization and Review, and which, as to five tracts, reduced its valuations.

On June 28, 1966, the taxpayers filed a petition in the Superior Court of Wake County for judicial review (G.S. 143-307) in which they prayed that "the decision of the Board of Assessment issued on May 31, 1966, be vacated and set aside," and that the cause "be remanded to the Board of Assessment for further consideration." Their petition does not directly challenge the valuations placed on specific properties but attacks the entire decision as arbitrary, contending, *inter alia*, (1) the State Board of Assessment, in its determinations of valuations, did not take into consideration the factors set out in G.S. 105-295, and (2) the valuations placed on the taxpayers' properties were greater than those on similar properties in the same general vicinity.

On July 7, 1966, Mecklenburg County filed in the Superior Court of Wake County a petition to review that portion of the de-

cision of the State Board of Assessment which reduced the valuations on five specific tracts.

The hearing below was on the taxpayers' motion to dismiss Mecklenburg County's said petition for review on the ground it had not been filed within the time prescribed by statute.

The order from which Mecklenburg County appeals contains the following findings: On Tuesday, May 30, 1966, H. C. Stansbury, Secretary of the State Board of Assessment, "forwarded a copy of said Administrative Order (dated May 17, 1966) by regular U. S. mail to the taxpayers, James J. Harris and Angelia M. Harris, and also on said day he deposited four separate copies of said Order in the regular United States mail with proper postage prepaid and properly addressed to the following representatives of Mecklenburg County: Mr. Sam T. Atkinson, Jr., Chairman of the Board of County Commissioners, the Clerk to the Board of County Commissioners, Mr. Robert Alexander, Tax Supervisor of the County, and Dockery, Ruff, Perry, Bond & Cobb (general Attorneys for Mecklenburg County who did not appear in this matter); that a letter of transmittal accompanied each of the aforesaid copies of said Administrative Order mailed to said persons; that in the usual and ordinary course of the mails, Mecklenburg County received on or about May 31, 1966, one or more of the aforesaid four copies of said Administrative Order and thereby had actual notice of the contents and ruling thereof; that Mecklenburg County has not filed any denial that it received a copy of said Administrative Order on May 31, 1966; . . . that Ernest S. DeLaney, Jr., Special Attorney for Mecklenburg County, stated to the Court and the Court finds that a copy of said Administrative Order was not mailed to him personally by the N. C. State Board of Assessment."

The order entered by Judge Bailey concludes as follows:

"Upon the foregoing findings of fact, the Court concludes that under said circumstances Mecklenburg County was not actually prejudiced by said Administrative Order being forwarded by regular mail rather than by registered mail and that under G.S. 143-309 Mecklenburg County had a period of thirty days from and after May 31, 1966, in which to file its petition for review; and that therefore the aforesaid petition to review filed by Mecklenburg County on July 7, 1966, was not timely filed within the required 30-day period.

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion of petitioners, James J. Harris and Angelia M. Harris, is allowed and the appeal of Mecklenburg County in this matter is dismissed."

Mecklenburg County excepted "(t)o the foregoing Order and the signing and entry of the same." No exception was taken to any of the court's findings of fact.

Bradley, Gebhardt, DeLaney & Millette for appellant.
Boyle, Alexander & Carmichael and Smith, Leach, Anderson & Dorsett for appellees.

BOBBITT, J. The record does not disclose whether any of the questions raised by the taxpayers' petition for review have been decided or considered. Presumably, these questions await consideration and decision at some further hearing.

The only question presented by this appeal is whether the court erred in dismissing Mecklenburg County's petition for review.

Mecklenburg County is a person "aggrieved by a final administrative decision" and entitled to a judicial review thereof. G.S. 143-307; *In re Assessment of Sales Tax,* 259 N.C. 589, 131 S.E. 2d 441. The sole question is whether it has *waived* its right to review by failure to file its petition in the Superior Court of Wake County within the prescribed statutory time.

G.S. 143-309, in pertinent part, provides: "In order to obtain judicial review of an administrative decision under this chapter the person seeking review must file a petition in the Superior Court of Wake County; . . . Such petition may be filed *at any time* after final decision, but must be filed not later than thirty days after *a written copy* of the decision is served upon the person seeking the review *by personal service* or *by registered mail, return receipt requested. Failure to file* such petition *within the time stated* shall operate as *a waiver* of the right of such person to review under this chapter, except that for good cause shown, the judge of the superior court may issue an order permitting a review of the administrative decision under this chapter notwithstanding such waiver." (Our italics.)

The court's findings of fact establish that Mecklenburg County received *on or about* May 31, 1966, in the usual and ordinary course of the mails, "one or more of the aforesaid four copies of said Administrative Order and thereby had actual notice of the contents and ruling thereof," and that Mecklenburg County has not denied it received such copy on May 31, 1966. There is no finding as to the exact date on which Mecklenburg County or any particular official thereof received such a copy. Nor is there any admission by Mecklenburg County with reference thereto.

Under G.S. 143-309 a petition for review may be filed *at any time*

after final decision by the State Board of Assessment. The only requirement is that such petition must be filed not later than thirty days "after a written copy of the decision is served upon the person seeking the review by personal service or by registered mail, return receipt requested." Here, the "written copy" was not served either "by personal service" or "by registered mail, return receipt requested."

A distinctive feature of each of the two prescribed methods of service is certainty in respect of proof of service. Seemingly, the General Assembly intended to avoid, if possible, the necessity for hearings to determine whether or when a "written copy" was served. Too, it may have thought the receipt of a "written copy" by *registered mail* would direct attention to the importance of the document and the need for immediate attention. Whatever the reasons therefor, the General Assembly provided that service by one or the other of two specific methods is prerequisite to the commencement of the thirty-day period prescribed for filing a petition for review.

Ordinarily, "(w)here a specified mode of giving notice is prescribed by statute, that method is exclusive." 39 Am. Jur., Notice and Notices § 9, p. 237. "Generally speaking, a person relying on the service of a notice by mail must show a strict compliance with the requirements of the statute." 66 C.J.S., Notice § 18(e)(1), p. 663. "(I)f the statute provides for notice to be given, the notice which is prescribed must be given; and failure to give such notice will render any order of the board void, in the absence of a waiver thereof." 84 C.J.S., Taxation § 503(b), p. 947.

In *Yuma County v. Arizona Edison Co.*, 65 Ariz. 332, 180 P. 2d 868, the Court considered a statute requiring the State Board of Equalization to give notice to a taxpayer by registered letter if it increased the taxpayer's valuation of its property. Notice by telegram was held insufficient. Udall, J., for the Supreme Court of Arizona, said: "(A)lthough notice requirements are liberally construed where the statute either makes no provision for notice or merely provides generally that notice shall be given, still the rule is more stringent when the statute details the method of giving notice; . . ."

In *Linder v. Watson*, 151 Ga. 455, 107 S.E. 62, the Court considered a statute requiring the County Board of Equalizers to give notice to a *resident* taxpayer, "either personally or by leaving same at his residence or place of business," if it increased the taxpayer's valuation of his property. Notice was given the taxpayer by mail, the prescribed method of service on *nonresidents*. On account of failure to give notice in accordance with the statute, the taxpayer obtained judgment enjoining the collection of taxes to the extent

they were based on the increase in valuation placed thereon by the County Board of Tax Equalizers. Beck, P. J., for the Supreme Court of Georgia, said: "The fact that the taxpayer . . . received the notice sent through the mail does not cure the failure to serve the notice as provided by the statute. A statute providing for notice, in a case like the present one, where for failure of service a man may be deprived of his property, must be strictly construed."

In *Allen v. Strickland,* 100 N.C. 225, 6 S.E. 780, notice by the judgment debtor to the judgment creditor of his exceptions to the valuation placed upon the personal property allotted as his exemption was given personally to the plaintiff's attorney and by mail to the plaintiff. The notice, although given within the statutory time, was not given in the prescribed statutory form and manner. Ruling the notice insufficient, Merrimon, J. (later C.J.), for the Court, said: "Unless it (notice) is given as the law directs or allows, the party to whom it is given is not bound to recognize or act upon it, nor indeed is it notice. It is the legal sanction that gives the notice, in sufficient form and substance, life and efficacy."

In *McNeill v. R. R.,* 117 N.C. 642, 23 S.E. 268, the service of a case on appeal was held ineffectual because not made *by a proper officer* within the prescribed time. Accord: *Smith v. Smith,* 119 N.C. 311, 25 S.E. 877; *Herndon v. Autry,* 181 N.C. 271, 107 S.E. 3.

"If the giving of notice is relied upon to sustain a forfeiture or divestiture of one's rights, directions as to how such notice shall be given must be strictly complied with." *Pennsylvania Co., etc., v. Forrest Hill Bldg. & L. Ass'n,* 190 A. 556, 559 (Pa.); *Germantown Trust Co. v. Forrest Hill Bldg. & L. Ass'n.,* 190 A. 561, 562-563 (Pa.). The Pennsylvania statute involved in each of these cases provided for service of notice either personally or by registered mail in order to bar a creditor from proving his claim against an insolvent building and loan association. It was held that notice *as prescribed by statute* was required. As pointed out below, the construction of G.S. 143-309 for which appellees contend is not in aid of the right to review but is in aid of a means of effectuating a waiver or forfeiture of such right.

In *White v. March,* 147 Me. 63, 83 A. 2d 296, the statute involved provided that service of process upon a nonresident motorist was sufficient, "provided that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt, and the plaintiff's affidavit of compliance herewith, are appended to the writ and are filed with the clerk of courts in which the action is pending, . . ." The Supreme Judicial Court of Maine held the statute must be con-

strued strictly and strictly followed; and, on account of failure to comply with its requirements, the court did not acquire jurisdiction. Accord: *Spearman v. Stover,* 170 So. 259 (La.); *Syracuse Trust Co. v. Keller,* 35 Del. 304, 165 A. 327. Recently, in *Distributors v. McAndrews,* 270 N.C. 91, 153 S.E. 2d 770, it was held that our statute, G.S. 1-105, providing for service of summons on nonresident motorists must be strictly construed and strictly followed.

Appellees contend the provisions as to notice in G.S. 143-309 should be construed liberally in their favor. As authority for such construction they cite *Fleisher Engineering and Constr. Co. v. United States,* 311 U.S. 15, 85 L. Ed. 12, 61 S. Ct. 81, and *United States v. Peerless Casualty Company,* 255 F. 2d 137.

In *Fleisher* the action was instituted by the United States of America for the use and benefit of one George S. Hallenbeck upon a payment bond given by the prime contractor on a government project pursuant to the Miller Act. 40 U.S.C., §§ 270a(a)(1, 2) and 270b(a). Hallenbeck had performed labor for a subcontractor. The statute conferred a right of action upon the bond "upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor . . . for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party . . . for whom the labor was done or performed." It provides that "(s)uch notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons." It was conceded that the prime contractor received written notice and that the contents thereof were adequate. However, such notice was not sent by "registered mail." The Supreme Court, in opinion by Mr. Chief Justice Hughes, held the statute was "highly remedial and should be construed liberally" *in favor of the person upon whom it conferred new rights.* In holding the notice sufficient, the Supreme Court affirmed *United States v. Fleisher Engineering & Const. Co.,* 107 F. 2d 925, and seemingly overruled *United States v. Bass,* 111 F. 2d 965. The opinion quotes with approval this excerpt from the opinion of Mr. Justice Brandeis in *Illinois Surety Co. v. John Davis Co.,* 244 U.S. 376, 61 L. Ed. 1206, 37 S. Ct. 614: "Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute" (an earlier statute providing for actions on the bond of a prime contractor on a government project).

Subsequently, in *Peerless,* the Court of Appeals of the Eighth Circuit, relying on *Fleisher,* held a notice sent in the ordinary course of mail and not by registered mail, which was received by the contractor and answered in the same course of mail, was a sufficient compliance with the statutory requirement as to notice.

The cited federal decisions are not authoritative and, in our opinion, are distinguishable factually from the present case.

"No appeal lies from an order or decision of an administrative agency of the State or from judgments of special statutory tribunals whose proceedings are not according to the course of the common law, unless the right is granted by statute." *In re Assessment of Sales Tax, supra.* The right to petition for review of the administrative order of the State Board of Assessment is conferred by the statute now codified as G.S. Chapter 143, Article 33, entitled "Judicial Review of Decisions of Certain Administrative Agencies." The primary purpose of this statute is to confer such right to judicial review; and, in our opinion, the statute should be liberally construed *to preserve and effectuate such right.* Hence, the provisions of G.S. 143-309 providing for the waiver or forfeiture of such right under certain conditions should be construed strictly; and, when so construed, the right to petition for review continues unless and until thirty days have expired from the date "a written copy" of the administrative order has been served on the party seeking review either *by personal service* or *by registered mail, return receipt requested.* Absent service by either of the two methods prescribed therefor, there was no waiver or forfeiture of Mecklenburg County's right to petition for review.

Our conclusion is that Mecklenburg County's petition for review was filed as permitted by G.S. 143-309. Accordingly, the judgment of the court below dismissing Mecklenburg County's petition for review *solely on the ground it was not filed in apt time* is reversed.

Reversed.

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

HUGH M. CUMMINGS, III AND WIFE, REBECCA C. CUMMINGS, v. DOSAM, INC.

(Filed 28 February, 1968.)

1. Deeds § 19—

A covenant restricting the use which the grantee may make of land conveyed to him or of land owned by him is deemed a grant by him of a negative easement in such land.

2. Same—

Restrictive covenants are not favored and will be strictly construed in favor of the free use of land.

3. Easements § 8—

The description of an easement in a deed must identify the land with reasonable certainty.

4. Deeds § 19—

A covenant in a deed purporting to impose restrictions upon the use of a tract of land conveyed by the grantor and upon "adjoining tracts being acquired by grantee" fails to impose restrictions upon other tracts already owned by the grantee, since the covenant does not contain a sufficient description of the intended servient estate.

5. Boundaries § 10—

The description in a deed must be interpreted as of the date the deed was executed, and if the description was not sufficiently certain at that time, it does not become so later by the occurrence or nonoccurrence of some other event.

6. Same—

A patent ambiguity in the description of land cannot be removed by parol evidence.

7. Deeds § 19—

A purchaser of land is chargeable with notice of restrictive covenants if such covenants are contained in any recorded deed in his chain of title.

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

APPEAL by plaintiffs from *McKinnon, J.*, at the May 1967 Civil Session of ALAMANCE, docketed and argued as No. 851 at Fall Term 1967.

The plaintiffs sued to enjoin the defendant from using certain land owned by it, known as the Cobb property, in violation of restrictions alleged by the plaintiffs to be applicable to such property and binding upon the defendant. The defendant in its answer denied that the Cobb property was subject to such restrictions upon its use and alleged that the property was conveyed to it free from any restrictions.

Upon the filing of the action, a temporary restraining order was entered, which apparently was continued in effect until the final hearing of the matter. At the final hearing in the superior court, the parties having waived a jury trial, the court found facts, entered its conclusions of law thereon, denied injunctive relief and dissolved the temporary injunction. The plaintiffs gave notice of appeal to this Court and thereupon the superior court entered a further order enjoining the defendant from constructing upon the property proposed retail business establishments pending a final decision upon the appeal.

The plaintiffs took no exception to any finding of fact by the superior court. Those findings, summarized except as otherwise indicated, were:

1. On 10 May 1965 the plaintiffs conveyed to Merrimac Realty and Development Company, a corporation, hereinafter called Merrimac, 3.6 acres of land, the deed containing the following provision:

> "*Covenants and Agreements on the Part of the Grantee.*
>
> It is hereby covenanted and expressly agreed by the Grantee for itself, its successors, and assigns, as a part of the consideration aforesaid and as an inducement to the execution of this deed by the Grantors, that *on this tract and adjoining tracts being acquired by Grantee (containing in the aggregate approximately 10 acres)* Grantee shall construct or cause to be constructed buildings to house retail business establishments for occupancy by no more than four of such establishments, none of which establishments shall be a drug store. These covenants shall expire on May 10, 1975, shall inure to the benefit of the Grantors, their heirs and assigns, and shall run with the land." (Emphasis added.)

2. Prior to the execution of the foregoing deed, Merrimac had leased or acquired by deed the following four additional tracts: 1.422 acres by lease from J. J. Carroll and wife; 1.287 acres by deed from Luther M. Cobb, Jr., and wife; 3.877 acres by deed from J. R. Kernodle and wife; and 0.689 acres by deed from J. J. Carroll and wife. (A total of 10.875 acres, including the tract conveyed by the plaintiffs.)

3. The Kernoodle tract and the two Carroll tracts are contiguous with the tract so conveyed by the plaintiffs, joining it on the southern, eastern and northern sides thereof, respectively. The Cobb tract is not contiguous with the tract so conveyed by the plaintiffs, but is contiguous with the two Carroll tracts. (That is, the Cobb tract is

separated from the land so conveyed by the plaintiffs by the two Carroll tracts.)

4. Two days after the deed to it from the plaintiffs, Merrimac executed a deed of trust as security for a construction loan, therein describing by metes and bounds as one tract all five of the above tracts so acquired by it.

5. On 15 September 1965 Merrimac conveyed to Plaza Associates, a partnership, all of the above tracts, describing them by metes and bounds as one tract. This deed contained the following provision:

> "This conveyance is also made subject to those certain restrictions contained in the deed from Hugh M. Cummings, III and wife, Rebecca C. Cummings, as Grantors, to Merrimac Realty and Development Co., which deed is recorded in Book 327, Page 171 of the Alamance County, North Carolina, Registry."

6. On 29 December 1966 Plaza Associates, the partnership, conveyed to the defendant, Dosam, Inc., the Cobb tract. In this deed to Dosam, Inc., there is no reference to any restriction or encumbrance of any kind.

7. The Cobb tract was part of the "adjoining tracts being acquired by Grantee (containing in the aggregate approximately 10 acres)," referred to in the deed from the plaintiffs to Merrimac, both within the contemplation of the parties to that deed and within the meaning of that phrase as used therein. (The defendant excepted to this finding.)

8. The defendant "is proposing to construct upon the 'Cobb' tract * * * certain buildings which together with the existing buildings on the Cummings, Kernodle and Carroll tracts would have in excess of four (4) retail establishments situated upon said combined * * * tracts."

9. Don Schaaf and Samuel Longiotti were stockholders and officers of Merrimac. They were partners in Plaza Associates. They are the owners of the majority of the stock of Dosam, Inc., and are its officers.

10. The plaintiffs own an interest in real estate across the street from the property in question and an interest in a shopping center in the immediate vicinity.

Upon the foregoing findings of fact the court reached the follow-

ing conclusions of law, to each of which the plaintiffs duly excepted and each of which they now assign as error:

> "1. The paragraph entitled *'Covenants and Agreements on the Part of the Grantee'* contained in the deed from Hugh M. Cummings, III and wife to Merrimac Realty and Development Company, Deed Book 327, Page 171 (P, Ex-1) is *not* contained in any instrument appearing in the chain of title of Dosam, Inc. with respect to 'the Cobb Property', Deed Book 342, Page 6 (P, Ex-7).
>
> "2. The reference in the deed from Merrimac Realty and Development Company to Plaza Associates of Burlington (P, Ex-6)
>
> > 'This conveyance is also made subject to those certain restrictions contained in the deed from Hugh M. Cummings, III and wife, Rebecca C. Cummings, as Grantors, to Merrimac Realty and Development Co., which deed is recorded in Book 327, Page 171 of the Alamance County, North Carolina Registry.'
>
> is not legally sufficient to extend and make such restrictions binding upon Dosam, Inc.
>
> "3. Under the allegations of the complaint and the evidence offered the identity and relationship of the corporate officers and stockholders of Dosam, Inc. to the partners of 'Plaza Associates of Burlington' and officers and stockholders of Merrimac Realty and Development Company is not sufficient to charge Dosam, Inc. with responsibility for compliance with the paragraph entitled *'Covenants and Agreements on the Part of the Grantee'* of the Cummings deed (P, Ex-1).
>
> "4. Plaintiffs are not entitled to injunctive relief against Dosam, Inc., the defendant herein."

Each of the foregoing deeds, the lease and the deed of trust was recorded, the finding of the court with respect to such instrument citing the book and page of recordation.

Ross, Wood & Dodge and Fred Darlington, III, for plaintiff appellants.

Sanders & Holt and R. Chase Raiford for defendant appellee.

LAKE, J. A grantee, who accepts a deed containing otherwise valid covenants purporting to bind him, thereby becomes bound for the performance of such covenants. *Realty Co. v. Hobbs,* 261 N.C.

414, 135 S.E. 2d 30; *Barrier v. Randolph,* 260 N.C. 741, 133 S.E. 2d 655. Such a covenant restricting the use which the grantee may make of the land so conveyed to him is deemed a grant by him of a negative easement in such property. *Ring v. Mayberry,* 168 N.C. 563, 84 S.E. 846. See also: *Callaham v. Arenson,* 239 N.C. 619, 80 S.E. 2d 619; *Craven County v. Trust Co.,* 237 N.C. 502, 75 S.E. 2d 620. It necessarily follows that such a covenant which purports to restrict the use he may make of other land owned by him is to be deemed a grant or attempted grant by him of such an easement in that land. Thus, the construction and the sufficiency of the provision are to be determined by the principles of law applicable to the creation of such an easement by deed.

The law looks with disfavor upon covenants restricting the free use of land. *Hege v. Sellers,* 241 N.C. 240, 84 S.E. 2d 892; *Julian v. Lawton,* 240 N.C. 436, 82 S.E. 2d 210. In *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197, this Court, speaking through Barnhill, J., later C.J., said, "Restrictive covenants cannot be established by parol evidence or otherwise save by a recordable instrument containing adequate words so unequivocally evincing the party's intention to limit the free use of the land that its ascertainment is not dependent on inference, implication or doubtful construction." It is well established that such covenants are to be strictly construed in favor of the free use of the land. *Lamica v. Gerdes,* 270 N.C. 85, 153 S.E. 2d 814; *Hullett v. Grayson,* 265 N.C. 453, 144 S.E. 2d 206; *Shuford v. Oil Co.,* 243 N.C. 636, 91 S.E. 2d 903; *Ingle v. Stubbins,* 240 N.C. 382, 82 S.E. 2d 388; *Callaham v. Arenson, supra; Craven County v. Trust Co., supra; Davis v. Robinson,* 189 N.C. 589, 127 S.E. 697. Any doubt or ambiguity will be resolved against the validity of the restriction. *Edney v. Powers,* 224 N.C. 441, 31 S.E. 2d 372. Thus, if the nature and extent of the intended restriction cannot be determined with reasonable certainty from the language of the covenant, it will not serve as the basis for the issuance of an injunction forbidding the owner of the land to use it for a purpose otherwise lawful and proper. *Hullett v. Grayson, supra.*

The covenant by the grantee in the deed from the plaintiff to Merrimac is far from clear. Does it impose a duty upon the grantee to construct buildings for retail business establishments, or is it intended to limit its right to do so? Does it limit the total number of buildings to four, or does it mean that each building is to contain no more than four units for the housing of retail business establishments? Does the mandate or limitation apply to each tract separately, or to the combined tracts as one unit?

It is equally well established that a deed granting an easement

must describe the land burdened with the easement. In *Gruber v. Eubank,* 197 N.C. 280, 148 S.E. 246, Brogden, J., speaking for the Court, said, "An easement, of course, is an interest in land, and, if it is created by deed, either by express grant or by reservation, the description thereof must not be too uncertain, vague and indefinite." In *Thompson v. Umberger,* 221 N.C. 178, 19 S.E. 2d 484, Barnhill, J., later C.J., speaking for the Court, said:

> "When the easement — here a passageway — is created by deed, either by express grant or by reservation, the description thereof must not be so uncertain, vague and indefinite as to prevent identification with reasonable certainty.
>
> "If the description is so vague and indefinite that effect cannot be given the instrument without writing new, material language into it, then it is void and ineffectual either as a grant or as a reservation.
>
> "The description must either be certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which it refers.
>
> * * *
>
> "If the ambiguity in the description in a deed is patent the attempted conveyance or reservation, as the case may be, is void for uncertainty. And a patent ambiguity is such an uncertainty appearing on the face of the instrument that the court, reading the language in the light of all the facts and circumstances referred to in the instrument, is unable to determine *therefrom* the intention of the parties as to what land was to be conveyed. This type of ambiguity cannot be removed by parol evidence since that would necessitate inserting new language into the instrument which under the parol evidence rule is not permitted." (Emphasis added.)

G.S. 8-39 provides that in an action for the possession of or title to land, parol evidence may be introduced to "identify the land sued for, and fit it to the description contained in the paperwriting offered as evidence of title." However, as we said in *McDaris v. "T" Corporation,* 265 N.C. 298, 144 S.E. 2d 59, "The purpose of parol evidence is to fit the description to the property, not to create a description." As Higgins, J., speaking for the Court in *Deans v. Deans,* 241 N.C. 1, 84 S.E. 2d 321, said with reference to the sufficiency of a description in a deed, "The description must identify the land, or it must refer to something that will identify it with certainty." The same principle applies to the description of the servient estate in a deed granting an easement.

The covenant upon which the plaintiffs rely purports to impose a restriction upon the use of "this tract [*i.e.*, the land conveyed by the grantors to Merrimac] and adjoining tracts being acquired by Grantee (containing in the aggregate approximately 10 acres)." Upon the basis of deeds offered in evidence by the plaintiffs, the superior court found that the tract now in question, and tracts separating it from the land coneveyed by the plaintiffs to Merrimac, were conveyed to Merrimac by other grantors prior to the execution of the deed to Merrimac from the plaintiffs. Does the expression "adjoining tracts being acquired" by the grantee point with certainty to tracts already owned by the grantee? The term is patently ambiguous. On its face, it applies, at least equally well, to other lands which the grantee may then have been in the process of acquiring or attempting to acquire. It must be interpreted as of the date the deed containing it was executed. See 23 Am. Jur. 2d, Deeds, § 222. If the description was not sufficiently certain at that time, it does not become so later by the occurrence or nonoccurrence of some other event. Thus, the fact that Merrimac actually did not thereafter acquire other "adjoining tracts" does not establish that the tracts previously acquired by it were the ones contemplated by the expression "tracts being acquired." As of the date this deed was executed, that expression does not point with certainty to the tracts already deeded to Merrimac by other grantors.

A patent ambiguity in the description of the land to be burdened by the restriction cannot be removed by parol evidence. *Thompson v. Umberger, supra.* Thus, the covenant upon which the plaintiffs rely fails, insofar as it relates to tracts other than that conveyed by the plaintiffs to Merrimac, for the reason that it does not contain a sufficient description of the intended servient estate.

When Merrimac conveyed to Plaza Associates, the grantors of the defendant, its deed provided that it was made "subject to those certain restrictions contained in the deed" from the plaintiffs to Merrimac. The record deed to Plaza Associates, the defendant's grantor, being in the defendant's chain of title, the defendant is charged with notice of its provisions, including the reference to restrictions contained in the deed from the plaintiffs to Merrimac. See: *Sedberry v. Parson*, 232 N.C. 707, 62 S.E. 2d 88; *Turner v. Glenn, supra.* Consequently, the defendant is charged with notice of that deed and of the restrictive covenants therein. Thus, if the deed from the plaintiffs to Merrimac were sufficient in itself to create a restriction upon the use of the tract now owned by the defendant, the defendant would have taken its title subject to that restriction. However, for the reasons above stated, that deed did not fasten such

restriction upon the tract now owned by the defendant. The provision in the deed from Merrimac to Plaza Associates did not initiate a restriction upon the defendant's land by extending to it whatever restrictions may have been fastened by the plaintiffs' deed to Merrimac upon the tract conveyed by them to Merrimac.

In *Trust Co. v. Foster,* 211 N.C. 331, 190 S.E. 522, a valid restriction was imposed upon a 13 acre tract by a recorded agreement between its owner and the owner of adjoining property. Subsequently, the owner of the 13 acre tract conveyed a 500 acre tract, which included the 13 acres, by a deed which provided that the larger tract was conveyed "subject to all the conditions, restrictions, and stipulations" contained in the recorded agreement previously made with reference to the 13 acre tract. This Court held that the restrictions were not thereby extended to and imposed upon the larger tract. See also: *Ferraro v. Kozlowski,* 101 N.J. Eq. 532, 138 A. 197; *Morrill Realty Corp. v. Rayon Holding Corp.,* 254 N.Y. 268, 172 N.E. 494; 26 C.J.S., Deeds, §§ 162(1) and 163a, Note 34.

The effect of the provision in the deed from Merrimac to Plaza Associates was merely to put Plaza Associates, and its successors in title, upon notice of whatever restrictions may have been imposed by the deed from the plaintiffs to Merrimac upon all or any part of the land so conveyed by that company to Plaza Associates. For the reasons above mentioned, the deed from the plaintiffs to Merrimac imposed no restrictions upon the tract subsequently conveyed by Plaza Associates to the defendant.

Our conclusion that the deed from the plaintiffs to Merrimac did not impose any restrictions upon that company's free use of the tract now owned by the defendant makes it unnecessary for us to consider the plaintiffs' contentions that the defendant is not a purchaser for value and that it is liable upon the covenant of Merrimac by reason of the fact that officers and majority stockholders of the defendant, were also officers and stockholders of Merrimac and were partners in Plaza Associates.

The plaintiffs did not except to any finding of fact by the superior court. These findings support the conclusions of law assigned as error by the plaintiffs. There was no error in the denial of the injunctive relief sought by the plaintiffs against this defendant.

Affirmed.

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

DONALD RAY MASON AND RELIANCE INSURANCE COMPANY v. NORTH CAROLINA STATE HIGHWAY COMMISSION.

(Filed 28 February, 1968.)

1. **State § 5c—**

The Industrial Commission is constituted the trial court for the hearing of tort claims against the State. G.S. 143-291.

2. **State § 5f—**

A motion for a further hearing on the ground of introducing additional or newly discovered evidence rests in the sound discretion of the Industrial Commission and its ruling thereon is not reviewable in the Superior Court in the absence of an abuse of discretion by the Commission.

3. **State § 5c—**

The affidavit filed by a claimant pursuant to the Tort Claims Act, G.S. 143-297, is in the nature of a complaint in an ordinary tort action, and the allowance of an amendment thereto after the expiration of the time allowed by statute rests in the sound discretion of the Industrial Commission and its ruling thereon is not subject to review in the absence of an abuse of such discretion.

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

APPEAL by defendant from *Carr, J.*, at the June 1967 Civil Session of DURHAM, docketed and argued as No. 770 at Fall Term 1967.

This is a proceeding instituted before the North Carolina Industrial Commission under the Tort Claims Act, G.S. 143-291 *et seq.* It arises out of damage to the automobile, trailer and boat of Donald Ray Mason, alleged to have occurred at about midnight on 14 July 1966, at which time the automobile, driven by Mason, together with the attached trailer and boat, plunged into an excavation in Highway 55 immediately south of Durham.

Reliance Insurance Company claims as subrogee of Mason, having paid to him part of his alleged damages by reason of a policy of insurance issued by it to him. The affidavits filed by the claimants are substantially identical, there being no conflict between the two claimants. They assert that the damage was proximately caused by the negligence of the defendant and of K. M. Duncan, the defendant's Road Maintenance Supervisor for the area, this alleged negligence consisting of the cutting out of a large segment of the pavement and bed of the highway, in the course of repairs thereto, and leaving the excavation without visible warnings. The defendant filed answers denying all material allegations of the affidavits, except that the accident occurred at the time alleged, and pleading contributory negligence by Mason.

The matter was heard by Deputy Commissioner Thomas. Evi-

dence was introduced both by the claimant and by the defendant concerning the presence or absence of a barricade, flambeaus and warning signs at and upon the approach to the excavation.

One of the witnesses offered by the defendant was Howard Vernon Moore, its Area Foreman. He testified that he was at the scene of the occurrence shortly after 5 p.m. and that certain signs and barricades were then in place. He further testified:

> "I know Mr. Kirk Duncan. He is the Durham County Maintenance Supervisor. To the best of my knowledge, he was the supervisor in charge of this job or work. I am the foreman in charge of such work as this with the State Highway Commission. The State Highway Maintenance Forces were doing the repair work on this road rather than some contractor. It was under my supervision and of course I am under Mr. Duncan's supervision. My crew did the work on it * * * Mr. Perry [present in the hearing room] looks after placing the flambeaus * * *."

Perry was not called as a witness by either party.

The Hearing Commissioner entered an order denying the claim, which order contained his findings of fact, including the following:

> "6. The hole had been cut out during the day on July 14, 1966 by defendant's employees under the direction and supervision of Howard V. Moore, a foreman in defendant's maintenance department in Durham County, North Carolina. Moore and the crew departed from the area about 5 p.m., leaving a flambeau burning and a barricade at each end of the hole with a sign at the south end of the hole indicating 'one lane road ahead.' An additional sign was located near Alston Avenue and another sign about 500 feet south of the hole indicating 'construction work ahead'."
>
> * * *
>
> "8. The speed limit of N.C. 55 was 55 miles per hour. Plaintiff Mason aproached the hole in question at a speed of about 50 miles per hour. There was no light burning at the south end of the hole and a light burning at the north end of the hole was burning feebly and was not sufficient to warn plaintiff Mason of the presence of the hole."
>
> * * *
>
> "10. There is no evidence of a negligent act on the part of K. M. Duncan, admittedly road maintenance supervisor for

> defendant in Durham County, who plaintiffs allege was negligent in connection with their claim."

Upon the foregoing findings of fact, the Hearing Commissioner made, and stated in his order, the following conclusion of law:

> "Plaintiffs allege negligence on the part of K. M. Duncan, who admittedly was road maintenance supervisor for defendant in Durham County, North Carolina. There being no evidence of a negligent act on the part of Duncan, plaintiffs' claim must be denied."

The claimants then appealed to the Full Commission. They excepted to the above Findings of Fact 6 and 10, among others, for the reason that the Hearing Commissioner failed to find and determine whether the claims arose as a result of a negligent act of a State employee whose act was imputed to K. M. Duncan. They also excepted to the Hearing Commissioner's conclusion of law.

Prior to the hearing by the Full Commission, the claimants filed a motion that additional evidence be taken and that they be allowed to amend their affidavits to make them conform to the evidence. In this motion they assert that at the time the original affidavits were filed, they did not know that there were certain other named employees of the defendant employed in a supervisory or responsible capacity upon this project, that the excavation was done by inmates of the Prison Department under the supervision of these employees, or that another employee, Cornelius Perry, had the duty of checking on flambeaus and barricades to see that they were in good working condition and properly maintained. They further assert in this motion that, prior to the hearing, their counsel conferred with K. M. Duncan concerning State employees who might have been negligent in this matter, that he was not informed by Duncan as to the names or duties of such persons and that he then understood that all State employees who might have been negligent in the matter "would be stipulated to" at the hearing and, in event negligence by the defendant was found, "said negligence of said employees would be imputed to the said K. M. Duncan."

Ten weeks after the filing of the foregoing motion, the matter was heard upon argument before the Full Commission. The Full Commission adopted as its own the findings of fact and the conclusion of law of the Hearing Commissioner and affirmed his order. There is nothing in the record to indicate any ruling by the Full Commission upon the foregoing motion except the following notation upon its order:

"In my opinion the motion of plaintiffs' counsel to take newly discovered evidence should be allowed and I, therefore, respectfully dissent."

The dissenting commissioner is not identified in the record.

The claimants appealed from the order of the Full Commission to the superior court, their exceptions being to the conclusion of law of the Hearing Commissioner, so adopted by the Full Commission, and to certain of his findings of fact, so adopted by the Full Commission, including the above quoted Findings 6 and 10, and a further exception to "the failure of the Full Commission to rule upon the plaintiffs' motion to take additional evidence and to amend their affidavits."

The superior court entered judgment, stating that it was of the opinion that the motion of the claimants should be allowed and that the findings of the commission "are insufficient for a proper determination of the questions involved." The court did not specify wherein it deemed the findings insufficient. The superior court thereupon ordered:

"1. That the motion to take newly discovered evidence and additional evidence and the motion to amend * * * the affidavits * * * is hereby granted.

"2. That the decision and order of the North Carolina Industrial Commission be and is hereby remanded to the North Carolina Industrial Commission for additional findings in accordance with this Judgment.

"3. That this cause be and the same is hereby remanded to the North Carolina Industrial Commission for re-hearing in accordance with this Judgment."

From the foregoing judgment of the superior court, the defendant appealed, assigning as error each of the court's said conclusions and each portion of its order.

Attorney General Bruton, Deputy Attorney General Lewis, Assistant Attorney General Rosser and Staff Attorney Parker for defendant appellant.

Brooks and Brooks for plaintiff appellees.

LAKE, J. The record does not contain an express ruling by the majority of the Full Commission upon the motion of the claimants for the taking of further evidence and for permission to amend their affidavits. However, the memorandum of dissent by the unidentified

commissioner, which is a part of the record, leads inescapably to the conclusion that the Full Commission did consider this motion and refused to allow it.

G.S. 143-291 provides that the Industrial Commission "is hereby constituted a court for the purpose of hearing and passing upon tort claims" against this defendant and other agencies of the State. G.S. 143-293 provides that an appeal from the commission to the superior court "shall be for errors of law only * * * and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." Thus, the Industrial Commission is the trial court for such claims.

In *Tindall v. Furniture Co.*, 216 N.C. 306, 4 S.E. 2d 894, we said;

> "In the Superior Court, upon appeal from an award by the Industrial Commission, the court has power in proper case to order a rehearing, and to remand the proceeding to the Industrial Commission, on the ground of newly discovered evidence, but this is a matter within the sound discretion of the court."

In that case, as here, the motion for leave to offer new or additional evidence was made in and denied by the Industrial Commission. The superior court affirmed the award of the commission and this Court affirmed the judgment of the superior court, citing as authority for the above quoted statement *Butts v. Montague Bros.*, 208 N.C. 186, 179 S.E. 799 and *Byrd v. Lumber Co.*, 207 N.C. 253, 176 S.E. 572.

In the *Butts* case the Industrial Commission, while the matter was pending before it, allowed a motion for rehearing on the ground of newly discovered evidence. On appeal from such order the superior court reversed the commission. This Court held that was error and said that the appeal from the order of the commission should have been dismissed. Thus, the *Butts* case is not authority for the proposition that the superior court may reverse the ruling of the Industrial Commission upon such a motion.

In the *Byrd* case, the motion for a further hearing by the commission was made originally in the superior court on the ground of evidence discovered subsequent to the appeal from the commission to that court. The superior court allowed the motion and this Court affirmed, saying that this Court has the power to consider a motion for a new trial "of an action pending here on appeal, on the ground of newly discovered evidence, and in a proper case to grant the motion." This Court further said in the *Byrd* case: "Whether the judge of the Superior Court shall exercise this power in any proceeding pending in said court rests upon his discretion. His action, therefore,

is ordinarily not subject to review by this Court." Thus, the *Byrd* case is not authority for the proposition that the superior court may reverse a denial by the Industrial Commission of such motion made before it while the proceeding was still pending before the commission.

In *Hall v. Chevrolet Co.,* 263 N.C. 569, 139 S.E. 2d 857, this Court construed a motion, originally filed before the Industrial Commission, as a motion for a further hearing for newly discovered evidence and directed that the matter be "returned to the Industrial Commission, which will determine, according to its own rules and the legal principles applicable to newly discovered evidence, whether it will grant plaintiff the requested hearing with reference to his diminished earning capacity." There, this Court said the proceeding had been heard by the Industrial Commission under a "misapprehension of applicable principles of law," the commission having treated and passed upon the claimant's motion as a motion to reopen for change of condition rather than a motion for further hearing on the ground of newly discovered evidence. Thus, in the *Hall* case there was no reversal of a denial by the commission of a motion for further hearing on the ground of newly discovered evidence, but a remand to the commission for its determination of such motion.

In *Thompson v. Funeral Home,* 208 N.C. 178, 179 S.E. 801, it was held that the superior court may grant a motion, originally made in the superior court, to remand a workmen's compensation proceeding to the commissioner in order that the commission may hear evidence and to make a finding upon a jurisdictional question. Connor, J., there said: "When the proceeding has been remanded to the Industrial Commission, the Commission will determine, in accordance with its rules, whether it will hear evidence tending to show the number of employees in the employment of the defendant employer * * * and if it shall hear evidence offered by the plaintiffs, * * * will have the power to make such findings a part of the record in this proceeding. * * * These findings of fact being jurisdictional, will be subject to review by the Superior Court." The Court did not say that a denial by the commission of a motion before it to hear further evidence upon a matter properly before it is subject to reversal by a reviewing court.

In *Webb v. Gaskins,* 255 N.C. 281, 121 S.E. 2d 564, this Court, speaking through Parker, J., now C.J., said:

> "As long as the trial court has jurisdiction over a cause, it seems to be thoroughly settled law in this nation, including this jurisdiction, that a motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion

> of the trial judge, and that his ruling thereon may not be made ground for reversal on appeal unless the appellant can show a manifest abuse of judicial discretion."

In *Frye & Sons, Inc. v. Francis,* 242 N.C. 107, 86 S.E. 2d 790, Johnson, J., speaking for the Court, said:

> "[A] motion for new trial on the ground of new evidence, discovered during the trial term, is addressed to the discretion of the trial judge, and his decision, whether granting or refusing the motion, is not reviewable in the absence of an abuse of discretion."

There is nothing in the present record to show that the Industrial Commission, in denying the motion for a further hearing for the introduction of additional evidence, abused the discretion thus vested in it as the trial court or that it failed, in passing upon such motion, to observe the prerequisites for the granting thereof prescribed in *Johnson v. R. R.,* 163 N.C. 431, 79 S.E. 690, and quoted with approval in *Bailey v. Department of Mental Health,* 272 N.C. 680, 159 S.E. 2d 28, decided February 2, 1968, and in *McCulloh v. Catawba College,* 266 N.C. 513, 146 S.E. 2d 467.

Neither the motion filed in the Industrial Commission nor the judgment of the superior court specifies what new evidence the Industrial Commission is to receive and consider. The superior court has no general power to remand a matter of this nature to the Industrial Commission for the taking of additional evidence and the finding of further facts. *Bailey v. Department of Mental Health, supra.*

The record shows that Howard Vernon Moore testified that he was the employee in actual supervision of this repair project and that he was cross examined by the claimants. The record further shows that Moore testified Perry was present in the hearing room and was the employee who looked after placing the flambeaus. Perry was not called as a witness by the claimants and there is nothing to indicate that they sought a temporary recess in order to confer with him.

The affidavit required by G.S. 143-297 to be filed by a claimant under the Tort Claims Act is the equivalent of a complaint in an ordinary tort action. The allowance of an amendment of a pleading, after the expiration of the time allowed therefor by statute, is ordinarily a matter resting in the sound discretion of the trial court and its ruling thereon is not subject to review upon an appeal in the absence of a clear showing of abuse of such discretion. *Moore v.*

Insurance Co., 266 N.C. 440, 146 S.E. 2d 492; *Terrace, Inc. v. Indemnity Co.,* 241 N.C. 473, 85 S.E. 2d 677; *Motor Co. v. Wood,* 238 N.C. 468, 78 S.E. 2d 391. The record does not show an abuse of discretion by the Industrial Commission, the trial court in this instance, in its denial of the motion by the claimants to amend their affidavit.

Bailey v. Department of Mental Health, supra, was a proceeding under the Tort Claims Act. This Court, speaking through Branch, J., said:

> "The scope of the reviewing court's inquiry in cases appealed from the Industrial Commission is succintly 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 not 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.' "

The order of the superior court allowing the amendments to the affidavits and remanding the matter to the North Carolina Industrial Commission with directions to take newly discovered evidence and additional evidence, to make additional findings, and conduct a rehearing in accordance with the judgment of the superior court, was error and is hereby reversed. The superior court not having passed upon the remaining exceptions of the claimants to the order of the Industrial Commission, which exceptions relate to the findings of fact and to the conclusion of law, the matter is hereby remanded to the superior court for its determination of whether such findings are supported by competent evidence and, if so, whether such findings support the conclusion of law made by the commission and its denial of the claims.

Reversed and remanded.

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

ROBERT O. GIVENS v. J. O. SELLARS, WILLIAM HOFFLER, JERRY TIMMONS AND SIKES BROTHERS, INC.

(Filed 28 February, 1968.)

1. **Pleadings § 12—**

A pleading will be liberally construed upon demurrer with a view to substantial justice between the parties, and the demurrer admits the truth of factual averments well stated and such inferences of fact as may be deduced therefrom. G.S. 1-127, G.S. 1-151.

2. **Public Officers § 9—**

An employee of a governmental agency is personally liable for negligence in the performance of his duties proximately causing injury to the property of another, even though his employer is clothed with immunity.

3. **Highways § 7—**

A contractor employed by the State Highway Commission is personally liable to the owner of property for damages proximately resulting from the negligence of the contractor in the performance of his work.

4. **Public Officers § 9—**

A public officer who willfully, wantonly and maliciously destroys personal property of another is personally liable for the injury inflicted.

5. **State § 4—**

Injuries intentionally inflicted by an employee of a State agency are not compensable under the Tort Claims Act. G.S. 143-291 *et seq.*

6. **Eminent Domain § 5—**

Where a leasehold estate is taken under the power of eminent domain for highway purposes, the personalty thereon is not affected by the taking, the Highway Commission being without authority to appropriate personal property for a public use. G.S. 136-19.

7. **Public Officers § 9—**

Allegations that plaintiff owned a leasehold estate on which he maintained a billboard adjacent to a highway, that defendant employees of the Highway Commission and defendant employee of a private contractor, in their capacity of supervising the construction of a road, negligently, and willfully and maliciously issued orders for the destruction of the billboard without first ascertaining plaintiff's property rights in the sign, thereby causing plaintiff the loss of profits from rental of the sign, *are held* sufficient to state a cause of action against defendants in their individual capacity.

8. **Pleadings § 15—**

Matters *dehors* the pleading may not be considered in passing upon a demurrer.

9. **Damages § 4—**

Compensatory damages for injury to personal property is the difference between its fair market value immediately before and immediately after the taking.

10. Pleadings § 2—

A complaint must be fatally defective before it will be rejected as insufficient.

ON *Certiorari* upon petition of defendants to review the judgments of *Peel, J.*, at the January 1967 Civil Session, Superior Court of CURRITUCK County.

Plaintiff's complaint is as follows, part summarized, part quoted:

1. Plaintiff is a resident of Pasquotank County engaged in the business of outdoor advertising; defendant Sellars is a resident of Hertford County; defendants Hoffler and Timmons are residents of either Currituck or Dare Counties; and defendant Sikes Brothers, Inc. is a North Carolina corporation with its principal office in Wadesboro.

2. Plaintiff is owner of a leasehold estate in Currituck County pursuant to a lease recorded in Deed Book 100, page 365, Currituck County Registry. Plaintiff acquired his leasehold from Mrs. R. F. Singletary and caused it to be recorded before she was divested of title to the subsisting fee by virtue of a judgment in Currituck Superior Court in a condemnation action entitled "*North Carolina State Highway Commission vs. Erma Griggs Singletary and husband,* . . ." Plaintiff's leasehold estate has not been condemned by said Highway Commission, and plaintiff is still the beneficial owner of it.

3. Plaintiff in the conduct of his business maintained on said leasehold a large outdoor advertising sign or billboard adjacent to U. S. Highway No. 158 with a name plate bearing the words "R. O. Givens" affixed to it. The advertising space on said sign was contracted to the owners of the Carolinian Hotel.

4. On or about March 15, 1966, defendant Timmons was Project Foreman for Sikes Brothers, Inc. and was supervising the workman of said corporate defendant then engaged in the construction of roadway approaches to the new Currituck Sound Bridge, Project No. 8.11199 of the N. C. State Highway Commission; defendant Hoffler was Project Engineer in charge of the project for the Highway Commission and was the supervisor of the work of defendants Timmons and Sikes Brothers, Inc.; and J. O. Sellars was Division Right-of-Way Agent for the Highway Commission and the superior of defendant Hoffler.

5. Defendants Sellars and Hoffler each knew or should have known the plaintiff owned said leasehold estate and maintained said sign thereon, and each knew or should have known that an attorney

employed by the Highway Commission was negotiating with plaintiff in an effort to acquire plaintiff's property and leasehold interest.

6. While said negotiations were being conducted, defendant Sellars ordered defendant Hoffler to destroy and demolish plaintiff's sign, or to cause it to be destroyed and demolished.

7. Defendant Sellars issued aforesaid order for destruction of said sign arbitrarily, willfully, wantonly and maliciously and with a reckless intent to damage the property and livelihood of the plaintiff.

8. Defendant Sellars, knowing plaintiff claimed a leasehold interest and the right to maintain a sign thereon, was culpably and grossly negligent in issuing said order for the destruction of said sign and was culpably and grossly negligent in failing to ascertain plaintiff's property rights prior to issuing said order for destruction of said sign.

9. While said negotiations were being conducted, defendant Hoffler, on or about March 15, 1966, ordered defendants Timmons and Sikes Brothers, Inc. to destroy and demolish said sign.

10. Defendant Hoffler, knowing plaintiff had said leasehold estate, arbitrarily, willfully, wantonly and maliciously issued said order for destruction of said sign with a reckless intent to damage the property and livelihood of the plaintiff.

11. Defendant Hoffler knew plaintiff claimed a leasehold interest in said estate and the right to maintain said sign thereon and was culpably and grossly negligent in issuing said order for the destruction of said sign and was culpably and grossly negligent in failing to ascertain plaintiff's property rights prior to issuing said order.

12. On or about March 15, 1966, the defendant Timmons, while acting in the course of his employment as agent, foreman and construction supervisor for Sikes Brothers, Inc., ordered the employees of said corporate defendant to destroy plaintiff's sign.

13. Defendant Timmons, knowing plaintiff had said leasehold estate, arbitrarily, willfully, wantonly and maliciously ordered the destruction of said sign with a reckless intent to damage the property and livelihood of the plaintiff.

14. Defendant Timmons knew plaintiff claimed a leasehold interest in said estate and the right to maintain said sign thereon and was culpably and grossly negligent in issuing said order for the de-

struction of said sign at a time when Timmons knew of the rights of the plaintiff; and defendant Timmons was culpably and grossly negligent in failing to ascertain plaintiff's property rights prior to issuing said order for destruction of plaintiff's sign.

15. On or about March 15, 1966, employees of Sikes Brothers, Inc. totally demolished and destroyed the plaintiff's sign.

16. "That the acts and misconduct of the defendants, and each of them, hereinbefore alleged, concurred directly, foreseeably, and proximately in causing total destruction and demolition of plaintiff's said sign and loss of profits, all to the damage of plaintiff as hereinafter alleged."

17. "That on or about March 15, 1966, said sign had a value to plaintiff of One Thousand Eight Hundred and No/100 ($1,800.00) Dollars, and would earn profits for plaintiff in the sum of Seven Hundred Fifty ($750.00) Dollars over its useful life; that plaintiff is entitled to recover from the defendants, jointly and severally, the total sum of Two Thousand Five Hundred Fifty ($2,550.00) Dollars for said damages to said sign and said loss of profits."

18. "That, by reason of the culpably and grossly negligent acts and the wrongful, unlawful, willful, wanton and malicious conduct of the defendants, and each of them, as hereinbefore alleged, plaintiff has been greatly damaged and has lost profits, for which acts and conduct the defendants, jointly and severally, should be assessed punitive damages for the use and benefit of plaintiff in the sum of Forty Thousand ($40,000.00) Dollars.

"WHEREFORE, the plaintiff demands judgment of the defendants, and each of them, jointly and severally, for compensatory and punitive damages in the total sum of Forty-two Thousand Five Hundred Fifty ($42,550.00) Dollars; for the costs of this action to be taxed against the defendants by the Clerk, and for such other relief as to the Court may seem meet and proper."

Separate, but identical, demurrers were filed by (1) defendants Sellars and Hoffler, and (2) defendants Timmons and Sikes Brothers, Inc., as follows:

> "The defendants . . . demur to the plaintiff's Complaint, and for cause of demurrer say:
>
> "That the complaint does not state facts sufficient to constitute a cause of action against defendants . . . in that it appears from the allegations in the complaint that the exclusive remedy of the plaintiff for the alleged taking of his property in-

terest is by appropriate action against the North Carolina State Highway Commission pursuant to the provisions of G.S. 136-111 and related statutes under Article 9 of Chapter 136 of the General Statutes of North Carolina and other statutes pertaining to rights, remedies and procedures in matters involving condemnation and taking of property or compensable interest therein by the said Highway Commission.

"WHEREFORE, the defendants . . . pray that this action be dismissed as to them.

"This the 17th day of August, 1966."

The demurrers were overruled, defendants excepted, and the matter is now before the Court on *certiorari*.

Aydlett & White, Attorneys for defendant appellants J. O. Sellars and William Hoffler.

Philip P. Godwin, Attorney for defendant appellants Jerry Timmons and Sikes Brothers, Inc.

Small, Small & Watts, Attorneys for plaintiff appellee Robert O. Givens.

HUSKINS, J. "The office of a demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of factual averments well stated and such relevant inferences of fact as may be deduced therefrom. Furthermore, pleadings challenged by a demurrer are to be construed liberally with a view to substantial justice between the parties. G.S. 1-127. G.S. 1-151. *McKinley v. Hinnant,* 242 N.C. 245, 87 S.E. 2d 568." *Jacobs v. Highway Commission,* 254 N.C. 200, 118 S.E. 2d 416. "The facts alleged, but not the pleader's legal conclusions, are deemed admitted when the sufficiency of the complaint is tested by demurrer." *Gillispie v. Service Stores,* 258 N.C. 487, 128 S.E. 2d 762. But if the complaint merely alleges conclusions, it is demurrable. *Broadway v. Asheboro,* 250 N.C. 232, 108 S.E. 2d 441. On the other hand, "if in any portion of it or to any extent it presents facts sufficient to constitute a cause of action the pleading will stand. . . ." *Snotherly v. Jenrette,* 232 N.C. 605, 61 S.E. 2d 708. See also *Cannon v. Wilmington,* 242 N.C. 711, 89 S.E. 2d 595.

Plaintiff sues for damages for destruction of an outdoor advertising sign located upon his leasehold estate and seeks to recover on the theory of (1) negligence, and (2) willfully tortious conduct of defendants. It thus becomes necessary to examine pertinent legal principles pertaining to plaintiff's theory of his case.

1. An employee of a governmental agency such as the North Carolina State Highway Commission is personally liable for his negligence in the performance of his duties proximately causing injury to the property of another even though his employer is clothed with immunity and not liable on the principle of *respondeat superior. Lewis v. Hunter,* 212 N.C. 504, 193 S.E. 814; *Miller v. Jones,* 224 N.C. 783, 32 S.E. 2d 594; *Hansley v. Tilton,* 234 N.C. 3, 65 S.E. 2d 300; *Smith v. Hefner,* 235 N.C. 1, 68 S.E. 2d 783.

2. A contractor employed by the State Highway Commission who is negligent in the performance of his work proximately causing injury to the property of another is personally liable to the owner. *Broadhurst v. Blythe Bros. Co.,* 220 N.C. 464, 17 S.E. 2d 646; *Highway Commission v. Reynolds Co.,* 272 N.C. 618, 159 S.E. 2d 198. Absent negligent or willfully tortious conduct, however, an independent contractor is not liable for injury to another's property caused by the performance of his contract with a governmental instrumentality in accordance with its plans and specifications. *Highway Commission v. Reynolds Co., supra.*

3. Conversely, one who willfully, wantonly and maliciously destroys the personal property of another is personally liable for the injury inflicted. ". . . [W]hile it is true that if a person is doing a lawful thing in a lawful way his conduct is not actionable though it may result in damage to another, still, . . . when a person goes outside of his line of duty and acts corruptly or with malice he becomes personally liable for consequent damages." *Betts v. Jones,* 203 N.C. 590, 166 S.E. 589. ". . . [I]f he acted wantonly, doing what any man of reasonable intelligence must have known to be contrary to his duty, and purposely prejudicial and injurious to another, the law will imply malice. This form of malice is also sometimes referred to as malice in law, or legal malice." 34 Am. Jur., Malice, § 3, citing *Betts v. Jones,* 208 N.C. 410, 181 S.E. 334.

In *Foster v. Hyman,* 197 N.C. 189, 148 S.E. 36, this Court said:

> "An act is done wilfully when it is done purposely and deliberately in violation of law (*S. v. Whitener,* 93 N.C. 590; *S. v. Lumber Co.,* 153 N.C. 610 [69 S.E. 58]), or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason. *McKinney v. Patterson, supra* [174 N.C. 483, 93 S.E. 967]. 'The true conception of wilful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract, or which is imposed on the person by operation of law.' Thomp-

son on Negligence (2 ed.), sec. 20, quoted in *Bailey v. R. R.*, 149 N.C. 169 [62 S.E. 912].

"An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others. *Everett v. Receivers*, 121 N.C. 519 [27 S.E. 991]; *Bailey v. R. R.*, *supra*. A breach of duty may be wanton and wilful while the act is yet negligent; the idea of negligence is eliminated only when the injury or damage is intentional. *Ballew v. R. R.*, 186 N.C. 704, 706 [120 S.E. 334, 335]." (Quoted with approval by Parker, J. (now C.J.) in *Blevins v. France*, 244 N.C. 334, 93 S.E. 2d 549.)

4. Injuries intentionally inflicted by employees of a State agency are not compensable under the North Carolina Tort Claims Act. Intentional acts are legally distinguishable from negligent acts. G.S. 143-291 *et seq.*; *Jenkins v. Department of Motor Vehicles*, 244 N.C. 560, 94 S.E. 2d 577; *Davis v. Highway Commission*, 271 N.C. 405, 156 S.E. 2d 685.

The Tort Claims Act embraces claims only against State agencies. Recovery against the State agency involved must be based upon the actionable negligence of an employee of such agency while acting in the scope of his employment; but recovery, if any, against the negligent employee must be by common law action. *Wirth v. Bracey*, 258 N.C. 505, 128 S.E. 2d 810. "Prior to the enactment of the Tort Claims Act the Highway Commission, as an agency or instrumentality of the State, enjoyed immunity to liability for injury or loss caused by the negligence of its employees. Even so, then as now, an employee of such agency was personally liable for his own actionable negligence." *Wirth v. Bracey*, *supra*.

5. "A lessee as tenant of an estate for years takes and holds his term in the same manner as any other owner of realty holds his title, subject to the right of the sovereign to take the whole or any part of it for public use upon the payment to him of just compensation." 26 Am. Jur. 2d, Eminent Domain, § 79. When such leasehold estate is taken under the power of eminent domain, the ownership of personalty kept on the premises taken, but not permanently affixed thereto, is not affected; and the owner is entitled to remove same at his own expense. *Williams v. Highway Commission*, 252 N.C. 141, 113 S.E. 2d 263. "[T]he Highway Commission has no authority to appropriate personal property for public use. G.S. 136-19." *Midgett v. Highway Commission*, 260 N.C. 241, 132 S.E. 2d 599. "No allowance can be made for personal property, as distinguished from

. . . fixtures, located on the condemned premises. . . ." 29A C.J.S., Eminent Domain § 175(1), p. 740.

Plaintiff alleges his leasehold estate has not been condemned by the State Highway Commission. Whether the sign maintained thereon was a part of the realty for which the State Highway Commission must pay just compensation when the leased estate is condemned, may not be raised by demurrer and is not now before us. That is a matter *dehors* the complaint. *Wright v. Casualty Co.,* 270 N.C. 577, 155 S.E. 2d 100; 3 Strong's N. C. Index, Pleadings, § 15. Even so, this is not to say that the measure of damages in this case is correctly reflected in paragraphs 17 and 18 of the complaint. Compensatory damages for injury to personal property is the difference between its fair market value immediately before and immediately after the injury. If the property has no market value the measure of damages may be gauged by the cost of repairs. *Guaranty Co. v. Motor Express,* 220 N.C. 721, 18 S.E. 2d 116; 3 Strong's N. C. Index 2d, Damages § 4.

Tested in light of these legal principles, and liberally construed with a view to substantial justice between the parties, the complaint is sufficient to survive the demurrers. A complaint must be fatally defective before it will be rejected as insufficient. *Gillispie v. Service Stores, supra* (258 N.C. 487, 128 S.E. 2d 762); *Woody v. Pickelsimer,* 248 N.C. 599, 104 S.E. 2d 273.

For the reasons stated the judgments of the learned trial judge overruling the demurrers are

Affirmed.

STATE v. THEOPHILUS COOPER.

(Filed 28 February, 1968.)

1. Criminal Law §§ 90, 104—

The introduction by the State of testimony of a defendant which includes exculpatory statements does not prevent the State from showing the facts concerning the crime to be otherwise, and on motion to nonsuit, only evidence favorable to the State will be considered.

2. Homicide § 14—

When it is admitted or when the State satisfies the jury from the evidence beyond a reasonable doubt that defendant intentionally shot deceased with a deadly weapon and thereby proximately caused his death, the presumptions arise (1) that the killing was unlawful and (2) that it was done with malice, thereby constituting the felony of murder in the second degree.

3. Same—

When presumptions from the intentional use of a deadly weapon obtain, the burden is upon defendant to show to the satisfaction of the jury the legal provocation that negates malice, thus reducing the offense to manslaughter, or that excuses the homicide altogether upon the ground of self-defense.

4. Same—

When defendant rebuts the presumption of malice only, the presumption that the killing was unlawful remains, making the crime manslaughter.

5. Homicide § 9—

Upon the plea of self-defense, defendant must satisfy the jury (1) that he acted in self-defense, and (2) that in so acting he used no more force than reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm.

6. Homicide § 6—

The killing of a human being under the influence of passion or in the heat of blood produced by adequate provocation constitutes manslaughter.

7. Homicide § 21—

Evidence in this case *held* sufficient to be submitted to the jury on the question of defendant's guilt of manslaughter.

8. 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 as to the law arising upon the evidence.

APPEAL by defendant from *Peel, J.*, September 1967 Session of WASHINGTON.

Prosecution on an indictment charging defendant on 20 May 1967 with the murder of James Henry Sanders.

Plea: Not guilty. After the jury was selected and empaneled, but before any evidence was introduced, the solicitor for the State announced that he would not ask for a verdict of guilty of murder in the first degree, but that he would ask for a verdict of guilty of murder in the second degree or guilty of manslaughter as the evidence might show. Verdict: Guilty of the felony and crime of manslaughter.

From a judgment of imprisonment, defendant appeals.

Attorney General T. W. Bruton, Assistant Attorney General George A. Goodwyn, and Assistant Attorney General William W. Melvin for the State.

Pritchett, Cooke & Burch by Stephen R. Burch and Bailey & Bailey by Carl L. Bailey, Jr., for defendant appellant.

PARKER, C.J. Both the State and the defendant introduced evidence.

The sole assignment of error in defendant's brief is that the court committed error in denying his motion for a judgment of compulsory nonsuit at the close of all the evidence.

The evidence for the State tends to show the following facts: Defendant operated a house known as the Jungle on Sand Hill in the town of Plymouth. It was a rented four-room house with two bedrooms, a living room and a kitchen. He operated it as some kind of a night spot or a club.

On 20 May 1967 Robert Biggs was in this house slightly drunk and asleep. He was awakened by a gunshot and saw the defendant with a gun in his hand. When he looked up he saw defendant sitting on the end of a table opposite him. As soon as the firing ceased, Biggs started out of the house, and as he did so James Sanders backed up against him. Biggs saw no knife in James Sanders' hands. He does not know how far Sanders was from defendant, and he heard only two shots. When he left the house, he went to his home.

Peter J. McNair on this night was in a room adjoining the kitchen of defendant's house playing "skin" with about five people. There was a doorway between the two rooms but no door. He had seen James Sanders in the house that night. Sanders had had a drink, but he was not drunk. Defendant left the room where McNair was and went into the kitchen. Shortly after defendant went into the kitchen, McNair heard three shots. McNair started out of the room through the opening where the doorway was. He saw Sanders lying near the door. He did not see any knife or anything in Sanders' hands. He did not hear too much of an argument before the shots. He testified: "In a place like that you can't hardly tell whether you are hearing argument or not, piccolo playing, lot of noise going on." Defendant had played some cards with them that night, but he was not chipping the pot or charging so much a game. He arrived at this house about 11 o'clock that night. After he heard the shots, he went out through the kitchen because he was interested in getting out of this house.

On 20 May 1967 Freeman Davenport went to the Jungle operated by defendant. When he arrived the boys were already playing cards, and he started in with them. He stayed several hours playing cards. He had nothing to drink. He was sitting with his back to the doorway. He heard some shots and saw Sanders fall. He saw no knife in Sanders' hands. He thinks he heard two shots. After he heard the shots and saw a man lying on the floor, he left and went home. Davenport testified: "I didn't look to see who was in there or

what happened. Yes, it was just a mad scramble, everybody trying to get out of there."

About 6 a.m. on 20 May 1967 Wallace Edward Craddock, a police officer of the town of Plymouth, was called to the hospital there to investigate the shooting of James Sanders. He went into the emergency room and saw James Sanders lying on the emergency table, stretched out. His clothes were off down to his waist. After seeing Sanders in the emergency room, he went outside and asked several people what had happened. At that time defendant was not there. Craddock went back into the hospital and when he came out about ten minutes later, defendant was in the lobby of the hospital. Craddock testified without objection in substance, except when quoted: He did not place defendant under arrest at that time. He said to defendant, "Hash, what happened?" Defendant said, "Well, I had to shoot at another one." They had a general conversation. The officer said, "Don't you know better? What happened?" Defendant said, "Well, I couldn't help it. You know I am kind of scarey and I do things like that." The officer said, "Where's the gun?" Defendant said, "Out here in the car. Come outside with me." Defendant went to his car parked near the hospital, opened the left-hand door, turned the back of the front seat down, and there was a pistol and a knife lying on the floor. Defendant picked them up and passed them to the officer and said, "Here's the gun I shot him with and here's a knife he was threatening me with." The officer said, "Well, you know I am going to have to charge you." Defendant said, "Well, I understand that. I reckon I can take care of it." The officer said, "Let's go down to the station, talk about it." Defendant asked him, "How's Sanders?" The officer replied, "I don't know really, I think in pretty bad shape. We will have to wait." Defendant said, "Can I wait with you?" The officer said, "Of course, come inside." They went inside and stood around talking. Dr. Stanton walked out and said, "He is dead." Defendant said, "My God." The officer said, "Hash, that makes it from assault to a murder charge." Defendant said, "I understand." The officer told defendant that he knew his rights and that he could call a lawyer or anybody he wanted to. Defendant got in the car with him. The officer let him stay in the station calling different people for twenty or thirty minutes before he put him in jail. During the conversation in the hospital, the officer told defendant that he did not have to tell him anything, that anything he said could be used against him, and defendant said, "I understand completely."

It was stipulated that Dr. A. M. Stanton, a physician and general surgeon practicing medicine in the town of Plymouth, was an expert physician specializing in the field of general surgery. He was on duty in the hospital when Sanders was brought in, and he exam-

ined the body. When Dr. Stanton first saw Sanders in the emergency room, he had no blood pressure or pulse and was almost dead. He had three bullet wounds — one in his left wrist about where one would wear a watch, another in the lower part of the abdomen in line with his navel, and another in his left thigh about an inch below the belt. In Dr. Stanton's opinion the bullet wound in the abdomen ruptured a large blood vessel, about the size of a thumb, which carries blood to the lower extremities, and this wound caused his death. The wound in the wrist looked like maybe a bullet had gone through the wrist into the abdomen. Sanders could have been shot twice.

Defendant's testimony in brief summary is as follows: On 20 May 1967 he rented a house on Sand Hill and operated it as a kind of night spot, a club like. There is a woods or swamp back of the place. The place was called the Jungle. He operated it for the benefit of people who did not have anywhere to go. On the night of 19 May 1967 and in the early morning of 20 May 1967 a number of people were in this house. There was a card game going on in the room adjacent to the kitchen. Defendant has known the deceased Sanders since he was a little boy. Defendant was about 11 year older than he was. Sanders was about half drunk when defendant saw him that night. Sanders had a general reputation as a dangerous and violent man when drinking. The first part of the night defendant was playing cards. He had occasion to go into the kitchen about 4:00 or 4:30 a.m. Hazel Barrow was in the kitchen cooking chickens. While defendant was in the kitchen, Sanders came up behind him playing and hit him on his back. He told Sanders, "Stop playing so much, when you're drunk you act like a little child." A little later he heard Sanders say, "M. F., I don't like you noway." He looked around and saw Sanders coming on him with a knife. Then Sanders said, "Another G. D. word, I am going to pull your head off." Defendant was back in the corner and saw Sanders coming toward him with a knife in his hand. He shot into the floor with a pistol he carried hanging out of his hip pocket for protection. After this shot it seemed like Sanders was coming on a little faster, and he shot at him three or four more times hitting him in the hand and in the stomach. He was afraid of Sanders and knew if he got to him with that knife he would cut him. He shot him in order to defend himself. After he shot him the last time, Sanders looked at him, kind of half-way laughed, turned around, walked back to the door, fell across two chairs, and then rolled over on the floor. After the shooting Sanders was carried to the hospital. On cross-examination defendant testified in substance: He ran this place to make some money. He sold

ABC whiskey, and he had a chicken cook-out every Friday night. He had the loaded pistol on him for protection. He had shot a man thirty days before with this pistol in this same house. He paid a fine of $50 for shooting a boy who had a hawk bill knife around his son. Sanders never got close enough to cut him. He was in a corner and he shot Sanders before he could get close enough to cut him. Sanders was a larger man than defendant.

Curtis Davis, Jr., was in the house on the morning of 20 May 1967. His foot was broken and it was in a cast. He was a partner of defendant in the operation of the business. He testified as a witness for defendant substantially corroborating the defendant. Hazel Barrow, who was a cook for defendant in the place and a partner in the operation of the house, testified for him in substantial corroboration of defendant's testimony.

Benjamin F. Biggs testified in rebuttal as a State's witness that "Hazel said, that I was to the stove cooking. She actually didn't see exactly what happened, when we talked, she didn't see no knife at that time."

Viola Hyman testified in rebuttal as a State's witness in substance, except when quoted: She saw Hazel Barrow before Sanders' funeral. She asked Hazel how it happened. She testified: "She told me, said that Buck and Hash was in the kitchen and they had some words together. Anyway said she was standing to the stove cooking. I asked, 'Did Buck say anything to Hash?' She said they had a few words. She said she was standing to the cook stove cooking. I asked, 'Did Buck draw a knife on Hash?' She said she didn't see any knife but said she was cooking chicken at the time."

Phoebe Sanders, wife of James Henry Sanders, was also called in rebuttal by the State. She is a sister of Hazel Barrow. When she and her sister left the hospital, Hazel Barrow said, "Don't cry, I will explain everything." She testified: "I asked her, 'Hazel, what happened?' She said, 'Well, I didn't see anything. I had my back turned, cooking chicken.' Said, 'When I turned around, Hash had shot Buck. He fell across the chairs and fell in the floor.' " Later, Hazel Barrow went down and had a talk with defendant. Then she and her sister, Phoebe Sanders, had another conversation. Phoebe Sanders said, "Hazel, if he was not intending to kill him, why did he shoot him four times?" Hazel said, "No, he didn't shoot him four times, he shot him three times." Phoebe Sanders further testified: "Yes, I asked her at that time about a knife. She told me Buck did not have no knife until she came and talked to Theophilus. Yes, she goes with Theophilus, been going with him quite a while, about eight years, I guess."

Defendant called Geraldine Cooper, his wife, in rejoinder. She testified in substance: That she lives in Washington, North Carolina, and visited her husband in jail in Plymouth. She testified on cross-examination: "Yes, I knew he [defendant] was in partnership with Hazel out in this bootleg joint." She teaches school in Washington, North Carolina.

Defendant's contention is this: The State offered evidence tending to show that the killing was done with a deadly weapon, but it offered no evidence as to what occurred immediately prior to the shooting. Defendant offered evidence tending to show that the shooting and the killing were done in self-defense, which showing does not contradict the State's evidence but tends merely to explain or make clear the State's evidence; and, since the State has not rebutted defendant's evidence that the killing was in self-defense, his motion for judgment of nonsuit should have been sustained.

Defendant's statements to Officer Craddock offered by the State may tend to exculpate him, but that did not prevent the State from showing the facts concerning the homicide were different from what the defendant said about them, and the State's case does not rest entirely on such statements. *S. v. Glover*, 270 N.C. 319, 154 S.E. 2d 305; *S. v. Mangum*, 245 N.C. 323, 96 S.E. 2d 39; *S. v. Phelps*, 242 N.C. 540, 89 S.E. 2d 132; *S. v. Simmons*, 240 N.C. 780, 83 S.E. 2d 904.

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 would permit, but not compel, a jury to find the following facts from the evidence beyond a reasonable doubt: (1) That the deceased Sanders had had no argument with defendant prior to the shooting, that he was not advancing on him prior to the shooting, and that he had made no threats against him and had no knife in his hands; and (2) that defendant intentionally shot Sanders at least twice with a loaded pistol that he had on his person, and that Sanders died as a proximate result of being shot by defendant. When the State satisfies the jury from the evidence beyond a reasonable doubt that the defendant intentionally shot the deceased or the defendant admits that he intentionally shot the deceased, and thereby proximately caused his death, it raises two presumptions against him: (1) That the killing was unlawful, and (2) that it was done with malice. This constitutes the felony of murder in the second degree. *S. v. Gregory*, 203 N.C. 528, 166 S.E. 387; *S. v. Wagoner*, 249 N.C. 637, 107 S.E. 2d 83; *S. v. Phillips*, 264 N.C. 508, 142 S.E. 2d 337; 2 Strong, N. C. Index, Homicide, § 13. The intentional use of a deadly weapon as a weapon,

when death proximately results from such use, gives rise to the presumptions. *S. v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322; *S. v. Phillips, supra.* When the presumption from the intentional use of a deadly weapon obtains, the burden is upon defendant to show to the satisfaction of the jury the legal provocation that will rob the crime of malice and thus reduce it to manslaughter or that will excuse it altogether upon the grounds of self-defense. *S. v. Mangum, supra; S. v. McGirt,* 263 N.C. 527, 139 S.E. 2d 640; *S. v. Todd,* 264 N.C. 524, 142 S.E. 2d 154. When defendant rebuts the presumption of malice only, the presumption that the killing was unlawful remains, making the crime manslaughter. 2 Strong, N. C. Index, Homicide, § 13. It was incumbent upon defendant upon a plea of self-defense to satisfy the jury (1) that he did act in self-defense, and (2) that, in the exercise of his right to self-defense, he used no more force than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm. *S. v. McDonald,* 249 N.C. 419, 106 S.E. 2d 477. It is hornbook law that if excessive force or unnecessary violence is used in self-defense, the killing of the adversary is manslaughter at least. *S. v. Cox,* 153 N.C. 638, 69 S.E. 419; *S. v. Glenn,* 198 N.C. 79, 150 S.E. 663; *S. v. Terrell,* 212 N.C. 145, 193 S.E. 161; *S. v. Mosley,* 213 N.C. 304, 195 S.E. 830. The killing of a human being under the influence of passion or in the heat of blood produced by adequate provocation constitutes manslaughter. 2 Strong, N. C. Index, Homicide, § 6; 40 C.J.S., Homicide, § 42. The court properly overruled the motion for judgment of compulsory nonsuit.

The court's charge has not been brought forward in the record. Therefore, it is presumed that the jury was charged correctly as to the law arising upon the evidence, as required by G.S. 1-180. *S. v. Pinyatello,* 272 N.C. 312, 158 S.E. 2d 596; 3 Strong, N. C. Index 2d, Criminal Law, § 158.

The jury found the defendant guilty of manslaughter. The verdict was supported by the evidence since it would permit a jury to find beyond a reasonable doubt that defendant killed Sanders while under the influence of passion or in the heat of blood produced by adequate provocation; or that, if defendant was exercising his right to self-defense, he used more force in so doing than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm. The verdict supports the judgment.

The judgment below is
Affirmed.

MRS. JESSE LEE HENDRICKS, PLAINTIFF, v. LESLIE FAY, INC., DAVID J. NORMAN, AND MICHAEL VALLON, ORIGINAL DEFENDANTS, AND PINKERTON'S, INC., ADDITIONAL DEFENDANT.

(Filed 28 February, 1968.)

1. Pleadings § 8—

Whether defendant stated a permissible cross-action against a party sought to be joined as an additional defendant is determinable by the factual allegations in the pleading and not by the legal conclusions.

2. Negligence § 9—

Primary and secondary liability between defendants exists only when they are jointly and severally liable to plaintiff and the one passively negligent is exposed to liability through the active negligence of the other or the one is derivatively liable for the negligence of the other, and the doctrine cannot arise if one defendant is solely liable to plaintiff.

3. Master and Servant § 20—

A contractee generally is not liable for the torts of an independent contractor, but in certain cases involving non-delegable or non-assignable duties the employer may be held vicariously liable for the tort of the independent contractor, although the employer has done everything that could be reasonably required of him.

4. Same; Principal and Agent § 9—

The duties performed by a private detective firm in maintaining a security watch over the property and the employees of a principal are nondelegable, and the firm has the status of an agent and not of an independent contractor in the performance of its duties, and the liability of the detective firm for the malicious prosecution or the false arrest of an employee of the principal is imputable to the principal under the doctrine of *respondeat superior.*

5. Negligence § 9; Torts § 6—

Where one of two persons is liable to the injured party for the wrongdoing of the other solely by reason of constructive or technical fault imposed by law, as under the doctrine of *respondeat superior,* the person whose liability is secondary, upon payment by him of the injured party's recovery, is entitled to recover full indemnity against the primary wrongdoer.

6. Negligence § 9; Pleadings § 8—

Where a party secondarily liable under the doctrine of *respondeat superior* is sued alone, he is entitled to set up a cross-action for indemnity against the party primarily liable and have the matter adjudicated in that action.

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

APPEAL by Pinkerton's, Inc., additional defendant, from *Campbell, J.,* June 1967 Session of CATAWBA, docketed and argued as No. 362 at Fall Term 1967.

Plaintiff instituted this action against Leslie Fay, Inc., hereafter called Fay, David J. Norman and Michael Vallon to recover damages, actual and punitive. In brief summary, plaintiff alleged: On February 5, 1966, she was an employee of Fay at its plant in Lincolnton, North Carolina, where Norman was Fay's security guard and Vallon was Fay's plant manager. Norman and Vallon falsely and maliciously charged plaintiff with the larceny of knitted goods of Fay of a value less than fifty dollars. They wilfully and maliciously caused a warrant for said criminal offense to be issued for plaintiff. Plaintiff was arrested on said warrant and taken to jail. No witnesses appeared to testify against plaintiff and said criminal action was dismissed. Norman and Vallon acted within the scope of their employment as agents of Fay.

Separate answers were filed by Fay, Norman and Vallon. The answers of Norman and of Vallon are not germane to this appeal. Fay, after answering, alleged "A First Further Answer and Defense" and "A Second Further Answer and Defense and . . . Cross-Action against Pinkerton's, Inc," containing allegations summarized in the opinion.

An *ex parte* order making Pinkerton a party defendant in respect of the cross action alleged by Fay was signed by the assistant clerk. Thereupon, Pinkerton moved to strike said cross action on the ground it was not germane to plaintiff's action and constituted a misjoinder of parties and causes of action. After hearing, Judge Campbell entered an order which, "both as a matter of right, and in the sound discretion of the Court," overruled Pinkerton's said motion. Pinkerton excepted and appealed. The appeal relates solely to matters in controversy between Fay and Pinkerton.

David Clark and Charles D. Randall for original defendant Leslie Fay, Inc., appellee.

James C. Smathers and William R. Sigmon for additional defendant appellant.

BOBBITT, J. If the facts alleged by plaintiff are established, the tortious conduct of Norman and of Vallon, acting jointly and concurrently as agents of Fay, was responsible for plaintiff's injury and damage. Assuming, but not deciding, that Norman was the agent of Pinkerton and *not* the agent of Fay, and that the tortious conduct of Norman, as agent of Pinkerton, *and* of Vallon, as agent of Fay, was responsible for plaintiff's injury and damage, both Fay and Pinkerton would be liable to plaintiff as joint tort-feasors. However,

Fay does not seek contribution from Pinkerton as an alleged joint tort-feasor under the provisions of G.S. 1-240.

Pinkerton is neither a necessary nor a proper party to a full and final determination of the cause of action alleged by plaintiff. The question is whether Fay is entitled *as a matter of right* to join Pinkerton as a defendant in respect of the cross action alleged by Fay against Pinkerton.

Although Fay's first further answer and defense is not referred to in Pinkerton's motion or in Judge Campbell's order, it is noted that Fay alleges therein, in substance, that Pinkerton, under the terms of its contract with Fay, was an independent contractor; that Norman was the agent of Pinkerton, not the agent of Fay; and that any actionable conduct of Norman on February 5, 1966, if imputable to anyone, would be imputable to his employer, Pinkerton, an independent contractor. In this connection, it is noted that plaintiff cannot recover on account of alleged tortious conduct of Norman unless she establishes that Norman was acting as agent of Fay.

In its second further answer and defense and *cross action,* Fay alleges that Pinkerton, under its contract with Fay, agreed to furnish specialized security service at Fay's Lincolnton plant, and did furnish such service in accordance with said contract according to its own means and methods; that Norman, as an employee of Pinkerton, was acting in the course and scope of such employment on February 5, 1966, when he signed the warrant charging plaintiff with petty larceny of knitted goods; that an implied contract on the part of Pinkerton to indemnify Fay for all losses and damages which it might incur and sustain as a proximate result of the conduct of Pinkerton, its agents and employees, while performing and carrying out the terms of its contract with Fay, arose out of said independent contract; that Norman was under the sole and exclusive control of Pinkerton; and that if Fay is liable to plaintiff by reason of the conduct of Pinkerton, or its employee and agent, Fay is entitled to judgment over against Pinkerton for indemnification. In a final paragraph, Fay, in substance, alleges: *If* the court and jury should hold that Pinkerton, at the time of the alleged injury, was the agent of Fay, then, as between Fay and Pinkerton, Fay would be secondarily liable and Pinkerton primarily liable to plaintiff; and that, in such event, Fay is entitled to have the primary liability of Pinkerton adjudicated in this action.

Whether Fay stated a permissible cross action against Pinkerton is determinable on the basis of the facts alleged by Fay rather than on the basis of its legal conclusions. According to the *legal conclusions* asserted by Fay, if plaintiff was injured by Norman's tortious

conduct, Pinkerton, not Fay, is liable therefor. It is well established that "(t)he doctrine of primary-secondary liability cannot arise where an original defendant alleges that the one whom he would implead as a third-party defendant is solely liable to plaintiff." *Edwards v. Hamill,* 262 N.C. 528, 531, 138 S.E. 2d 151, 153, and cases cited. Moreover, as stated by Sharp, J., in *Edwards v. Hamill, supra:* "Primary and secondary liability between defendants exists only when: (1) they are jointly and severally liable to the plaintiff (citations); and (2) either (a) one has been passively negligent but is exposed to liability through the active negligence of the other or (b) one alone has done the act which produced the injury but the other is derivatively liable for the negligence of the former. (Citations.)" Hence, before Fay can establish a right to indemnity from Pinkerton, Fay must allege and prove (1) that Pinkerton, by reason of the tortious conduct of Norman, its agent, is liable to plaintiff, and (2) that Fay's liability to plaintiff is derivative, that is, based on the tortious conduct of Pinkerton through Norman, Pinkerton's agent.

"For the torts of an independent contractor, as distinguished from a servant, it has long been said to be the general rule that there is no vicarious liability upon the employer." Prosser on Torts, 3rd Ed., § 70, p. 480. Fay's first further answer and defense is based on this general rule. If this general rule were applicable, the plaintiff could not recover from Fay for the tortious conduct of Norman if Norman were acting exclusively as agent of Pinkerton, an independent contractor; and, absent a recovery by the plaintiff against Fay, there would be no basis for any cross action by Fay against Pinkerton. However, in respect of certain duties, an employer cannot absolve itself from liability by delegating the performance thereof to an independent contractor.

As stated in Prosser, *op. cit.,* § 70, p. 483; "But the cases of 'non-delegable duty' . . . hold the employer liable for the negligence of the contractor, although he has himself done everything that could reasonably be required of him. They are thus cases of vicarious liability."

The crucial question is whether the duty committed by Fay to Pinkerton under the contract alleged by Fay is a "non-delegable" or "non-assignable" duty. If so, Pinkerton, the contractor, has the status of an agent of Fay in respect of the performance thereof and liability for the tortious conduct of Pinkerton and its agents, including Norman, would be imputed to Fay. Annotation: "Liability of employer as predicated on the ground of his being subject to a non-

delegable duty in regard to the injured person." 23 A.L.R. 984 *et seq.*, and supplemental decisions.

In *Adams v. F. W. Woolworth Co.*, 144 Misc. 27, 257 N.Y.S. 776, the plaintiff, a customer in the defendant's store, recovered damages for false arrest. The defendant contended the plaintiff's arrest was caused by employees of one Lowenthal, who had contracted to provide the defendant with detective service. In rejecting this contention, the Court said: "A store owner who places a detective agency on his premises for the purpose of protecting his property by various means, including arrests, should not be immune from responsibility to an innocent victim of a false arrest made by the detective agency, even as an independent contractor." The rationale of this decision is set forth in the opinion of Rosenman, J., as follows: "There appear to be no direct precedents on the question of liability for a false arrest made by an independent contractor detective agency. The tendency of our law, indicated above, would, however, clearly be toward the imposition of vicarious responsibility. Customers of Woolworth Company are invited into the store to buy its merchandise, for the profit of Woolworth Company. Can it be said that Woolworth Company can disclaim all duty of protecting them from the tortious acts of detectives brought by it into its own premises for the very purpose, among others, of making arrests of its customers? This is not the case of a contractor doing his work negligently. Where negligence is the sole basis of liability, the doctrine of *respondeat superior* has been held inapplicable to independent contracts. Negligence does not enter into the tort of false arrest. The act itself, if not justified under the statute (section 183, Code of Criminal Procedure), is tortious, irrespective of negligence. Lowenthal was brought onto the premises to watch and also to arrest. Immunity from vicarious liability would permit any store keeper to subject his customers to the hazards of an irresponsible detective agency without peril to himself. He would obtain all the benefit of the surveillance and punishment of shoplifters; he would be subject to none of the penalties for unjustified or unlawful arrests of law-abiding citizens. The opportunities for gross injustice afforded by such a doctrine are too manifest to permit its incorporation into the jurisprudence of our state, without compelling reason."

In *Clinchfield Coal Corporation v. Redd*, 123 Va. 420, 434, 96 S.E. 836, 840, where the plaintiff's judgment in an action for malicious prosecution was upheld, the Court, in opinion by Kelly, J., said: "The owner of an operation or enterprise cannot, by securing, through others, special agents, even though they be officers of the law, for the prosecution of offenders around the plant, obtain any immunity

from liability for malicious prosecutions which such owner would not be equally entitled to if he himself directly selected and paid the agents and expressly retained the power of control and removal. When he undertakes these functions, his duties are personal and non-assignable, and, where he arranges for and accepts the service, he will not be permitted to say that the relationship of master and servant does not exist."

In *Szymanski v. Great Atlantic & Pacific Tea Co.,* 74 N.E. 2d 205 (Ohio), it was held that the personal character of the services performed by a store detective "can not be assigned or delegated to an independent contractor and thereby relieve the store owner from liability for illegal acts of such detective to the injury of the store's customers."

In *Halliburton-Abbott Co. v. Hodge,* 44 P. 2d 122 (Okla.), the plaintiff, an employee in the defendant's department store, recovered in an action for false imprisonment. The defendant sought to excuse itself from liability on the ground the alleged tortious conduct was by employees of Willmark Service System, Inc., an independent contractor, and the defendant was not responsible for their acts. Although the decision affirming the plaintiff's recovery is based in part on a determination that the defendant's superintendent participated in the alleged tortious conduct of Willmark's employees, the Court, in opinion by Phelps, J., said: "The weight of authority seems to be that one may not employ or contract with a special agent or detective to ferret out the irregularities of his employees and then escape liability for malicious prosecution or false arrest on the ground that the agent is an independent contractor." Indeed, authority to the contrary has not come to our attention.

Decisions in accord with those cited above include the following: *W. T. Grant Co. v. Owens,* 149 Va. 906, 141 S.E. 860; *Zentko v. G. M. McKelvey Co.,* 88 N.E. 2d 265 (Ohio).

In our opinion, and we so decide, the duties committed by Fay to Pinkerton by the terms of the contract alleged by Fay were "non-delegable" or "non-assignable"; that Pinkerton has the status of agent of Fay in respect of the performance thereof; and that liability for tortious conduct of Pinkerton and its agents, including Norman, while engaged in such performance, is imputable to Fay under the doctrine of *respondeat superior.*

"Where two persons are jointly liable in respect to a tort, one being liable because he is the actual wrongdoer, and the other by reason of constructive or technical fault imposed by law, the latter, if blameless as between himself and his co-tortfeasor, ordinarily will be allowed to recover full indemnity over against the actual wrong-

doer." *Hayes v. Wilmington*, 243 N.C. 525, 543, 91 S.E. 2d 673, 686. Thus, "where liability has been imposed on the master because of the negligence of his servant, and the master did not participate in the wrong and incurs liability solely under the doctrine of *respondeat superior*, the master, having discharged the liability, may recover full indemnity from the servant." *Ingram v. Insurance Co.*, 258 N.C. 632, 635, 129 S.E. 2d 222, 225. And, "(w)here two alleged tort-feasors are sued by the injured party, one may set up a cross-action against the other for indemnity, under the doctrine of primary-secondary liability, and have the matter adjudicated in that action." *Steele v. Hauling Co.*, 260 N.C. 486, 490, 133 S.E. 2d 197, 200. "Moreover, a defendant secondarily liable, when sued alone, may have the person primarily liable brought in to respond to the original defendant's cross-action." *Clothing Store v. Ellis Stone & Co.*, 233 N.C. 126, 131, 63 S.E. 2d 118, 122.

The foregoing leads to this conclusion: Under the facts alleged by Fay, the duties it committed to Pinkerton by the terms of the contract were "non-delegable" or "non-assignable." Fay, therefore, would be liable to plaintiff under the doctrine of *respondeat superior* for tortious conduct of Pinkerton and its agents while engaged in the performance of such duties. Thus, Fay is entitled to have determined in this cause the issue of primary and secondary liability as between Fay and Pinkerton in respect of any loss incurred by Fay based on tortious conduct of Norman while acting exclusively as employee and agent of Pinkerton.

For the reasons stated, the order of the court below is affirmed.

Affirmed.

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

SHIRLEY B. BECKER (NOW HALL) v. DAVID H. BECKER.

(Filed 28 February, 1968.)

1. Divorce and Alimony §§ 19, 22—

Where plaintiff institutes an action in the general county court for alimony without divorce and for custody and support of the children, that court acquires original jurisdiction of the parties and the children, and the Superior Court thereafter has appellate jurisdiction only and is without authority to modify custody or contempt orders entered in the court below.

2. Courts § 7—

The jurisdiction of the Superior Court upon appeal from a general county court is limited to rulings on exceptions duly noted and brought forward, and the Superior Court is without authority to make additional findings of fact.

3. Divorce and Alimony § 22—

In a suit for alimony without divorce and for custody of the children, the court first acquiring jurisdiction of the parties and children retains that jurisdiction subject only to review by appeal for errors of law raised by exceptive assignments.

4. Divorce and Alimony §§ 20, 23—

A decree of divorce on the ground of separation for the statutory period in an action instituted by the wife terminates the husband's liability for support of the wife and for payment of her counsel fees, G.S. 50-11, but his duty to support the children of the marriage continues, and payments made to the wife subsequent to the divorce should be credited to the defendant's liability for the support of the children.

ON *certiorari* to review orders of *Bryson, J.*, entered in the Superior Court of BUNCOMBE County, August 24, 1967.

On December 11, 1961, Shirley B. Becker, wife, instituted in the General County Court an action against David H. Becker, husband, for alimony without divorce, for the custody of and support for David H. Becker, Jr. and Timothy Floyd Becker, minor children of the parties. The plaintiff alleged the parties are separated; that the defendant is financially able and she is financially unable to support either herself or the children. She asked for *pendente* allowances, including counsel fees.

The defendant, by answer, also filed on December 11, 1961, denied all material allegations except the separation and his financial ability to support the plaintiff and the children. He asked that custody of the boys be awarded to him.

On December 12, 1961, the day following the institution of the suit, the filing of the complaint and answer, the parties submitted to the court a consent settlement which the court approved and adopted as its judgment. By the judgment the plaintiff was given custody of the children. However, the defendant was given liberal visitation rights, including exclusive custody for a period of six consecutive weeks during the summer. The agreement provided:

> "2. That the defendant shall pay for the support and maintenance of his wife and minor children the sum of Sixty and 00/100 ($60.00) Dollars per week, beginning on the 12th day of December, 1961, and a like amount thereafterwards on each succeeding Tuesday, to be used by the plaintiff for the support and maintenance of herself and said children, . . ."

By the agreement, the parties settled their property rights. The court ordered the defendant to pay to plaintiff's counsel the sum of $150 for services to the date of settlement.

On January 9, 1963 the General County Court (Judge Pennell) entered a consent order modifying to a limited degree the days and hours during which each party should have actual custody of the children. Otherwise, the original order of December 12, 1961 was to remain in force.

On February 15, 1964 the parties were in the county court before Assistant Judge Howell and an order apparently was entered adjudging the defendant in contempt. The defendant gave notice of appeal to the Superior Court.

And on April 20, 1964, after notice and hearing, the General County Court (Judge Willson), found, on the basis of changed conditions, the plaintiff was entitled to have her custody rights enlarged; that the defendant was behind in support payments, and that he should pay $840 within sixty days. The court ordered defendant to pay $900 additional attorneys fees to plaintiff's counsel. The order provided (except as modified) that the provisions of the consent judgment should remain in force.

On appeal to the Superior Court, Judge Mintz, by order dated September 3, 1965, affirmed the orders of the General County Court entered on February 15, 1964 by Assistant Judge Howell adjudging the defendant in contempt, and on April 20, 1964 by Judge Willson enlarging plaintiff's custody rights, requiring the defendant to make the support payments and ordering additional counsel fees of $900.

At this juncture we note that Shirley B. Becker, on December 13, 1963, instituted an action in the Superior Court of Buncombe County for absolute divorce on the ground of two years separation. The agreement of December 12, 1961 was offered as evidence of the separation. A decree of absolute divorce was entered in the Superior Court on April 6, 1964 upon the findings of the judge without a jury. The defendant appealed.

This Court affirmed the divorce judgment on November 4, 1964. The case is reported in 262 N.C. 685. Four days after the opinion of this Court was filed, the plaintiff remarried. The parties have acted on the assumption that the question of custody remained in the General County Court.

Pursuant to notices and petitions, Judge Willson of the General County Court, after extensive hearings and the introduction of much evidence, on January 17, 1967 entered an order awarding permanent custody of the children to the mother, adjudging the father in

contempt, and ordering him to make the past due payments in thirty days or be committed for contempt.

The defendant gave notice of appeal to the Superior Court. A number of orders were entered extending the time for filing the case on appeal. Objections and motions to dismiss were entered. Eventually, what purported to be a case on appeal was filed in the Superior Court. Judge Bryson, after reviewing the record and being in doubt whether the case was properly before the Superior Court by way of appeal, nevertheless treated defendant's motion to docket the appeal as a petition for writ of *certiorari*, and the record before him as a return to the writ, then began his review. Upon the basis of the "bundle of papers" before him, he proceeded to enter seven separate orders, some revoking parts of others. In combination he found that defendant's exceptions and objections to the order of Judge Willson entered on January 17, 1967 were without merit and overruled them in their entirety. He concluded the evidence before Judge Willson fully warranted his findings of fact.

After further reviewing the evidence taken before Judge Willson, Judge Bryson made modifications in the custody orders and required the defendant to provide tutorage for the children, whose school work was shown to be deficient. Judge Bryson, after revoking some of the prior orders, found from the evidence before Judge Willson in the General County Court and the admissions of counsel before him that the defendant was in arrears in the weekly payments in excess of $5,200, but that by certain payments, including $2,200 paid into the clerk's office, ". . . said defendant appellant is purged of his wilful contempt of court." Another order required the defendant to pay into court within ninety days the sum of $5,000 for plaintiff's counsel. Still another order contained this provision:

> ". . . (A)nd the Court having further considered this matter independently upon the motion in the cause filed in the Superior Court by the defendant appellant on June 16, 1967 and the further motion in the cause made in this Court on July 24, 1967, for a modification in custodial privileges, and the Court being of the opinion, after fully considering this matter, that it is for the best interests of said minor children of the parties that plaintiff appellee have the right to determine the educational institution attended by said minor children, with visitation rights to be granted the defendant appellant, and the Court being of the opinion that it is for the best interests of said minor children that the plaintiff have the exclusive physical custody and control of said minor children . . ."

The defendant's applications for *certiorari* and *supersedeas* writs were allowed by this Court on September 20, 1967. The cause is before us for review.

Shelby E. Horton, William J. Cocke for defendant appellant.
Uzzell and Dumont by Harry Dumont, Gudger and Erwin by Lamar Gudger for plaintiff appellee.

HIGGINS, J. When the plaintiff instituted this action in the General County Court for alimony without divorce and for custody and support of the children, that court acquired original jurisdiction of the parties and the children. Thereafter, the Superior Court had only appellate jurisdiction. ". . . (A)ppeals from that court to the Superior Court are upon exceptions duly noted and assigned as error, and . . . the power of the Judge hearing the case on appeal is limited to ruling on the exceptions brought forward. Exercising only appellate jurisdiction, he is without authority to make additional findings of fact as the basis of judgment. G.S. 7-279; *Jenkins v. Castelloe,* 208 N.C. 406, 181 S.E. 266; *Starnes v. Tyson,* 226 N.C. 395, 38 S.E. 2d 211." *McLean v. McLean,* 233 N.C. 139, 63 S.E. 2d 138. See also *Robbins v. Robbins,* 229 N.C. 430, 50 S.E. 2d 545; *Robinson v. McAlhany,* 216 N.C. 674, 6 S.E. 2d 517; Chapter 925, Session Laws of 1953; Chapter 1189, Session Laws of 1955.

In a suit for alimony without divorce and for the custody of children, the court now acquires jurisdiction of the children as well as the parents. That jurisdiction remains in the court wherein the action is brought. *Blankenship v. Blankenship,* 256 N.C. 638, 124 S.E. 2d 857; G.S. 7-296; Chapter 1198, Session Laws of 1965. *In Re Custody of Sauls,* 270 N.C. 180, 154 S.E. 2d 327 and *Swicegood v. Swicegood,* 270 N.C. 278, 154 S.E. 2d 324, are not in conflict but are in harmony with the view here expressed. In those cases this Court held that in an action for divorce or for alimony and custody without divorce, the Court acquires jurisdiction over the children and ousts the custody jurisdiction previously acquired by another court in a *habeas corpus* proceeding pursuant to G.S. 39-17 or G.S. 39-17.1. The court which first acquires jurisdiction in a divorce action, *Robbins v. Robbins, supra,* or alimony without divorce, *Murphy v. Murphy,* 261 N.C. 95, 135 S.E. 2d 148; *Cox v. Cox,* 246 N.C. 528, 98 S.E. 2d 879 retains that jurisdiction subject only to review by appeal for errors of law raised by exceptive assignments.

On December 11, 1961 the plaintiff, wife, instituted this action in the General County Court against the defendant, husband, for alimony without divorce and for the custody of and support for the

two sons of the parties. The plaintiff's complaint and the defendant's answer were filed at the same time on the date the action was instituted. The following day the parties filed with the court a written settlement of differences, including property rights, which the court approved and adopted as its judgment. The judgment awarded the plaintiff the primary custody and required the defendant to pay for the support and maintenance of his wife and children the sum of $60 per week. Insofar as the property rights of the parties were involved, the judgment was a consent settlement.

On motions of the parties from time to time the General County Court made changes with respect to custody. At no time, however, has there been a change in the requirement that the defendant pay for the support of his wife and children the sum of $60 per week. Neither has there been any determination of how much of the amount was allocated to the support of the plaintiff and how much to the support of the children. When the plaintiff obtained her divorce on the ground of separation for the statutory period, the husband's liability for her support and counsel fees terminated. G.S. 50-11; *Porter v. Bank,* 249 N.C. 173, 105 S.E. 2d 669. His duty to support the children, however, continued. All payments made to the plaintiff subsequent to the divorce should be credited on the defendant's liability for the support of the children. When the status of the account is thus established, the General County Court will be in a position to determine whether the defendant has been in wilful contempt for failure to pay what the court finds is due for their support.

Upon the basis of the authorities heretofore discussed, we conclude that Judge Bryson was limited in his review to decision on the questions of law or legal inference presented by exceptions and assignments of error. When he overruled all of the exceptive assignments, it was then his duty to remand the case to the General County Court. All other orders entered by him were beyond his authority and may be treated as a nullity. When the cause is again before the General County Court the questions of custody, the father's liability for the childrens' support according to their needs and his ability to meet them, may be determined. Attorneys fees for services rendered subsequent to plaintiff's divorce may be allowed only for services rendered on behalf of the children. The judgment of the Superior Court is modified by striking therefrom all orders except that which overrules the assignments of error. The Superior Court will remand the cause to the General County Court of Buncombe County (or its successor) for further disposition. As modified herein, the judgment is

Affirmed.

DOROTHY H. SHEPHERD (Now DOROTHY H. BARRINGER) v. RAY B. SHEPHERD.

(Filed 28 February, 1968.)

1. Divorce and Alimony § 22—

The court in which a divorce action is instituted acquires jurisdiction over the custody of the unemancipated children of the parties, and such jurisdiction continues even after the decree of divorce.

2. Divorce and Alimony § 24; Infants § 9—

Decrees awarding custody of minor children are subject to judicial modification upon a change of circumstances affecting the welfare of the children.

3. Same—

An order of the court modifying a decree of custody must be supported by a finding of fact of changed conditions, and upon the failure of the court to find sufficient facts to support the judgment, the cause will be remanded for a hearing *de novo.*

4. Infants § 9—

In a judgment awarding the custody of a child, a recital therein to the effect that the court considered other matters which were brought to its attention and that such matters were known by all the parties and their counsel, *is held* insufficient to show that the court based its ruling on matters *dehors* the record.

5. Appeal and Error § 38—

Where the record states that the parties agreed to the case on appeal but contradictions appear in the record as to matters decisive of the assignments of error, the case is properly remanded to be settled by the trial court.

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

APPEAL by plaintiff from *Crissman, J.,* 28 August 1967 Criminal Session of GUILFORD, Greensboro Division. This case was docketed and argued at the Fall Term 1967 as No. 698.

Motion in the cause filed 22 August 1967 by defendant to inquire into the custody of Susan Elaine Shepherd, minor daughter born to the marriage of plaintiff and defendant.

By judgment of Judge Walter E. Crissman dated 25 November 1963, plaintiff obtained an absolute divorce from defendant and was awarded "complete and exclusive care, custody and control" of the child. The judgment further provided:

> ". . . defendant shall have the right and authority to visit with Susan Elaine Shepherd . . . at any reasonable time, at any place he so desires and as frequently as he so desires; provided, said visitations do not unreasonably interfere with the

health, education and welfare of said minor child; and the defendant shall have the right to have the said minor child visit with him at his place of residence during the period of time each year when the said minor child is out of school for her summer vacation and to have the said minor child visit with him during the Christmas holidays one year out of every two years. . . ."

Plaintiff remarried in December 1963 and she and her daughter moved to Charleston, West Virginia, to live with plaintiff's husband, William A. Barringer. Defendant remarried in May 1964 and presently lives in Greensboro with his wife, her son by a previous marriage, and an infant child born to their marriage.

During the summer of 1967, Susan was visiting defendant and was to return to Charleston, West Virginia, on 21 August 1967. She did not return on that date. On 22 August 1967, this motion in the cause to inquire into the custody of Susan Shepherd was filed by defendant.

At hearings held on August 29-30 and 11 September 1967 before Judge Crissman, numerous affidavits were submitted on behalf of plaintiff and defendant to the effect that both parents were fit persons to have custody of the child. Individual affidavits of both plaintiff and defendant related that conduct on the part of the other had emotionally disturbed the child. The child submitted a handwritten letter indicating her desire in the matter. On 29 August 1967, in chambers, Susan gave unsworn testimony in the presence of Judge Crissman and attorneys for both parties, which was transcribed by the court reporter. Subsequently, Judge Crissman talked with her without the presence of counsel or the court reporter. The record is conflicting as to whether counsel and parties consented to the private talk between the Judge and the child.

Counsel for the parties disagreed as to whether or not there had been an agreement to hear the matter only upon affidavits. On 29 August 1967, the Judge announced that if he needed to hear from anybody on either side, he would hear it on the next day, and if he did not need to hear from them, he would try to make a decision on it anyway.

A statement appears in the record that plaintiff's attorney asked to put on testimony and to be permitted to cross-examine defendant, Ray B. Shepherd. The record does not show when this request was made or whether a witness was actually tendered, nor does it show what the testimony would have been had the witness testified. Further, the statement of case on appeal shows that on 11 September 1967 neither party, nor their counsel, indicated a desire to introduce

evidence. By a footnote contained on the same page of the record, appellant indicates that this statement was the recollection of the Judge and defendant's counsel, and that plaintiff and her counsel "do not agree that this recollection is correct and object to its inclusion."

On 18 September 1967 Judge Crissman entered judgment which, in part, is as follows:

> ". . . plaintiff . . . and defendant . . . were both represented by counsel; . . . each caused to be filed with the Court certain pleadings and a number of affidavits; that the minor child born of the marriage between the parties hereto, to wit, Susan Elaine Shepherd, age eleven years, testified in this matter and gave further information to the Court, in chambers; that other matters were brought to the attention of the Court, which said matters were known by all of the parties hereto and their respective Counsel, all of which said matters were considered by the Court in arriving at its judgment. . . .
>
> ". . . defendant . . . is a fit and proper person to assume the responsibilities and obligations commensurate with the custody and control of the minor child . . .; that the best interests of the said Susan Elaine Shepherd would best be served by her being placed in the custody of her father, Ray B. Shepherd, defendant herein; . . . the mother, plaintiff herein, should have reasonable visitation privileges with her daughter, . . . which . . . privileges and arrangements should be worked out between the parties hereto, considering at all times the schedule and welfare of the said Susan Elaine Shepherd.
>
> "NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Ray B. Shepherd, defendant herein, be, and he is hereby granted full and complete custody and control of Susan Elaine Shepherd, and that henceforth the said Ray B. Shepherd shall not be required to pay to the plaintiff any support whatsoever for or on behalf of the said Susan Elaine Shepherd as long as she remains in his care, custody and control under the terms of this Judgment.
>
> "IT IS FURTHER ORDERED that this matter be retained for the further orders of this Court in the event of a change in circumstances."

Plaintiff appealed.

Smith, Moore, Smith, Schell & Hunter for plaintiff.
Perry N. Walker for defendant.

BRANCH, J. Appellant contends that the trial court erred in modifying the custody order without a finding of fact of any change of circumstances affecting the welfare of the child. This assignment of error is based on exceptions duly noted. *Langley v. Langley,* 268 N.C. 415, 150 S.E. 2d 764.

As a general rule, the court in which a divorce action is instituted acquires jurisdiction over the custody of unemancipated children of the parties, and such jurisdiction continues even after the divorce. This phase of the court's jurisdiction is properly activated by a motion in the cause. *Cox v. Cox,* 246 N.C. 528, 98 S.E. 2d 879. Decrees awarding custody of minor children determine the present rights of the parties, but such decrees are subject to judicial modification upon a change of circumstances affecting the welfare of the children. *Thomas v. Thomas,* 259 N.C. 461, 130 S.E. 2d 871.

The rationale of modification of custody decrees upon a change of circumstances is stated in *Hardee v. Mitchell,* 230 N.C. 40, 51 S.E. 2d 884, as follows:

> ". . . the welfare of the child at the time the contest comes on for hearing is the controlling consideration. . . . It may be well to observe . . . that the law is realistic and takes cognizance of the ever changing conditions of fortune and society. While a decree making a judicial award of the custody of a child determines the present rights of the parties to the contest, it is not permanent in its nature, and may be modified by the court in the future as subsequent events and the welfare of the child may require. . . ."

In the case of *Stanback v. Stanback,* 266 N.C. 72, 145 S.E. 2d 332, the Court construed the validity of an order of one superior court judge modifying a custody order entered by another superior court judge. Holding that absent evidence of changed conditions the judge was without authority to modify the previous custody order, the Court, speaking through Higgins, J., stated:

> ". . . There is no evidence the fitness or unfitness of either party had changed between the hearings. There is no evidence the needs of the boys had changed during that time, or that they were not properly cared for by the father.
>
> "A judgment awarding custody is based upon the conditions found to exist at the time it is entered. The judgment is subject to such change as is necessary to make it conform to changed conditions when they occur. . . .
>
> ". . . Judge Gwyn's finding of changed conditions is not

> supported by the evidence. Absent evidence of change he was without authority to modify Judge Walker's order. . . ."

Appellee contends that there is no necessity to find facts of changed circumstances affecting the welfare of the minor child, since the judge who originally granted custody signed the order of modification.

"The welfare of the child in controversies involving custody is the polar star by which the courts must be guided in awarding custody." *Thomas v. Thomas, supra.*

A decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order. To hold otherwise would invite constant litigation by a dissatisfied party so as to keep the involved child constantly torn between parents and in a resulting state of turmoil and insecurity. This in itself would destroy the paramount aim of the court, that is, that the welfare of the child be promoted and subserved.

We hold that there must be a finding of fact of changed conditions before an order may be entered modifying a decree of custody. The jurisdiction is in the courts, and whether the original decree was entered by the same judge of superior court or some other judge of superior court is not controlling. Here, the trial judge did not find sufficient facts to support the judgment.

Appellant contends that the order of the trial court was error because it was based on matters outside the record. The judgment recites:

> ". . . that other matters were brought to the attention of the Court, which said matters were known by all of the parties hereto and their respective Counsel, all of which said matters were considered by the Court in arriving at its judgment; . . ."

In re Custody of Gupton, 238 N.C. 303, 77 S.E. 2d 716, concerns a custody matter in which the court made "an independent investigation of the private and home life of the parties to the controversy" through the instrumentality of "an officer of the law." "In so doing, the judge acted on his 'own motion and without the knowledge of the litigants or their attorneys.' " The petitioner in that action excepted to the judgment and appealed, asserted that the judgment was based upon evidence and matters not in the record. In setting the judgment aside, the Court stated:

> "The law of the land clause embodied in Article I, Section

17, of the North Carolina Constitution guarantees to the litigant in every kind of judicial proceeding the right to an adequate and fair hearing before he can be deprived of his claim or defense by judicial decree. *Eason v. Spence,* 232 N.C. 579, 61 S.E. 2d 717; *Surety Corp v. Sharpe,* 232 N.C. 98, 59 S.E. 2d 593.

"Where the claim or defense turns upon a factual adjudication, the constitutional right of the litigant to an adequate and fair hearing requires that he be apprised of all the evidence received by the court and given an opportunity to test, explain, or rebut it. *In re Edwards' Estate,* 234 N.C. 202, 66 S.E. 2d 675; *S. v. Gordon,* 225 N.C. 241, 34 S.E. 2d 414; *Interstate Commerce Commission v. Louisville & N. R. Co.,* 227 U.S. 88, 33 S. Ct. 185, 57 L. Ed. 431.

"The judgment sets at naught the petitioner's constitutional right to an adequate and fair hearing. It deprives him of his claim to the custody of his daughter upon a factual adjudication based in substantial part upon evidence of an unrevealed nature gathered by the presiding judge in secret from undisclosed sources without his knowledge or that of his counsel."

See also *In re Gibbons,* 245 N.C. 24, 95 S.E. 2d 85.

The judgment on its face shows that it was partially based "on matters brought to the attention of the court . . . all of which matters were considered by the court in arriving at its judgment." The record fails to show whether the judgment entered was based substantially on evidence received outside the record, and the record shows that parties and counsel were cognizant of the matters referred to. This assignment of error, standing alone, is not prejudicial error, but we observe that it is the better procedure (absent consent of all parties) in hearings of this nature for the trial court to base its factual adjudication upon evidence received by it in open court, so as to give all parties opportunity to test, explain, or rebut it.

The condition of the record as to the remaining assignments of error is such that we would ordinarily remand so that the case might be properly settled by the judge. *McDaniel v. Scurlock,* 115 N.C. 295, 20 S.E. 451. It appears from the record that the case on appeal was accepted by the attorney for appellee on 6 October 1967, and that no objections or countercase has been returned by appellee. The case on appeal was not settled by the trial judge. Rather, it appears that the parties agreed to the case on appeal. However, upon an examination of the record itself we find constant contradictions as to matters decisive of the remaining assignments of error.

Although we do not deem it necessary to consider the remaining assignments of error, we note that this Court has held that the trial judge may question a child in open court in a custody proceeding, but he cannot do so privately except by consent of the parties. *Raper v. Berrier,* 246 N.C. 193, 97 S.E. 2d 782; *In re Gibbons, supra.* Further, in a proceeding involving final custody the trial court should permit oral evidence when properly tendered and the exercise of the right of cross-examination when requested. *Stanback v. Stanback, supra;* 27B C.J.S., Divorce, § 315, p. 496; *Cotton Mills v. Local 578,* 251 N.C. 218, 111 S.E. 2d 457.

For the reasons stated, the judgment of the trial court is vacated and this cause is remanded to the end that there may be a hearing *de novo* according to the principles herein enunciated.

Error and remanded.

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

HOWARD L. STEIN, PETITIONER, v. CAPITAL OUTDOOR ADVERTISING, INC., AND JAMES A. BRIDGER AND CLAWSON A. HICKS, RESPONDENTS.

(Filed 28 February, 1968.)

1. Corporations § 4—

The execution of a proxy without specifying the length of time for which it is to continue in force nor limiting its use to a particular meeting is invalid after the expiration of eleven months from the date of its execution, G.S. 55-68(b), and does not affect the right to vote the shares at a stockholders meeting held more than eleven months after the proxy is issued.

2. Same—

An agreement whereby a stockholder assigned to another stockholder the right to vote all of the shares owned by the first stockholder did not create a voting trust subject to the provisions of G.S. 55-72 since there was no transfer, nor an intent to transfer, the shares of stock for the purpose of the agreement. G.S. 55-72(a).

3. Same—

G.S. 55-73(a), providing that two or more stockholders may validly contract that the shares held by them shall be voted as a unit for the election of directors, is inapplicable to an agreement which gives one stockholder general voting rights in the shares of another stockholder and which fails to provide that the shares of the two stockholders are to be voted as a unit.

4. **Same—**

Agreement giving one stockholder voting rights in the shares of another cannot be construed as an agreement by all of the shareholders to treat the corporation as a partnership, G.S. 55-73(b), there being no evidence that the third shareholder of the corporation assented to the voting agreement.

5. **Same—**

Agreement giving one stockholder an unlimited right to vote the shares of another stockholder is a mere continuing proxy which expires eleven months after the execution thereof, G.S. 55-68(b), and is not an agreement attempting to interfere with the discretion of the board of directors. G.S. 55-73(c).

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

APPEAL by respondent Hicks from *Braswell, J.,* at the 24 April 1967 Civil Session of WAKE, docketed and argued as No. 527 at Fall Term 1967.

This is a proceeding instituted under G.S. 55-71 to determine the validity of an alleged election of directors of Capital Outdoor Advertising, Inc., at the special meeting of its stockholders on 5 April 1967. The matter was heard without a jury and the court entered an order setting forth its findings of fact and conclusions of law. It adjudged thereon that the election was null and void and that the petitioner Stein is entitled to vote at all shareholders' meetings six hundred (600) shares of stock purchased by him from Thomas F. Hannon. The sole assignment of error is to the conclusion that Stein is entitled to vote the said shares.

The court's findings of fact, to which no exception was taken, may be summarized as follows, the two documents in question being quoted in full:

1. The corporation was organized under the laws of this State on 20 April 1966 and for its fiscal year ending 18 April 1967 Hicks was elected president-treasurer, Stein vice president and Hannon secretary.

2. At the time of organization, 51,020.00 shares of stock were issued, of which there were issued to Stein 24,999.80 shares, to Hicks 13,775.40 shares and to Hannon 12,244.80 shares.

3. On the day the corporation was organized, Hannon and Hicks executed two written instruments entitled "Agreement" and "Stock Voting Proxy," respectively, and reading as follows:

"NORTH CAROLINA AGREEMENT
WAKE COUNTY

THIS AGREEMENT, made and entered into this 20 day of April 1966 by and between Thomas F. Hannon, FIRST PARTY, and Clawson A. Hicks, SECOND PARTY;

WITNESSETH:

THAT WHEREAS the parties to this agreement are both stockholders in CAPITAL OUTDOOR ADVERTISING, INC. and WHEREAS both parties hereto participated in the organization of said corporation; and WHEREAS the second party is experienced in the sign advertising business and corporation business, structure, and organization; that said Clawson A. Hicks is President of said corporation and the first party holds special confidence in the ability and integrity of said Clawson A. Hicks to manage, conduct, and operate the business of said corporation and to vote the stock of the first party to the best interest of the first party;

NOW, THEREFORE, in consideration of the sum of Five Dollars and other good and valuable consideration and the mutual desires and covenants herein, receipt of which is acknowledged, the first party, said Thomas F. Hannon, hereby transfers and assigns unto the second party, Clawson A. Hicks, the right to vote all of his stock in said corporation, the same consisting of 12,244.80 shares, at any and all meetings of the stockholders of said corporation; that the second party, said Clawson A. Hicks, agrees to vote said stock of the first party, within his reasonable discretion, to the best interest of the business of the corporation and said first party.

WITNESS OUR HANDS AND SEALS THIS 20 DAY OF APRIL, 1966.

THOMAS F. HANNON (SEAL)
CLAWSON A. HICKS (SEAL)

WITNESS: CARL GADDY, JR."

— — — —

"NORTH CAROLINA
WAKE COUNTY

STOCK VOTING PROXY

KNOW ALL MEN BY THESE PRESENTS that I, the undersigned stockholder in CAPITAL OUTDOOR ADVERTISING, INC., do hereby constitute and appoint Clawson A. Hicks my true and lawful proxy, for me and in my name and stead to attend all meetings of the stockholders of said company, both regular and special, held from this day forward, and at all of said meetings to cast all votes to which my said stock may be entitled upon all ques-

tions coming before said meetings, retaining the right, however, to withdraw this proxy provided said Clawson A. Hicks and the undersigned agree to cancel a certain contract relating to the handling of the voting rights of my said stock, said agreement being dated 20 April 1966, and by executing a withdrawal or proxy of later date or by written notice to said company.

WITNESS MY HAND AND SEAL THIS 20 DAY OF APRIL, 1966.

THOMAS F. HANNON (SEAL)

WITNESS: CARL GADDY, JR."

4. Stein first learned of the existence of these documents on 22 February 1967, at which time he was given a copy of each of them.

5. On 24 February 1967, Stein purchased 600 shares of stock from Hannon, which shares were transferred on the books of the corporation, the old certificate issued to Hannon being cancelled and a new certificate being issued to Stein.

6. Following such sale and transfer, Stein was the owner of 25,599.80 shares, Hicks of 13,775.40 shares and Hannon 11,644.80 shares.

7. Hicks, as president, called a special meeting of the stockholders to be held 5 April 1967. Prior to that meeting, Hicks received from Hannon a letter dated 1 April 1967 stating that Hannon thereby revoked the above agreement and the above proxy.

8. On 5 April 1967, such special meeting of the stockholders was held and all three of them were present.

9. At the stockholders' meeting, Hicks made a motion that Stein and Hannon be removed as directors. As president, Hicks ruled that he, Hicks, was entitled to vote his own 13,775.40 shares, the 11,644.80 shares still retained by Hannon and the 600 shares transferred from Hannon to Stein. Hicks, as president, refused to allow Hannon to vote the shares still owned by him and refused to allow Stein to vote the 600 shares acquired by him from Hannon.

10. As a result of votes taken and counted pursuant to such ruling by Hicks, as president, over the objections of Stein and Hannon, Hicks ruled that Stein and Hannon were removed as directors and that Bridger, one of Hicks' nominees, and Stein were elected to fill the resulting vacancies, Stein having nominated himself and exercised the right to cumulate his votes.

11. The terms to which Hannon and Stein had been originally elected directors not having expired and the notice of the meeting of stockholders not having stated the removal of a director as business to be transacted at the meeting, there were no vacancies on the board of directors at the time of such meeting.

Jordan, Morris & Hoke for respondent Clawson A. Hicks.
Teague, Johnson, Patterson, Dilthey & Clay by Robert M. Clay and Bob W. Bowers for appellee Howard L. Stein.

LAKE, J. The documents entitled "Agreement" and "Stock Voting Proxy" were executed contemporaneously as part of a single agreement or plan. They must, therefore, be construed together in order to determine what that agreement or plan contemplated. Apparently, the purpose of the paper designated "Stock Voting Proxy" was to make the one entitled "Agreement" effective, the parties seemingly being of the opinion that without the "Stock Voting Proxy" Hicks would have no authority to vote the stock then standing in the name of Hannon.

G.S. 55-68(b) provides:

> "(b) A proxy is not valid after the expiration of eleven months from the date of its execution unless the person executing it specifies therein the length of time for which it is to continue in force, or limits its use to a particular meeting, but no proxy, whether or not coupled with an interest or otherwise irrevocable by law, shall be valid after ten years from the date of its execution unless renewed or extended at any time for not more than ten years from the date of such renewal or extension."

The "Stock Voting Proxy" executed by Hannon on 20 April 1966 does not specify the length of time for which it was to continue in force. It is not limited to a particular meeting. Thus, by the terms of the statute, it automatically expired eleven months from 20 April 1966 and, therefore, could not affect the right of anyone to vote the shares to which it applied at the meeting held on 5 April 1967. We need not determine whether the provision in this document that Hannon retained the right to withdraw or terminate it if he and Hicks agreed to cancel the other document entitled "Agreement" would have prevented him from revoking it within its life span of eleven months. It could not extend the life of the proxy beyond that period since this provision is not a specification of the length of time for which the proxy was to continue.

The document entitled "Agreement" likewise contains no pro-

vision as to its intended duration. It recites the receipt by Hannon of $5.00 in consideration for its execution, but the testimony of Hicks is that he actually paid nothing. The document recites that it was executed because of Hannon's special confidence that Hicks had the ability and integrity to operate the business of the corporation and to vote the stock of Hannon to the best interest of Hannon. We note with interest that the only recorded use of the alleged power by Hicks was in his effort to remove Hannon as a director of the corporation and substitute his own nominee. The agreement recites that Hannon "transfers and assigns" to Hicks, for an unspecified time, the right to vote all of the shares then owned by Hannon, which would include the 600 shares subsequently transferred by him to Stein. In return, Hicks agreed to vote the stock "to the best interest of the business of the corporation and said first party," *i.e.*, Hannon.

Obviously, this document does not create a voting trust, so the provisions of G.S. 55-72 do not apply to it. The shares issued to Hannon were not transferred, or intended to be transferred, to Hicks, and the other requirements for a voting trust specified in G.S. 55-72(a) are not present.

G.S. 55-73(a) provides:

> "(a) An otherwise valid contract between two or more shareholders that the shares held by them shall be voted as a unit for the election of directors shall, if in writing and signed by the parties thereto, be valid and enforceable as between the parties thereto, but for not longer than ten years from the date of its execution."

This statute does not apply to the agreement in question. First, the agreement is not limited to the election of directors but applies to all corporate business to be transacted at meetings of the stockholders. Second, the agreement does not provide that the shares standing in the name of Hicks shall be voted as a unit with the shares standing in the name of Hannon. There is nothing in this agreement which purports to restrict the right of Hicks to sell all or any part of his shares as he may from time to time see fit to do. There is nothing in the agreement which purports to restrict a transferee of any shares originally issued to Hicks in the voting of such shares purchased by the transferee from Hicks.

G.S. 55-73(b) provides:

> "(b) * * * [N]o written agreement, to which *all* of the shareholders have actually assented, whether embodied in the charter or bylaws or in any side agreement in writing and signed by all the parties thereto, and which relates to any phase of the

affairs of the corporation, whether to the management of its business or division of its profits or otherwise, shall be invalid *as between the parties thereto* on the ground that it is an attempt by the parties thereto to treat the corporation as if it were a partnership or to arrange their relationships in a manner that would be appropriate only between partners. * * * A transferee of shares covered by such agreement who acquires them with knowledge thereof is bound by its provisions." (Emphasis added.)

This statute does not apply to the agreement in question because this agreement was not assented to by all of the shareholders as of the time it was executed, Stein having had no knowledge of it until ten months later and, obviously, was not a party to it. There is no showing that he ever "actually assented" to the agreement between Hannon and Hicks.

G.S. 55-73(c) provides:

"(c) An agreement between all *or less than all* of the shareholders, whether solely between themselves or between one or more of them and a party who is not a shareholder, is not invalid, as between the parties thereto, on the ground that it so relates to the conduct of the affairs of the corporation as to interfere with the discretion of the board of directors * * *" (Emphasis added.)

In *Wilson v. McClenny,* 262 N.C. 121, 136 S.E. 2d 569, this Court held an agreement by promoters that, after they became stockholders, they would use their voting power to procure and continue the employment of an individual by the corporation as its president for a fixed period at a specified salary could not be deemed void as against public policy, nothing else appearing. Speaking through Sharp, J., the Court there said:

"Thus, the Business Corporation Act clearly aligns North Carolina with the majority of jurisdictions which hold that a contract entered into between corporate stockholders by which they agree to vote their stock in a specified manner — including agreements for the election of directors and corporate officers — is not invalid unless it is inspired by fraud *or will prejudice the other stockholders.*" (Emphasis added.)

In the *McClenny* case, *supra,* there was nothing to indicate that, at the time the contract was made, the person to be so employed by the corporation as its president was not then competent to act in that capacity or that the specified salary was excessive. There was

nothing to indicate any purpose of the contract other than to assure that the then nonexistent corporation would, upon coming into existence, have for the specified period the services of a capable executive officer. As this Court there held, under the provisions of G.S. 55-73(c), such a contract, treated as a contract between shareholders, is not subject to attack on the ground that it interferes with the discretion of the board of directors. However, all that G.S. 55-73(c) does is to remove an agreement between stockholders from that specific objection to its validity.

G.S. 55-73(c) does not apply to the agreement involved here. This agreement is unlimited as to the matters upon which it purports to authorize Hicks to vote the shares held by Hannon in a stockholders' meeting, but it has no relation to and does not purport to interfere with or affect any exercise of a power vested in the board of directors. This, together with the recitals in the agreement of the confidence had by Hannon in the integrity of Hicks to vote the shares to the best interest of Hannon, leads us to construe this agreement as a mere continuing proxy, the duration of which is not specified therein. As such, it terminated eleven months after the date of its execution by virtue of G.S. 55-68(b) quoted above. It, therefore, could have no bearing upon the right of Hicks to vote the shares owned by Hannon and to which the agreement relates, including the 600 shares sold by Hannon to Stein.

These things being true, it is unnecessary for us to determine the effect upon the agreement of Hannon's attempt to revoke it or the effect, as to the 600 shares, of Hannon's subsequent sale of those shares to Stein. The agreement having expired by the passage of time and the force of the statute, there was no error in the conclusion of the trial judge that Stein, the record owner, was entitled to vote the 600 shares at the meeting of the stockholders on 5 April 1967.

Affirmed.

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

KING HOMES, INC., v. JACK BRYSON.

(Filed 28 February, 1968.)

1. Trial § 21—

On motion to nonsuit, the evidence must be taken as true and considered in the light most favorable to plaintiff, giving him the benefit of every reasonable inference which may be drawn therefrom.

2. Same—

Contradictions and inconsistencies in plaintiff's evidence are for the jury and do not warrant nonsuit.

3. Automobiles § 5—

A mobile home is a motor vehicle, G.S. 20-38(17), and is subject to the mandatory provisions of the statutes relating to the registration of motor vehicles in this State. G.S. 20-50, G.S. 20-52, G.S. 20-52(b), G.S. 20-52.1(a), G.S. 20-52.1(c).

4. Sales § 3—

A cash sale is one in which the title to the property and the purchase price pass simultaneously, and title remains in the seller until the purchase price is paid, even though possession of the property is delivered to the buyer.

5. Same—

Even though the contract be for a cash sale, title will pass to the buyer without payment if the seller by language or conduct waives his right to immediate cash payment, but the acceptance of a check is not such a waiver and if the check is dishonored title does not pass.

6. Payment § 1—

In the absence of an agreement to the contrary the giving of a check operates only as a conditional payment until the check is paid.

7. Sales § 3—

If the possessor of a chattel has no title, a *bona fide* purchaser from him acquires no property right therein unless the true owner authorizes or ratifies the sale or is estopped to assert his title.

8. Same—

In the absence of estoppel, the true owner who is induced to part with possession by fraud may reclaim his chattel from a *bona fide* purchaser from or under the person obtaining such possession, but if the true owner is induced to part with title by fraud, he may not reclaim the chattel from a *bona fide* purchaser from the fraudulent buyer.

9. Same; Estoppel § 4—

The fact that he has entrusted the bare possession of a chattel to another does not estop the true owner from denying such possessor's authority to sell or encumber it, but if the true owner invests the possession with *indicia* of title, the true owner is estopped to claim ownership of the chattel as against an innocent purchaser.

10. Same; Automobiles § 5— Owner held not estopped to assert title as against innocent purchaser from dealer giving worthless check for cash sale.

The plaintiff, a manufacturer of mobile homes, delivered a unit to a dealer with instructions for payment by certified check. Upon assurances by the dealer that he had sufficient funds in the bank, the manufacturer accepted the dealer's personal check and gave the dealer possession of the mobile home. The evidence fails to show that plaintiff invested the dealer with a manufacturer's certificate of origin or any other *indicia* of title.

Thereafter the dealer sold the mobile home to the defendant. The dealer's check was subsequently dishonored. *Held:* Plaintiff's evidence is sufficient to withstand a motion for nonsuit since, assuming the evidence to be true, plaintiff retained title to the mobile home and is not estopped to assert it even against an innocent purchaser.

11. Appeal and Error § 59—

On appeal from a judgment of nonsuit, the Supreme Court will discuss the evidence only to the extent necessary to give the reason for the decision and will not attempt to pass on the credibility of the witnesses or to reconcile conflicts in the evidence.

12. Appeal and Error § 45—

Exception not discussed in the brief is deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by plaintiff from *Morris, E.J.*, 11 September 1967 Civil Session, TRANSYLVANIA Superior Court.

Plaintiff's evidence would permit the jury to find the following facts:

1. King Homes, Inc. is a manufacturer of mobile homes in Elkhart, Indiana, and prior to 9 January 1964 was the owner of a 1964 model Commander Mobile Home, the subject matter of this action.

2. Twentieth Century Mobile Homes, Inc. of Asheville, North Carolina (Twentieth Century) was a dealer in mobile homes and had handled several King Homes units prior to the one in controversy.

3. The defendant Jack Bryson is a resident of Transylvania County, North Carolina. In November, 1963 he placed with Twentieth Century a custom order for a mobile home. This order was forwarded to plaintiff who manufactured a unit in conformity with the order and delivered it to Twentieth Century to be delivered to defendant Bryson. The original typed invoice dated 9 January 1964, which accompanied the unit, showed $3,938.00 to be due and contained the notation "C.O.D., Certified Check or Bank Money Order, Only!" The Manufacturer's Statement of Origin ordinarily accompanied a mobile home sale as part of the original transaction, but plaintiff's vice president gave contradictory testimony with reference to it. At one point on direct examination he testified that "the invoice, right here, this is a copy of the original accompanied the mobile unit as the mobile unit came down to Twentieth Century, as well as the Statement of Origin"; while at another point in his direct examination he stated that "the paperwriting defined as PX-1, I had that in my possession prior to the time of this sale — that the

purported sale took place from Twentieth Century to Jack Bryson. I have had that in my possession ever since the time that I acquired it. Until the present time, today. There was absolutely no other paperwriting issued regarding this mobile home now and regarding this ownership, other than this paperwriting identified as PX-1." (PX-1 was a plaintiff's Exhibit of "Manufacturer's Statement of Origin to a Motor Vehicle.") Plaintiff's driver delivered the mobile home unit to Twentieth Century at a time when the banks were closed, and it was impossible to get a certified check or a bank money order as stated on the invoice. Upon assurances by Dan Taylor, an official of Twentieth Century, that funds were in the bank to cover a check, plaintiff instructed its driver to accept a check from Twentieth Century and deliver the unit. About a week thereafter, Twentieth Century delivered the mobile home unit to defendant Jack Bryson and received from him the sum of $3,000.00 plus a used trailer in full payment. The Manufacturer's Statement of Origin was never shown or exhibited to defendant, either prior to or at the time of the sale of the unit to him. Defendant later demanded the Statement of Origin from the Twentieth Century salesman and was informed that either the manufacturer or Mr. Dan Taylor had it. It was never delivered to defendant.

4. The check given by Twentieth Century to the plaintiff was returned by the bank upon which it was drawn marked "Insufficient Funds", and plaintiff has never received any sum whatsoever in payment for this mobile home unit. The net purchase price of the unit was $3,938.00, f.o.b. Asheville.

5. Initially, plaintiff was looking to Twentieth Century for payment and did not expect payment from defendant. Plaintiff's vice president, Howard Lesher, came to Asheville to institute a suit against Twentieth Century on the worthless check but refrained from doing so because Dan Taylor, the official of Twentieth Century with whom plaintiff had dealt, was already in jail for reasons not disclosed by the record. No suit has ever been instituted against Twentieth Century or Dan Taylor. Rather, plaintiff instituted this action against defendant Jack Bryson, alleging ownership of the mobile home unit in question and seeking immediate possession of same by claim and delivery or, if actual possession cannot be had, recovery of the sum of $3,938.00 with costs. Defendant posted a replevin bond, retained possession of the property and asserted ownership in himself.

Plaintiff contends that Twentieth Century practiced a fraud upon it to obtain possession of the mobile home unit in question by falsely representing that it had money in the bank upon which its

check was drawn in an amount sufficient to pay the check; that such representation was false to the knowledge of Twentieth Century; that Twentieth Century intended for plaintiff to rely upon such representation, which plaintiff in fact did to its prejudice. Plaintiff further contends that it retained legal title to the property and therefore has a right to repossess it or recover its value even from an innocent purchaser.

Defendant admits plaintiff sold and delivered said mobile home to Twentieth Century and asserts that he bought it in good faith and paid full value without knowledge of any defect in Twentieth Century's title to it. Defendant further pleads that plaintiff is estopped by its conduct to assert title to the property.

Plaintiff offered in evidence (1) Manufacturer's Statement of Origin (PX-1), (2) the worthless check payable to King Homes, Inc., dated January 20, 1964 and signed by Dan Taylor (PX-2), and (3) the invoice for the mobile home dated January 9, 1964 (PX-3).

At the close of plaintiff's evidence, defendant's motion for compulsory nonsuit was allowed and plaintiff appeals.

S. Thomas Walton, attorney for plaintiff appellant.

Redden, Redden & Redden by Monroe M. Redden, Jr., attorneys for defendant appellee.

HUSKINS, J. It is axiomatic that on motion to nonsuit the evidence must be taken as true and considered in its light most favorable to the plaintiff. Plaintiff is entitled to the benefit of every reasonable inference which may be drawn therefrom. *Insurance Co. v. Storage Co.,* 267 N.C. 679, 149 S.E. 2d 27; *Higdon v. Jaffa,* 231 N.C. 242, 56 S.E. 2d 661. Contradictions and inconsistencies in plaintiff's evidence are for the jury where the evidence, taken in its most favorable light to the plaintiff, makes out a *prima facie* case. *Watt v. Crews,* 261 N.C. 143, 134 S.E. 2d 199; *Nixon v. Nixon,* 260 N.C. 251, 132 S.E. 2d 590; *Smith v. Corsat,* 260 N.C. 92, 131 S.E. 2d 894. All conflicts in plaintiff's evidence must be resolved in his favor. *Raper v. McCrory-McLellan Corp.,* 259 N.C. 199, 130 S.E. 2d 281.

The judgment of nonsuit cannot stand unless (1) defendant acquired title to the property from Twentieth Century, or (2) plaintiff is estopped to deny defendant's title.

A mobile home is classified by statute as a motor vehicle. G.S. 20-38(17). When a manufacturer transfers a new motor vehicle to another he is required, at the time of transfer, to supply the transferee with a manufacturer's certificate of origin assigned to the transferee. G.S. 20-52.1(a). Any dealer who transfers a new ve-

hicle to a consumer-purchaser is required, at the time of transfer, to give the purchaser the proper manufacturer's certificate assigned to the transferee. G.S. 20-52.1(c). (A revision of this subsection contained in Chapter 863 of the 1967 Session Laws was effective June 21, 1967 and has no pertinence here.) A mobile home is designed to be operated upon the highways; and an owner who intends to so operate it is required to make application to the Department of Motor Vehicles for, and obtain, the registration thereof and issuance of a certificate of title for such vehicle. G.S. 20-50; G.S. 20-52. When the application for registration and certificate of title refers to a new vehicle purchased from a manufacturer or dealer, the application must be accompanied by a manufacturer's certificate of origin that has been properly assigned to the applicant. G.S. 20-52(b). These statutes are mandatory and not merely directory. *Hawkins v. Finance Corp.*, 238 N.C. 174, 77 S.E. 2d 669.

In passing on the rights and liabilities of the parties, we must consider the relevant rules of law with respect to cash sales. These rules evolve from many cases in this and other jurisdictions and have been assembled in a scholarly opinion by Ervin, J., in *Wilson v. Finance Co.*, 239 N.C. 349, 355, 79 S.E. 2d 908, 913, and are quoted, except where summarized, as follows:

> "1. A cash sale is one in which the title to the property and the purchase price pass simultaneously, and the title remains in the seller until the purchase price is paid, even though possession of the property is delivered to the buyer. [Citations omitted.]
>
> "2. The seller may waive his contractual right to the immediate cash payment of the purchase price in a sale for cash and permit the title to pass to the buyer before the payment of the purchase price is made by language or conduct manifesting an intention on his part to abandon or relinquish his contractual right rather than to insist upon it. [Citations omitted.] But he does not waive his contractual right by taking a check, which subsequently proves to be worthless, in payment for the property sold for cash. [Citations omitted.]
>
> "3. In the absence of an agreement to the contrary, the delivery and acceptance of a check does not constitute payment of the item covered by it until the check itself is paid by the bank on which it is drawn. [Citations omitted.] It necessarily follows that where the seller contracts to sell a chattel to the buyer for cash, and the seller accepts a check from the buyer as a means of payment of the cash and delivers the chattel to the

buyer in the belief that the check is good and will be paid on presentation, no title whatever passes from the seller to the buyer until the check is paid; and the seller may reclaim the chattel from the buyer in case the check is not paid on due presentation. [Citations omitted.]

"4. Even a *bona fide* purchaser of a chattel acquires no property right in it at common law or in equity as against the true owner, if it is sold by a third person who, although in possession, has no title to it, unless the true owner authorizes or ratifies the sale, or is precluded by his own conduct from denying the third party's authority to make it. [Citations omitted.]

"5. . . . [I]n the absence of an estoppel, one is not entitled to protection as a *bona fide* purchaser unless he holds the legal title to the property in dispute. [Citations omitted.] As a consequence, an owner who is induced by the fraud of the buyer to part with the possession of his chattel, and no more, can reclaim it from a *bona fide* purchaser from or under the fraudulent buyer, unless the *bona fide* purchaser can bring himself within the protection of some principle of estoppel. [Citations omitted.] But an owner who is induced by the fraud of the buyer to part with the legal title to his chattel cannot recover it from a *bona fide* purchaser from or under the fraudulent buyer." [Citations omitted.]

6. Although there is a conflict of authority, North Carolina adheres to the rule that on a cash sale of personal property the legal title remains in the seller until the purchase price is paid, even though the seller accepts a check from the buyer as a means of payment of the cash and delivers the property to the buyer. *Motor Co. v. Wood,* 237 N.C. 318, 75 S.E. 2d 312.

7. The true owner of a chattel may deny the authority of its possessor to sell or encumber it and is not estopped to do so merely because he entrusts the possessor with its possession. However, if the true owner entrusts the possession of his chattel to another and at the same time clothes him with the *indicia* of title to it, the true owner is estopped to claim ownership as against an innocent purchaser who pays value to the possessor in reliance on the *indicia* of title. *Hawkins v. Finance Corp., supra* (238 N.C. 174, 77 S.E. 2d 669); *Motor Co. v. Wood, supra.*

Applying the foregoing principles of law to the evidence, considered in its light most favorable to plaintiff as we are required to do, it is apparent that title to the mobile home in question remained

in the plaintiff and never passed to Twentieth Century because its check was dishonored by the bank upon which it was drawn. Since the evidence, when considered most favorably to plaintiff, fails to show that plaintiff invested Twentieth Century with the Manufacturer's Certificate of Origin or any other *indicia* of title upon which defendant relied, plaintiff is not estopped on this record from asserting its title even against an innocent purchaser. *Hawkins v. Finance Corp., supra; Bank v. Winder,* 198 N.C. 18, 150 S.E. 489; *Motor Co. v. Wood, supra; Ellison v. Hunsinger,* 237 N.C. 619, 75 S.E. 2d 884. In case of a bailment of personal property for purpose of sale, the result is the same. Nothing else appearing, mere possession by bailee of the bailor's goods, with authority as agent to sell them, works no estoppel upon the bailor to deny the title of an innocent purchaser. *Hawkins v. Finance Corp., supra;* 8 Am. Jur. 2d, Bailments § 92.

Assuming the truth of plaintiff's evidence, as we must when evaluating a motion for nonsuit, defendant acquired no title to the mobile home from Twentieth Century, and plaintiff is not estopped to assert its title to the property in controversy.

The defendant has not been heard. We have considered only the plaintiff's evidence most favorable to it. As stated by Higgins, J., for the Court, in *Poindexter v. Bank,* 244 N.C. 191, 92 S.E. 2d 773, "It is generally the practice of this Court when a judgment of nonsuit is reversed and the case sent back to the Superior Court for trial on the merits, to discuss the evidence only to the extent necessary to give the reason for the decision. This Court does not attempt to pass on the credibility of the witnesses or to reconcile conflicts in the evidence." Our review of the evidence for purposes of this decision is not intended to influence the jury at the trial.

Plaintiff's remaining exception is not discussed in its brief and is deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810; *State v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781; *State v. Cole,* 270 N.C. 382, 154 S.E. 2d 506.

For the reasons stated, we are of the opinion that plaintiff's evidence makes out a case for the twelve whose prerogative it is to pass upon its weight and credibility. *State v. Squires,* 272 N.C. 402, 158 S.E. 2d 345. Judgment of nonsuit was improvidently entered and is

Reversed.

IN THE MATTER OF PAUL B. EDMUNDSON, JR., ADMINISTRATOR OF THE ESTATE OF SANDRA LOU WALZ, DECEASED.

(Filed 28 February, 1968.)

1. Executors and Administrators § 2—

The clerk of the Superior Court of the county in which a nonresident dies leaving assets in this State has authority to appoint an administrator for the decedent. G.S. 28-1(4).

2. Same; Executors and Administrators § 3—

The term "assets" as used in G.S. 1-28(3) and in G.S. 1-28(4) includes intangibles.

3. Same—

Administrator's potential right of exoneration against the automobile liability insurer of the decedent is a chose in action and is, therefore, an intangible asset of the estate.

4. Executors and Administrators § 3—

A policy of automobile liability insurance issued in the name of the deceased by an insurer qualified to do business in this State or otherwise subject to service of process is an asset within the purview of G.S. 28-1(4) so as to support the appointment of an ancillary administrator.

5. Trial § 55—

An agreed statement of facts must contain every essential element without omission, and whether the facts stipulated include all facts necessary to a decision is a question of law for the court.

6. Trial § 56—

Where a case is submitted for decision on stipulated facts, and the facts contained in the stipulation are insufficient for a determination of the issues raised by the pleadings, the court should proceed to trial to determine upon evidence the crucial factual issues not covered by the stipulations.

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

APPEAL by Grange Mutual Casualty Company from an order entered July 5, 1967, in chambers, by *Cohoon, J.*, then holding the courts of the Eighth Judicial District, from WAYNE, docketed and argued as No. 368 at Fall Term 1967.

Judge Cohoon's judgment affirms an order entered June 5, 1967, by the clerk of the superior court, which denied the petition of Grange Mutual Casualty Company (Casualty Company) that Paul B. Edmundson, Jr., be removed as the administrator of the estate of Sandra Lou Walz, deceased.

The hearings before the clerk and Judge Cohoon were on the stipulated facts summarized below.

Sandra Lou Walz (Sandra), a resident of Ohio, died intestate in

Wayne County, North Carolina, on July 16, 1963, as a result of a collision in Goldsboro, Wayne County, between a 1963 Corvair automobile, owned and operated by Sandra, and an automobile operated by Elizabeth G. Kirchner (Kirchner), a resident of Maryland.

On August 12, 1963, in Franklin County, Ohio, Luther Walz was appointed administrator of Sandra's estate. Administration was completed and closed on April 21, 1964, and said administrator was discharged.

On June 15, 1966, John H. Kerr, III, an attorney for Kirchner, filed a petition with the Clerk of the Superior Court of Wayne County, North Carolina, requesting the appointment of an administrator of Sandra's estate "as provided for under the provisions of G.S. Section 28-1, Subsection 4." In brief summary, the petition of Mr. Kerr asserted that Kirchner had a good cause of action against Sandra's estate for personal injuries Kirchner sustained as a result of said collision of July 16, 1963.

On June 23, 1966, Paul B. Edmundson, Jr., applied to said clerk for appointment, and was appointed and duly qualified, as administrator of Sandra's estate. His application sets forth that Sandra's age on July 16, 1963, the date of her death, was twenty-one, and that her father, Luther W. Walz, of Columbus, Ohio, was her only heir. Mr. Edmundson, as administrator, filed an inventory in which he listed as assets as of July 16, 1963, a 1963 Corvair, having an appraised value of one hundred dollars, and a liability insurance policy with Grange Mutual Casualty Company of Columbus, Ohio, "to protect her estate from civil liability."

On July 5, 1966, a civil action entitled *"Elizabeth G. Kirchner vs. Paul B. Edmundson, Jr., Administrator of the Estate of Sandra Lou Walz,"* was instituted in the Superior Court of Wayne County, North Carolina, to recover damages for personal injuries as the result of said collision. The plaintiff alleged said collision and her injuries were proximately caused by the negligence of Sandra. Mr. Edmundson, in his capacity as administrator, was personally served with summons and a copy of the complaint on July 7, 1966, and thereupon gave immediate notice of the pendency of said action to the Casualty Company.

The Casualty Company is an Ohio corporation duly authorized to issue policies of automobile liability insurance. Prior to July 16, 1963, it had issued in the name of Sandra Lou Walz a liability insurance policy insuring her, within the limits specified in said policy, against liability for personal injury and property damage sustained by others arising out of the operation of her 1963 Corvair. This policy was in full force and effect on July 16, 1963.

Mr. Edmundson has never had possession of Sandra's 1963 Corvair; nor has he had possession of the liability insurance policy issued to her by the Casualty Company; nor has he had possession of any other tangible personal property belonging to Sandra's estate. The 1963 Corvair was duly disposed of in the administration of Sandra's estate.

On January 5, 1967, a petition was filed by W. Powell Bland, an attorney for the Casualty Company, in which, after setting forth facts substantially as stated above, he requested that the clerk of the superior court remove Mr. Edmundson as administrator of Sandra's estate.

The clerk denied said petition of removal filed by Mr. Bland. Upon appeal, Judge Cohoon affirmed the clerk's order. The Casualty Company excepted and appealed to this Court.

W. Powell Bland for petitioner appellant Grange Mutual Casualty Company.

Taylor, Allen, Warren & Kerr for respondent appellee Elizabeth G. Kirchner.

BOBBITT, J. The petition for appointment filed by Mr. Kerr must be considered the petition of Kirchner, his client; and the petition for removal filed by Mr. Bland must be considered the petition of Casualty Company, his client.

The domicile and residence of Sandra were in Ohio. The domiciliary administration there, in which the 1963 Corvair "was duly disposed of," was completed April 21, 1964. The petition for appointment in Wayne County, North Carolina, of an ancillary administrator was filed June 15, 1966.

G.S. 28-1 provides that the clerk of the superior court of each county has jurisdiction, within his county, to grant letters of administration, in cases of intestacy, "(4) Where the decedent, not being domiciled in this State, died in the county of such clerk, *leaving assets in the State*, or assets of such decedent thereafter come into the State." (Our italics.)

The term "assets," as used in G.S. 1-28(3) and in G.S. 1-28(4), includes intangibles. *Cannon v. Cannon*, 228 N.C. 211, 45 S.E. 2d 34; *In re Will of Brauff*, 247 N.C. 92, 100 S.E. 2d 254; *In re Scarborough*, 261 N.C. 565, 135 S.E. 2d 529.

The policy issued by the Casualty Company to Sandra contains provisions requiring the Casualty Company to discharge, within the limits specified therein, Sandra's legal liability for personal injuries and property damages caused by the negligent operation of her car.

Nothing else appearing, we must assume the policy required the Casualty Company to defend at its own expense suits instituted against Sandra to determine and enforce any alleged legal liability growing out of the operation of her car, and that the benefits of the policy accompanied Sandra wherever the car was operated, including her operation thereof in Wayne County, North Carolina. Unquestionably, this policy was an asset of Sandra during her lifetime and an asset of her estate upon her death. *Bank v. Hackney,* 266 N.C. 17, 22, 145 S.E. 2d 352, 357.

The personal injury action Kirchner asserts is transitory. *Alberts v. Alberts,* 217 N.C. 443, 8 S.E. 2d 523; *Bogen v. Bogen,* 219 N.C. 51, 12 S.E. 2d 649. The appointment in Wayne County of an ancillary administrator of Sandra's estate was a prerequisite to the institution and maintenance thereof. If Edmundson's appointment is valid, the Casualty Company, upon the facts stipulated and nothing else appearing, would be obligated to defend the pending suit and, within the limits specified by its policy, to discharge any legal liability of Sandra established therein. The question is whether, upon Sandra's death, the policy is *an asset in North Carolina* within the meaning of G.S. 28-1(4).

The potential right of an administrator of Sandra's estate against the Casualty Company is a chose in action, an intangible asset. As stated by Denny, J. (later C.J.), in *Cannon v. Cannon, supra:* "(A) simple debt due a decedent's estate, which is being administered in a foreign jurisdiction, constitutes a sufficient asset upon which to base a proceeding for the appointment of an ancillary administrator. (Citations.) The debt is an asset where the debtor resides, even though a note has been given therefor, without regard to the place where the note is held or where it is payable. (Citation.)"

The Casualty Company, the debtor, is an Ohio corporation. However, according to the great weight of authority, the deceased insured's potential right of exoneration constitutes a sufficient asset to support the appointment of an (ancillary) administrator in the state where the alleged liability of the insured was incurred *and where such administrator can obtain service of process on the insurer* and thereby enforce the insurer's liability to the estate of the deceased. *Robinson v. Dana's Estate,* 87 N.H. 114, 174 A. 772, 94 A.L.R. 1437; *Gordon v. Shea,* 300 Mass. 95, 14 N.E. 2d 105; *In re Vilas' Estate,* 166 Or. 115, 110 P. 2d 940; *Furst v. Brady,* 375 Ill. 425, 31 N.E. 2d 606, 133 A.L.R. 558; *In re Breese's Estate,* 51 Wash. 2d 302, 317 P. 2d 1055; *Miller v. Stiff,* 62 N.M. 383, 310 P. 2d 1039; *Kimbell v. Smith,* 64 N.M. 374, 328 P. 2d 942; *Campbell v. Davis,* 145 So. 2d 725 (Ala. 1962); *In re Riggle's Will,* 188 N.Y.S. 2d 622; *In re Kreso-

vich's Estate, 168 Neb. 673, 97 N.W. 2d 239; *Tweed v. Houghton,* 103 Ga. App. 57, 118 S.E. 2d 496; *In re Preston's Estate,* 193 Kan. 145, 392 P. 2d 922, overruling *In re Estate of Rogers,* 164 Kan. 492, 190 P. 2d 857; *In re Estate of Gardinier,* 40 N.J. 261, 191 A. 2d 294, overruling *In re Roche,* 16 N.J. 579, 109 A. 2d 655. See Annotation, 67 A.L.R. 2d 936, *et seq.,* superseding 94 A.L.R. 1441, supplemented in 133 A.L.R. 565.

The factual situation in *In re Breese's Estate, supra,* is similar to that now under consideration with one exception. There it appeared affirmatively that the insurer had been licensed to do business in the State of Washington and had appointed the Commissioner of Insurance to accept service of process. Rosellini, J., speaking for the Supreme Court of Washington, said: "Justice and convenience are served by the conclusion we reach that a liability, such as the one involved in this case, *exists wherever it can be enforced* and is therefore an 'asset' sufficient to support the appointment of an administrator, even though it is the only asset subject to his administration." (Our italics.)

In *In re Scarborough, supra,* a resident of Michigan, en route to Florida, died from asphyxiation in a motel room in South Carolina. Domiciliary administration was in Michigan. The question was whether the Clerk of the Superior Court of Mecklenburg County, North Carolina, had authority to appoint an ancillary administrator. As asserted cause of action for wrongful death against a defendant *upon whom service of process could be had in Mecklenburg County* was the only asset of decedent's estate alleged to have a situs in North Carolina. The appointment was held valid. This Court, in opinion by Rodman, J., said: "The fact that a personal representative could obtain a judgment *in personam* on the cause of action which arose in South Carolina was sufficient to authorize the Clerk of the Superior Court of Mecklenburg County to appoint an ancillary administrator."

Appellee directs our attention to *In re Leigh's Estate,* 6 Utah 2d 299, 313 P. 2d 455. A collision in Utah resulted in injuries to a Utah resident and death to a resident of Minnesota. The Utah resident, seeking to assert a personal injury action, obtained the appointment of an administrator of the estate of the Minnesota resident in the Utah county where the collision had occurred. A Wisconsin insurance company had issued a liability policy to the deceased Minnesota resident. The Wisconsin insurer had never qualified to do business and was not doing business in Utah. Notwithstanding, the Supreme Court of Utah upheld the appointment. It was stated that, under the Utah statute, "no property within this State is necessary for the

appointment and functioning of an administrator within this State." In this respect, G.S. 28-1(4) is quite different from the Utah statutes.

In our opinion, and we so hold, the liability insurance policy was an asset in North Carolina within the meaning of G.S. 28-1(4) *if*, but *only if*, the Casualty Company was qualified to do business in this State or otherwise subject to service of process herein. The "Agreed Statement of Facts" is silent as to this essential and determinative fact.

Paragraph 13 of the "Agreed Statement of Facts" reads as follows: "That the agreed statement of facts stipulated herein are all of the facts necessary for the court to make its decision upon the petition of Grange Mutual Casualty Company to remove the said Administrator." We do not agree. "An agreed statement must contain every essential element without any omission, . . ." 83 C.J.S., Stipulations § 10(f)(9), p. 22. Whether the facts stipulated include all facts necessary to decision is a question of law. "(W)hile the parties to an action or proceeding may admit or agree upon facts they cannot make admissions of law which will be binding upon the courts." *Moore v. State*, 200 N.C. 300, 156 S.E. 806; *Auto Co. v. Insurance Co.*, 239 N.C. 416, 419, 80 S.E. 2d 35, 38; 83 C.J.S., Stipulations § 10(e), p. 14; 50 Am. Jur., Stipulations § 5.

The applicable rule is as follows: "When a case is submitted for decision on stipulated facts, and no evidence is offered, the court should not proceed to determine the cause unless *all facts* essential to a determination of the crucial issues raised by the pleadings are included in the stipulations. Rather, in such case, the court should proceed to trial to determine upon evidence the crucial factual issues not covered by the stipulations. In the instant case, the court erred in failing to follow this procedure." *Swartzberg v. Insurance Co.*, 252 N.C. 150, 157, 113 S.E. 2d 270, 277. See also *New Bern v. White*, 251 N.C. 65, 110 S.E. 2d 446, and cases cited.

For the reasons stated, the judgment of the court below is vacated and the cause remanded to the end that there may be a determination as to whether the Casualty Company was qualified to do business in this State or otherwise subject to service of process herein; and, after such factual determination has been made, for further hearing and decision in the light of the principles of law stated herein.

Judgment vacated and cause remanded.

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

JOHAH R. SNEED, ADMINISTRATOR, v. LIONS CLUB OF MURPHY, NORTH CAROLINA, INC.

(Filed 28 February, 1968.)

1. Trial § 21—

On motion to nonsuit, plaintiff's evidence must be considered in the light most favorable to him and with all contradictions resolved in his favor.

2. Trial § 18—

It is the province of the court to determine whether the evidence, circumstantial, direct, or a combination of both, considered in the light most favorable to plaintiff is sufficient to permit a legitimate inference of the facts essential to recovery, and it is the province of the jury to weigh the evidence and to determine what it proves or fails to prove.

3. Appeal and Error § 59—

On appeal from a judgment of nonsuit, the Supreme Court will discuss the evidence only to the extent necessary to show the legal basis for decision.

4. Negligence § 37b—

The operator of a swimming pool for hire is not an insurer of the safety of his invitees, but he does, however, owe them the duty to exercise due care to maintain his premises in a reasonably safe condition for the purpose for which he offers them to the public.

5. Same—

The operator of a swimming pool for hire is under a duty to mark the depths of the water, to provide a suitable number of competent attendants, and to institute a timely search for a missing bather.

6. Same—

Plaintiff's evidence was to the effect that her intestate, a 14 year old boy who was unable to swim, entered defendant's pool which had a range in depth from 2½ to 8 feet, that a 16 year old lifeguard was the only attendant in charge, that the only notice as to the depth of the water was at the deep end of the pool, that a lime treatment of the water rendered objects invisible at a depth of more than two feet, and that upon plaintiff's inquiry as to her son's disappearance the guard made a belated search of the pool where the body was discovered. *Held:* The evidence is sufficient to be submitted to the jury on the issue of defendant's negligence.

APPEAL by plaintiff from *Thornburg, J.*, August, 1967 Session, CHEROKEE Superior Court.

The plaintiff, administrator, instituted this civil action on January 31, 1967 to recover for the wrongful death of his intestate, Stanley Roy Davis, who had lost his life by drowning in a swimming pool operated and maintained by the defendant, Lions Club of Murphy, North Carolina, Inc. The plaintiff alleged the intestate's death was proximately caused by the defendant's negligence, in several particulars: (1) By failing to have competent personnel, in-

cluding competent lifeguards, at the pool, or proper equipment for reviving those who have been strangled or are in distress; (2) By placing in a pool of clear water a substance which discolored it to the extent the depth could not be ascertained more than 2 feet from the surface; (3) By failing to mark the various stages of water depth on the side of the pool; and (4) By the failure of the single 16 year old lifeguard to discover the body or search the pool after the boy's absence was made known.

According to the evidence offered at the trial, Stanley Roy Davis, age 14, paid the admission fee of 25¢ charged by the defendant for admission to its swimming pool. He entered the enclosure surrounding the pool when it opened for patrons at 1:00 on August 18, 1966. The water in the concrete pool was approximately 2½ feet deep at one end and sloped downward to a depth of 8 feet at the lower end, where the outlet and the springboard were located. Stanley Roy Davis was unable to swim.

Prior to the opening of the pool on August 18, 1966, the defendant's agents had treated the water in the pool by dumping into it a quantity of lime, which caused the water to become discolored and milky. Objects in the water were indistinguishable at a depth of more than 2 feet. One of the agents who treated the water with lime testified that before the lime treatment the water was clear. The witness, if permitted, would have testified that this was the first time that lime had been placed in the water. This evidence was excluded on defendant's objection.

Robert Allen Jordan, adversely examined by the plaintiff, testified that he arrived at the pool about 3:00, relieved another lifeguard, and went on duty as the sole guard at 3:30. He was then 16 years of age, had a junior lifeguard certificate, and had served as a junior lifeguard for one week the previous summer. He had served as lifeguard at the pool for almost two months prior to August 18, 1966. He admitted that he and another employee placed the lime in the pool on the morning of August 18. "As a result of making it murky, you could not see the bottom of the pool. . . . Prior to putting lime in it, the water was clear."

The evidence disclosed that at about the middle of the pool, where the water was approximately 5 feet deep, there was a rope fastened to each side of the pool by a bolt, or hook, with floats between the two anchors. There were other bolts, or hooks, for similar ropes, but no ropes were attached. There was this sign at the lower end of the pool: "Diving Board — Twelve feet."

Stanley's mother left him at the pool with some of his relatives and was gone for a short time. She was seen to return to the park-

ing area near the pool, leave her car and enter the enclosed area. A witness passed her at the entrance. He stated that he had seen Stanley in the shallow part of the pool within 30 seconds of the time he left the pool and met Stanley's mother. As Stanley's mother entered, a large number of persons (50 to 75), including children, were in the water. She failed to see Stanley and complained to the guard on duty, who stated he had just come on and advised her to "Ask him" and pointed to an automobile which the other guard was entering. He drove off before she was able to get to his automobile.

A search around the pool and in the restroom failed to locate Stanley. Finally, the guard went into the pool, near its lower end, and discovered the body, which was removed from the water. Efforts at artificial respiration were unsuccessful.

Dr. Paul E. Hill testified after examination that in his opinion Stanley died as a result of drowning. He further testified that anyone who is without respiration for 3 minutes has 75% chance for survival. If the time is 5 minutes, the chance for survival is 25%.

The evidence disclosed that the owners of the pool charged an admission fee of 50¢ for grown ups and 25¢ for children. Stanley had paid his fee.

Dr. Quinn Constantz, found by the Court to be an expert in "Aquatics, Lifesaving and Administration of Swimming Pools," in answer to a hypothetical question, stated (admitted over defendant's objection) that it is not in keeping with accepted procedures in the operation of swimming pools . . . that a 16 year old lifeguard with only a junior lifesaving certificate . . . was the sole lifeguard at a pool where 60 to 65 people were swimming.

The defendant filed answer and set up certain defenses, in addition to a denial of negligence. At the close of the plaintiff's evidence, the Court, on defendant's motion, entered judgment of involuntary nonsuit. The plaintiff excepted and appealed.

T. M. Jenkins, Coward & Coward, Potts & Hudson by Jack H. Potts for plaintiff appellant.

Clarence N. Gilbert for defendant appellee.

HIGGINS, J. The sole question before the Court for review is whether the plaintiff's evidence was sufficient to survive the defendant's motion for nonsuit. On this question, all evidence (which the Court admitted) must be considered in the light most favorable to the plaintiff. *Aasar v. Charlotte,* 265 N.C. 494, 144 S.E. 2d 610. This is so because the jury *may* find according to plaintiff's evidence. *Barefoot v. Joyner,* 270 N.C. 388, 154 S.E. 2d 543; *Taylor v. Brake,*

245 N.C. 553, 96 S.E. 2d 686; *Scarborough v. Veneer Co.*, 244 N.C. 1, 92 S.E. 2d 435. It is the province of the court to determine whether the evidence, circumstantial, direct, or a combination of both, considered in the light most favorable to the plaintiff, is sufficient to permit a legitimate inference of the facts essential to recovery; and it is the province of the jury to weigh the evidence and to determine what it proves or fails to prove. *Thomas v. Morgan*, 262 N.C. 292, 136 S.E. 2d 700; *Lane v. Dorney*, 252 N.C. 90, 113 S.E. 2d 33, overruling the same case on rehearing, 250 N.C. 15.

In the statement of facts the Court has detailed only that which tends to support the plaintiff's cause of action. On the question of nonsuit, even contradictions in the plaintiff's evidence are to be resolved in his favor. Ordinarily, when the Court reverses a nonsuit, it discusses the evidence only to the extent necessary to show the legal basis for decision. *Poindexter v. Bank*, 244 N.C. 191, 92 S.E. 2d 773. At the new trial, the jury should be uninfluenced by this Court's analysis of the evidence. Only that which is favorable to the plaintiff has been reviewed.

This Court determines as a matter of law what constitutes legal evidence sufficient for jury consideration. Its weight is exclusively a jury function. *State v. Squires*, 272 N.C. 402, 158 S.E. 2d 345.

Many courts and commentators have discussed the duties which swimming pool operators owe their paying invitees. The following appears to be a fair summary of the rules applicable to the questions presented in this appeal. The operator of a swimming pool for hire does not insure the safety of his invitees. He does, however, owe them the duty to exercise due care to see that his premises are reasonably safe for the purposes for which he offers them to the public. He is under a duty to install and maintain proper signs warning patrons of dangerous depths of the water. He should exercise ordinary care to provide a sufficient number of competent attendants to supervise the bathers and to rescue any of those who appear to be in danger. He should institute a timely search for a missing bather on ascertaining that such bather may have been lost in the water. *Hahn v. Perkins*, 228 N.C. 727, 46 S.E. 2d 854, citing many cases, including 33 A.L.R. 598, 58 Am. St. Rept. 709.

> "The proprietor of a public bathing resort has a duty to place and maintain signs to indicate water depths and to provide adequate supervision. He is under a duty, not only to be prepared to rescue those who may get into danger while bathing, but also to act with promptness and to make every effort possible to locate those who are known to be missing, and, if necessary, to rescue and resuscitate the missing person. Thus, he will be

held liable for a drowning which occurs as a result of the inattention of a lifeguard, or for the failure to perform the duty of effecting a prompt rescue. . . ." 4 Am. Jur., Amusements and Exhibitions, § 84.

"Proprietors of a bathing resort, in discharging the duty of ordinary care for the safety of patrons, may be obliged to keep someone on duty to supervise bathers and rescue any apparently in danger; and may also be held liable for negligence if, on information that a bather is missing, they are tardy in instituting search." 22 A.L.R. 636. (This rule applies to invitees. *Adams v. Enka Corp.*, 202 N.C. 767, 164 S.E. 367.)

In this case we have a 14 years old boy who could not swim entering a swimming pool in which the depth of the water increased from 2½ to 8 feet. The only notice of depth marked on the pool was this at this deep end: "Diving Board — Twelve feet". In the middle of the pool, a distance of 50 feet from either end, there was a rope secured at each side of the pool at a point where the water had a depth of 5 feet.

At the time the plaintiff's intestate drowned, more than 50 persons were in and around the pool, many of them children. One junior lifeguard, 16 years of age, was in charge. When the mother missed her son, she asked him if he had seen a little white headed boy. He directed her to inquire of the guard whom he had relieved and who was in the act of leaving the parking lot outside the enclosure. The guard drove away before the mother was able to get to him. According to the evidence of the lifeguard, the water in the pool was so murky as a result of the lime treatment that an object in the water could not be seen at a depth of more than 2 feet.

The facts in evidence, when tested by the applicable rules of law, made out a case for the jury. The judgment of nonsuit is

Reversed.

STATE v. JAMES ROBERT PIKE.

(Filed 28 February, 1968.)

1. Criminal Law § 103—

In our system of jurisprudence the functions of the court are separate from those of the jury; it is the duty of the court to pass on the competency and admissibility of the evidence and the jury may not invade the province of the court in this respect.

2. Criminal Law § 84—

On defendant's motion to suppress the evidence of the State on the ground that it was procured by an unlawful search, the procedure to be followed by the trial court is the same as the inquiry into the voluntariness of a confession.

3. Same—

When the defendant objects to the admissibility of the State's evidence on the ground that it was obtained by unlawful search, 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 as to the lawfulness of the search and seizure and to make findings of fact thereon, and such findings are binding on appeal if supported by competent evidence.

4. Same; Constitutional Law § 30—

Upon the *voir dire* to determine the lawfulness of a search and seizure, it is reversible error for the trial court to deny defendant the opportunity to offer evidence in his behalf.

5. Criminal Law § 177—

On appeal from the denial of motion of nonsuit, defendant is not entitled to a dismissal on the ground that incompetent evidence was admitted, since the State may be able to offer sufficient competent evidence at the next trial.

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

APPEAL by defendant from *Crissman, J.*, 17 July 1967 Criminal Session of GUILFORD, High Point Division. This case was docketed and argued at Fall Term 1967 as No. 682.

Defendant was tried under an indictment charging (1) breaking or entering and (2) larceny and receiving. This offense was allegedly committed on 16 April 1967 at Dedmon Produce Company, located at 205 Jacob Street, High Point, North Carolina. Defendant was charged with the larceny of $5000.00, one Pediclip finger nail clipper, and one razor blade stainless citrus knife, each valued at $2.00. Defendant pleaded not guilty to both counts.

Charlie Paul Dedmon, State's witness, testified that he operated Dedmon Produce Company. He closed the business at 5:30 P.M. on 16 April 1967 and returned the next day, Sunday, at about 10:15 A.M. He discovered that one of the back windows had been opened and that his desk, which he had locked, had been broken into. Missing from his desk were $5000.00, consisting of 49 one-hundred dollar bills and two fifty-dollar bills, two knives and some silver coins. On an adjoining desk there had been an adding machine and a "fingerclip." Dedmon identified State's Exhibit 1 as his "fingerclip" and State's Exhibit 2 as a fruit knife belonging to him which had "Sealdsweet, Breakfast Belle," written on one side of it, and "Lake Garfield Citrus Co-op, Bartow, Florida" written on the other side.

The State produced witnesses who had seen defendant with one or more one-hundred dollar bills, near and after the time the break-in allegedly occurred.

W. T. Amaker, Detective-Sergeant with the High Point Police Department, testified that he initiated investigation of this case upon receiving routine report, and that thereafter, as a result of a telephone call, an order was issued for officers to be on the lookout for defendant. Defendant was picked up Monday afternoon. The witness stated that he advised defendant of his rights. Amaker was then asked whether defendant removed anything from his (defendant's) pocket in the presence of the witness. Counsel for defendant objected, and the jury was excused. In the absence of the jury, Amaker testified that defendant voluntarily took a nail clip and other articles from his pockets. He identified State's Exhibit 1 as the nail clip. He knew of no search being made of defendant. Counsel for defendant then made the following request:

> "MR. CECIL requested the court at this point to hear the defendant's testimony out of the presence of the jury as to what transpired and bearing on the constitutional question of admissibility of Detective Amaker's testimony. The Court requested Mr. Cecil to show him authority after lunch for such procedure.
> THE FOLLOWING WAS IN THE PRESENCE OF THE JURY AFTER THE LUNCH RECESS:
> THE COURT: Let the record show that counsel for the defendant requested that he be allowed to put the defendant on in the absence of the jury, in order to determine whether or not certain evidence that may have been obtained from him in the presence of the officers is competent. Let the record show the motion is DENIED. EXCEPTION FOR DEFENDANT.
> MR. CECIL: Will your Honor state that this is for the grounds of determining the constitutionality, the Constitutional points of the admissibility of the evidence?
> THE COURT: Put whatever he said down there. I think I have done enough, but put that in. DEFENDANT'S EXCEPTION 9."

Amaker's testimony, including that concerning the nail clip, was then given in the presence of the jury.

Detective Lawrence Graves of the High Point Police Department testified that on Monday afternoon he saw defendant on the street and there talked with him. He asked defendant to go to the police station for the purpose of discussing the break-in at Dedmon Produce Company, and at that time informed defendant that he was not under arrest. Defendant agreed, and thereupon took a knife from

his pocket and gave it to the officer. Graves identified State's Exhibit 2 as the knife defendant gave him.

About two hours later, and after the knife and clip were identified as property taken from Dedmon Produce Company, defendant was placed under arrest.

At the completion of the State's evidence, defendant's motion for nonsuit was overruled. Defendant did not introduce evidence and renewed his motion for nonsuit, which was overruled.

The verdict of the jury was "guilty as charged," and judgment was imposed thereon. Defendant's motions to set aside the verdict, for a new trial, and to set aside the judgment, were overruled.

Defendant appealed.

Attorney General Bruton, Deputy Attorney General Lewis, and Staff Attorney Jacobs for the State.

Harold I. Spainhour for defendant.

BRANCH, J. Defendant assigns as error the trial court's action in refusing to allow defendant to testify on *voir dire* hearing held on his motion to suppress evidence.

One of the most strictly defined principles in our system of jurisprudence is that which separates the functions of the court from those of the jury. *State v. Fogleman,* 204 N.C. 401, 168 S.E. 536. It is the duty of the court to pass on the competency and admissibility of evidence. This includes the duty to pass upon the validity of a search warrant and the competency of evidence procured thereunder, when they are properly made the subject of inquiry. The jury has no duty in determining the competency or admissibility of evidence, and the jury may not invade the province of the court in this respect. *State v. Harper,* 235 N.C. 62, 69 S.E. 2d 161. When the court determines the competency of evidence in the absence of the jury, it thereby insures that its functions and those of the jury remain separate and unaffected.

In the case of *State v. Myers,* 266 N.C. 581, 146 S.E. 2d 674, a motion was made to suppress evidence obtained by a search warrant on the ground of insufficiency of the warrant. The Court, finding the warrant illegal, *inter alia,* made this pertinent statement:

> "In this case, as a matter of procedure, we see no reason why the trial court, in its discretion and on defendant's motion to suppress the evidence, could not conduct a preliminary inquiry relating to the legality of the search in the same manner as the court does in determining the voluntariness of a confession."

In passing upon whether confessions of defendants in criminal cases are voluntary and admissible in evidence, this Court has approved the following rule:

> "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 its observation of the demeanor of the witnesses, the judge must resolve the question of whether the defendant, if he made the statement, made it voluntarily and with understanding. *State v. Barnes, supra; State v. Outing, supra; State v. Rogers, supra.* The trial judge should make findings of fact with reference to this question and incorporate those findings in the record. Such findings of fact, so made by the trial judge, are conclusive if they are supported by competent evidence in the record. No reviewing court may properly set aside or modify those findings if so supported by competent evidence in the record. *State v. Barnes, supra; State v. Chamberlain, supra; State v. Outing, supra; State v. Rogers, supra.*" (Emphasis ours.) *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1.

We see no reason why the procedure on motion to suppress evidence because of illegal search and seizure should not be the same as the inquiry by the court into the voluntariness of a confession.

In the case of *State v. Smith,* 213 N.C. 299, 195 S.E. 819, the Court considered the competency of an alleged confession and there stated:

> "The defendant contends here that he had the right to testify and offer witnesses in the absence of the jury in rebuttal concerning the circumstances under which the alleged confession was procured from him. This is true if he asserts or requests the right at the time. . . ."

Headnote No. 5 from the case of *State v. Whittemore,* 255 N.C. 583, 122 S.E. 2d 396, accurately states the pertinent holding of the case, as follows:

> "It is error for the court upon the challenge of the competency of a confession to refuse to hear evidence on the *voir dire* that defendant was of low mentality, had great imagination, and would believe anything told him, it being the duty of the court

to hear and weigh such evidence in determining whether the confession was in fact understandingly and voluntarily made."

Justice Ervin, speaking for the Court in *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, stated:

". . . When the admissibility of a confession is challenged on the ground that it was induced by improper means, the trial judge is required to determine the question of fact whether it was or was not voluntary before he permits it to go to the jury. *S. v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84; *S. v. Andrew,* 61 N.C. 205. In making this preliminary inquiry, the judge should afford both the prosecution and the defense a reasonable opportunity to present evidence in the absence of the jury showing the circumstances under which the confession was made. *S. v. Gibson,* 216 N.C. 535, 5 S.E. 2d 717; *S. v. Alston,* 215 N.C. 713, 3 S.E. 2d 11; *S. v. Smith,* 213 N.C. 299, 195 S.E. 819; *S. v. Blake,* 198 N.C. 547, 152 S.E. 632; *S. v. Whitener,* 191 N.C. 659, 132 S.E. 603. . . ."

In the instant case, upon motion to suppress the evidence the trial judge conducted an inquiry in the absence of the jury. The court heard a State's witness, but refused to hear defendant.

It is basic to due process that a defendant in a criminal action be allowed to offer testimony. When the trial judge heard the State's witness on *voir dire,* he should have given defendant an opportunity to offer evidence to present his version of the search and seizure or to contradict, amplify, or explain the testimony offered by the State.

We hold that the trial court committed error in refusing to allow defendant to offer evidence during the *voir dire.*

We do not decide as to the competency of the evidence which defendant moved to suppress.

The trial court correctly overruled defendant's motion for nonsuit. Defendant contends that the motion should have been granted since the State's case depends largely on the evidence which he contends resulted from the illegal search. This argument is not tenable since the admissibility of the evidence must yet be determined according to the procedure herein set out.

Further, had the evidence been incompetent, he would not have been entitled to a dismissal, since the State might have been able to offer sufficient competent evidence at the next trial. *State v. Hall,* 264 N.C. 559, 142 S.E. 2d 177; *State v. Stallings,* 267 N.C. 405, 148 S.E. 2d 252.

We do not deem it necessary to consider further assignments of error.

Defendant is entitled to a

New trial.

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

B. G. FRENCH v. STATE HIGHWAY COMMISSION.

(Filed 28 February, 1968.)

Eminent Domain §§ 2, 5—

Where an agreement between the owner and the State Highway Commission for the taking of land for a limited access highway provides that the owner should have no right of access to the highway except at designated survey stations, the right of access in accordance with the agreement is a property right, and the denial by the Commission of access at these stations constitutes a "taking" for which the owner is entitled to compensation.

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

APPEAL by defendant from *Hobgood, J.*, at the May 1967 Mixed Session of ROBESON, docketed and argued as No. 853 at Fall Term 1967.

The plaintiff sues for compensation for the alleged taking of his property by the defendant in the process of converting U. S. Highway No. 301 into a controlled-access highway now known as Interstate Highway No. 95. The property which he claims was so taken was his alleged access easement from and to his land lying on both sides of the highway to, from and across the through traffic lanes of the highway at two points known as Stations 348+00 and 378+00. The defendant denies that it has taken the plaintiff's right of access, for the reason that at such points he has access from and to his land to and from service roads which are part of the highway, one lying on each side thereof, and which provide him with access to and from the through traffic lanes of the highway by proceeding along one of such service roads to its point of interchange with the through traffic lanes.

Pursuant to G.S. 136-108, a hearing was had in the superior court, without a jury, to determine issues raised by the pleadings other than the issue of damages. The specific issue so before the court was

whether the elimination by the defendant of crossovers previously established at Stations 348+00 and 378+00 constituted a taking of a property right of the plaintiff for which he is entitled to compensation. The superior court adjudged that it did constitute such taking and ordered the appointment of commissioners to appraise the damage sustained by the plaintiff as a result of such taking.

The material facts found by the court from admissions in the pleadings, stipulations, oral testimony and exhibits are as follows:

1. The plaintiff is the owner of a large tract of land through which Interstate Highway 95, formerly U. S. Highway 301, runs.

2. In 1954 the plaintiff and his wife executed a Right of Way Agreement which was accepted by the defendant. They thereby granted to the defendant a right of way through the farm of the plaintiff for the construction of the defendant's Project 3971, this being the construction of a portion of U. S. Highway 301 bypassing the city of Lumberton. The agreement recited that the plaintiff and his wife, "recognizing the benefits to their property by reason of the construction of the proposed highway development in accordance with the survey and plans proposed for same, and in consideration of the construction of said project," granted to the defendant the right of way therefor. It then provided:

> "It is further understood and agreed that the undersigned, their heirs and assigns, shall have no access to the proposed highway to be constructed on said right-of-way except as follows: 348+00, 378+00 and 406+34."

3. Pursuant to the plans therefor, the defendant thereupon constructed on the right of way so granted its Project 3971, including divided lanes for northbound and southbound through traffic, a service road on each side of and parallel to the through traffic lanes and, at Stations 348+00 and 378+00, crossovers running from one service road to the other whereby, at these points, direct access was given, across the through traffic lanes and service roads, from the land of the plaintiff on one side of the highway to the land of the plaintiff on the other side of it.

4. In 1963 the defendant began and in 1965 it completed the construction of its Project 8.13978 upon the same right of way through the farm of the plaintiff, this project being the conversion of U. S. Highway 301 to Interstate Highway 95. In the course of this construction, the defendant physically removed the crossovers at Stations 348+00 and 378+00 and constructed a woven wire fence between the through traffic lanes of the highway and the service roads,

so that thereafter the plaintiff could no longer go directly across the highway at these points from his land on one side of the highway to his land on the other side of it but, in order to reach the through traffic lanes, was compelled to proceed along one of the service roads to its interchange point with the through lanes.

5. Following the completion of the construction of Project 3971, including the above mentioned crossovers, and prior to the commencement of the construction of Project 8.13978, resulting in the removal of those crossovers, the plaintiff constructed upon his property near Station 378+00 two service stations.

6. After the completion of the construction of Project 3971, including the crossovers, and prior to the elimination of those crossovers, the plaintiff and his grantees were afforded by the defendant free access to the service roads running parallel to the through traffic lanes, and numerous driveways were connected with such service roads affording access to and from the property of the plaintiff and his grantees from and to such service roads.

7. By the above quoted language of the Right of Way Agreement executed by the plaintiff and his wife to the defendant, it was the intention of the parties thereto that on both sides of the highway at Stations 348+00 and 378+00 there would be crossovers and direct at grade access to the through traffic lanes of the highway.

8. The defendant has not compensated the plaintiff for the elimination of such access to the through travel lanes of the highway at these points.

Attorney General Bruton, Deputy Attorney General Lewis, Assistant Attorney General McDaniel and John Wishart Campbell, Associate Counsel, for defendant appellant.

Dickson McLean, William T. Joyner and W. T. Joyner, Jr., for plaintiff appellee.

LAKE, J. The provisions of the Right of Way Agreement executed by the plaintiff and his wife to the defendant, which are quoted in the foregoing statement of facts, are exactly the same as the corresponding provisions in the agreement which was before us in *Petroleum Marketers v. Highway Commission,* 269 N.C. 411, 152 S.E. 2d 508. There, we said:

> "In determining whether the plaintiff had a property right which has been taken or destroyed by the resolution of the

> Highway Commission, we are not controlled by the provision in G.S. 136-89.52 [enacted after the execution of the agreements both in that case and in the present case] * * *. It is also not necessary for us to determine upon this appeal what would have been the rights of the parties without such agreement. The agreement was made and the rights of the parties are fixed thereby * * *"

Here, as in that case, the Right of Way Agreement refers to the then proposed highway construction in accordance with "the survey and plans proposed for the same." The Right of Way Agreement was executed by the plaintiff "in consideration of the construction of said project." Those plans for the project showed service roads on each side of the through traffic lanes of the highway and also showed crossovers at the two points here in question, each of which crossovers ran from one service road to the other directly across the through traffic lanes at grade level. The highway was so constructed by the defendant and so used by the public, including the plaintiff, for a number of years.

It would be, indeed, a strained construction of the Right of Way Agreement to say that the parties by stipulating for a right of access "to the proposed highway to be constructed" at the two points in question meant only a right of access to service roads and did not contemplate the construction of and continuance of the crossovers shown upon the plans then in existence and to which the agreement referred. Had the Right of Way Agreement contained no reference whatever to the plaintiff's access to the highway at the points in question, he, along with the rest of the world, would now have the right to travel along the service roads from these points to their points of interchange with the through travel lanes of the highway. The following observations in *Petroleum Marketers v. Highway Commission, supra,* are equally applicable to the present case:

> "Since all the world has this right, such a construction of the agreement between this landowner and the Commission would be most unreasonable. Such construction would give to the landowner no greater right of access than he would have had if there had been omitted entirely from the agreement the words 'except at the following survey stations: 350+00.' [In the present case, 348+00 and 378+00.] These words in the agreement meant something. It was intended thereby to leave in or confer upon the landowner a right of access which the general public did not have, and which the landowner would not have had if the excepted phrase had been omitted from the

agreement. It will be observed that the agreement in this case did not provide, as did the agreement in *Abdalla v. Highway Commission* [261 N.C. 114, 134 S.E. 2d 81], 'grantors * * * shall have no right of access to the highway constructed on said right of way except *by way of service roads and ramps* built in connection with this project in the vicinity of survey stations 0+00.'" (Emphasis supplied.)

In that case, we said the plain meaning of the agreement was that the landowner surrendered whatever claims she might otherwise have had to a direct access to the highway at other points in exchange for a cash consideration and a reservation or grant of a right of direct access to the highway at the designated point.

The defendant's exception to the finding by the superior court that it was the intent of the Right of Way Agreement that the plaintiff have direct access and the right of crossover to and from and across the through traffic lanes of the highway at the designated points is without merit. This is the clear meaning of that agreement.

By virtue of this agreement, so interpreted, the plaintiff had an easement, which is a property right and which the defendant took from him by the removal of the crossovers and the construction of the fences between the service roads and the through traffic lanes of the highway. *Petroleum Marketeters v. Highway Commission, supra; Williams v. Highway Commission,* 252 N.C. 772, 114 S.E. 2d 782. While the defendant, in the exercise of its power to regulate the flow of traffic upon the highway so as to promote safety and the free flow of traffic thereon, could take this property right from the plaintiff and terminate it, the defendant could not do so without the payment of compensation to the plaintiff for his property so taken. *Petroleum Marketeters v. Highway Commission, supra.*

Our decision in *Highway Commission v. Nuckles,* 271 N.C. 1, 155 S.E. 2d 772, upon which the defendant relies, has no application to this case. There, we held that the separation of north and southbound traffic lanes so that the property of an adjoining landowner had direct access to one lane only did not deprive such landowner of a property right for which he was entitled to compensation. In the *Nuckles* case, there was no agreement between the landowner and the commission giving him access to all portions of the highway at a specified point.

Likewise, our statement in *Petroleum Marketeters v. Highway Commission, supra,* that a ramp is part of a highway does not support the defendant's contention in the present case that access to the service road is the access to the highway contemplated by the Right of Way Agreement executed by the plaintiff and his wife. In that

case, the agreement, as here, stated that the landowner was to have access to the highway at a specified point, and the plan then in existence, to which the agreement related, showed the ramp at that point. Those plans did not show a crossover crossing the ramp and it would have been unreasonable to construe the agreement as giving the landowner the right to cross over the ramp and thus go on to the through traffic lanes beyond the ramp. Here, on the contrary, the plans to which the Right of Way Agreement refer, specifically showed a crossover from one service road to the other at each point designated and subsequently the commission constructed those crossovers and maintained them in use for several years. It is clear that the parties did not contract with reference to access to the service road only. The service road is part of the highway, but access to it only was not what the parties clearly intended when they executed and accepted the Right of Way Agreement.

We have carefully considered each of the defendant's assignments of error and find no merit therein.

Affirmed.

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

ARTHUR H. FREEMAN AND LILLIAN S. FREEMAN v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION.

(Filed 28 February, 1968.)

1. Trespass to Try Title § 1—

When one wrongfully enters upon the land of another and cuts trees thereon, the owner of the land has an election of remedies.

2. Trespass to Try Title § 4; Ejectment § 10—

In an action to recover for trespass on a tract of land by the cutting and removal of timber therefrom, the failure of plaintiffs to prove their title to the land by some recognized method does not warrant judgment as of nonsuit when one of the plaintiffs testifies without objection that they are the owners of the tract and when the defendant's witnesses refer to the land as the plaintiffs' tract.

3. Appeal and Error § 59; Trial § 21—

In passing upon a motion for judgment of involuntary nonsuit, evidence offered by plaintiff and not challenged by defendant must be treated as before the jury with all its probative force.

4. Appeal and Error § 45—

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

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

APPEAL by defendant from *Froneberger, J.*, and a jury, April 10, 1967 Session, Schedule B, of MECKLENBURG, docketed and argued as No. 288 at Fall Term 1967.

Plaintiffs alleged they were the owners and in possession of a tract of land in Berryhill Township, Mecklenburg County, N. C., containing 7.05 acres and shown as Tract No. 11 on plat of the I. H. Freeman Estate property dated September, 1956, and recorded in Map Book 7, Page 845, Mecklenburg Registry, made by Edwin L. Faires, Registered Surveyor; that defendant wrongfully and unlawfully entered upon their said lands and cut and removed timber therefrom; and that defendant, by its said unlawful acts and trespasses, "permanently damaged the lands of the plaintiffs" in the amount of $8,000.00.

Answering, defendant denied, for lack of knowledge or information sufficient to form a belief, plaintiffs' allegations as to their ownership and possession of said 7.05-acre tract. Defendant also denied plaintiffs' allegations as to trespass and damages, alleging: "(T)he true facts being that plaintiffs granted specific permission to the defendant to enter and cut timber on their property."

The issues submitted and the jury's answers, are as follows:

"1. Are the plaintiffs the owners of the 7.05-acre tract of land in Berryhill Township, Mecklenburg County, as alleged in the Complaint? ANSWER: Yes. 2. Did the defendant wrongfully trespass upon the land of the plaintiffs in cutting and removing timber, as alleged in the Complaint? ANSWER: Yes. 3. What amount, if any, are the plaintiffs entitled to recover for damages to their land by reason of such trespass? ANSWER: $3,500.00."

In accordance with the verdict, it was adjudged that plaintiffs have and recover of defendant the sum of $3,500.00 and their costs. Defendant excepted and appealed.

Howard B. Arbuckle, Jr., for plaintiff appellees.
Paul L. Whitfield for defendant appellant.

BOBBITT, J. Defendant, in its brief, presents this question for decision: "Did the court err in overruling defendant's motion of nonsuit at the close of plaintiffs' evidence, renewed at the close of all the evidence, in failing to charge the jury as to the burden of proof

on the plaintiffs where title to real estate is in issue, and in signing and entry of judgment?"

When one wrongfully enters upon the land of another and cuts trees thereon, the owner of the land has an election of remedies. *Andrews v. Bruton,* 242 N.C. 93, 96, 86 S.E. 2d 786, 789, and cases cited. Plaintiffs elected to sue for permanent damage to their 7.05-acre tract. With reference to the third (damages) issue, the court instructed the jury: "The measure of damages for the wrongful trespass upon realty in the cutting and removing timber is the difference in the value of the land immediately before and immediately after the trespass." Plaintiffs' evidence as to damages was directed towards the difference between the reasonable market value of the 7.05-acre tract immediately before and immediately after the alleged trespass thereon by defendant.

Admittedly plaintiffs failed to prove their title to the 7.05-acre tract by any method approved in *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142, and decisions in accord therewith. On account of such failure, defendant contends the court erred (1) in the denial of its motion(s) for judgment of nonsuit, and (2) in the failure to instruct the jury that plaintiffs were required to establish their title by such method.

Much of the discussion in the briefs bears upon whether plaintiffs were required to establish their title according to the rules applicable in an action in ejectment or of trespass to try title. However, disposition of the present appeal does not depend upon the answer to that question.

Arthur H. Freeman, one of the plaintiffs, and each of three other witnesses, testified, without objection, that plaintiffs were the owners of the 7.05-acre tract. The admissibility of this testimony not having been challenged, it must be treated as before the jury with all its probative force. *Lambros v. Zrakas,* 234 N.C. 287, 66 S.E. 2d 895; *Durham v. Trucking Co.,* 247 N.C. 204, 207, 100 S.E. 2d 348, 351; *Cotton Mills v. Local 578,* 251 N.C. 218, 229-230, 111 S.E. 2d 457, 464; Stansbury, N. C. Evidence, Second Edition, § 27. This evidence was sufficient to warrant the submission of the first issue and to support the jury's affirmative answer thereto. *Skipper v. Yow,* 249 N.C. 49, 56, 105 S.E. 2d 205, 210, and cases cited.

One of the witnesses for defendant, testifying on direct examination, pointed out where he lived "in relation to the plaintiffs' 7.05-acre tract," and referred to the cutting of timber upon an adjoining tract owned by his sister "about the same time that the timber was cut on the Arthur Freeman tract." The only other witness for defendant, testifying on direct examination, stated he was aware "that Mr.

Arthur Freeman's three acres of trees were cut to ground level." Defendant offered no evidence to support its allegation "that plaintiffs granted specific permission to the defendant to enter and cut timber on their property." The only evidence offered by defendant tended to minimize the damage to the 7.05-acre tract as a result of the cutting and removal of timber therefrom.

Exceptions to the admission over defendant's objection of certain documents are not brought forward and assigned as error. The only reference thereto in defendant's brief bears upon their insufficiency to warrant submission of the first issue to the jury. "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him." Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810.

Defendant having failed to show prejudicial error, the verdict and judgment will not be disturbed.

No error.

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

H. E. FRITTS AND JIM WHITE v. JAMES GERUKOS.

(Filed 28 February, 1968.)

1. Deeds § 23—

A covenant of warranty is an agreement or assurance by the grantor of an estate that the grantee and his heirs and assigns shall enjoy the estate without interruption or eviction by virtue of a paramount title outstanding in another person.

2. Same—

A cause of action for breach of warranty of title to real estate does not arise until there has been an ouster or eviction of the grantee under a superior title.

3. Deeds § 24—

A restriction upon the use or the transfer of land imposed by a statutes or ordinance enacted pursuant to the police power is not an encumbrance upon the land within the meaning of a covenant against encumbrances or a contract or option to convey the land free from encumbrances.

4. Same; Vendor and Purchaser § 4— City ordinance is not an encumbrance within the meaning of a warranty deed.

In an action to recover the amount paid for an option, plaintiffs' evidence was to the effect that they entered into an option agreement whereby the defendant agreed to convey to them a tract of land by deed containing full covenants against encumbrances. An ordinance of the municipality ap-

plicable to the land in question prohibited the transfer of the land until the plat thereof had been approved by the city upon the construction of streets, curbs and storm sewers. The city issued a restraining order enjoining defendant from the transfer of the land until the ordinance had been complied with. *Held:* The existence of the ordinance did not subject defendant's title to an encumbrance, and there being no obligation by defendant to act in compliance with the ordinance, a finding by the jury that defendant was able to deliver a sufficient deed in accordance with the option agreement is fully supported by the evidence.

5. **Vendor and Purchaser § 7—**

Where there is no evidence that plaintiffs tendered the remainder of the purchase price to defendant and demanded the specific performance of an option agreement, their right to recover the amount paid for the option agreement depends upon the proof of a defect in defendant's title or the existence of an encumbrance which defendant was obligated to remove under the option.

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

APPEAL by plaintiffs from *Campbell, J.*, at the January 1967 Regular Session of CATAWBA. This case was docketed and argued as No. 355 at Fall Term 1967.

The plaintiffs sued to recover the amount paid by them for an option for the purchase of land in or near the city of Gastonia and for expenses incurred by them in advertising such land for resale at public auction. They allege that the defendant was unable to convey the land free from encumbrances in accordance with the terms of the option agreement.

In the option agreement, dated 5 May 1965, the defendant undertook, in consideration of the payment to him by the plaintiffs of $4,000, to convey to them, or to their nominee, a "parcel of land, situated in Gastonia Township, Gaston County, North Carolina, containing 49 Lots, and more particularly described as follows: Being 49 Lots as surveyed by Bob G. Roberts L-772 of the Pinehurst Subdivision located on North Weldon Street (Pinehurst Subdivision #2)." By the agreement the defendant further undertook that he would, at the request of the plaintiffs, on or before 5 July 1965, execute and deliver to them or their nominee "a sufficient deed with full covenant and warranty free from encumbrance" upon the payment to him of the further sum of $21,000.

At the time the option agreement was made, there was in effect an ordinance of the city of Gastonia, adopted by the city pursuant to Chapter 160, Art. 18, Part 3-A of the General Statutes, entitled "Subdivision Standard Control Ordinance of Gastonia, North Carolina," which was applicable to the land in question. This ordinance prohibits the transfer or sale of land by reference to a plat showing

a subdivision of such land until the plat has been approved by the city, which approval may be granted only upon compliance with provisions of the ordinance concerning the construction upon the land of improvements such as streets, curbs, gutters and storm sewer systems.

The plaintiffs introduced in evidence the option agreement, the ordinance and a restraining order issued 18 May 1965 in a suit brought by the city against the defendant, his wife and the plaintiff Fritts after the grant of the option. The restraining order enjoined the defendant, his wife and Fritts from conducting a public auction sale of the lots included within the description of the option agreement. It further enjoined the defendant and his wife from transferring any lot within "their subdivision" in violation of the ordinance. It was subsequently continued in effect until the final hearing of that action and was in effect until after 5 July 1965.

Other evidence introduced by the plaintiffs was to the effect that it was their purpose in acquiring the option to conduct an auction sale at which they hoped to sell the lots. Immediately upon the execution of the option they advertised such sale to be held on 22 May 1965. In obedience to the restraining order the sale was not held. The plaintiffs did not tender the remainder of the purchase price on or before 5 July 1965, nor did the defendant tender to them a deed for the land. Had the plaintiffs posted a bond conditioned upon the compliance with all provisions of the ordinance, the city would not have proceeded to prevent the proposed auction sale. The plaintiff White, prior to the issuance of the restraining order, instituted a special proceeding contemplating the posting of such bond and the approval thereof, but this was discontinued by him prior to 5 July 1965, the bond being either never filed or withdrawn. The defendant has not complied with the requirements of the ordinance and has failed and refused to return to the plaintiffs the $4,000 which they paid to him for the option.

The jury found that the defendant was able, from the execution of the option agreement to 5 July 1965, to execute and deliver a sufficient deed in accordance with the option agreement. From a judgment on the verdict that the plaintiffs recover nothing, they now appeal, assigning as error the denial of their motion to set aside the verdict as against the greater weight of the evidence and certain alleged errors in the charge of the court to the jury.

Corne and Warlick for plaintiff appellants.

Sanders & Lafar and Hollowell, Stott & Hollowell for defendant appellee.

LAKE, J. The validity of the ordinance is not questioned by either party. The plaintiffs do not contend that the defendant was not the owner in fee simple of the land described in the option agreement. They do not contend that a deed, proper in form, executed and delivered to them by the defendant would not have conveyed the land to them in fee simple. Their contention is that the existence of the ordinance and the failure of the defendant to comply with its provisions constituted an encumbrance such as to prevent him from giving to them a deed as specified in the option agreement.

A covenant of warranty is "an agreement or assurance by the grantor of an estate that the grantee and his heirs and assigns shall enjoy it without interruption by virtue of a paramount title, or that they shall not by force of a paramount title be evicted from the land or deprived of its possession." *Cover v. McAden,* 183 N.C. 641, 112 S.E. 817. "It is the law in this State that a cause of action for breach of warranty of title to real estate does not arise until there has been an ouster or eviction of the grantee or grantees under a superior title." *Shimer v. Traub,* 244 N.C. 466, 94 S.E. 2d 363. There is no suggestion that had the plaintiffs gone into possession of the property under a deed from the defendant, proper in form, they could have been evicted under a paramount title.

A restriction upon the use which may be made of land, or upon its transfer, which is imposed by a statute or ordinance enacted pursuant to the police power, such as a zoning ordinance or an ordinance regulating the size of lots, fixing building lines or otherwise regulating the subdivision of an area into lots, is not an encumbrance upon the land within the meaning of a covenant against encumbrances or a contract or option to convey the land free from encumbrances, being distinguishable in this respect from restrictions imposed by a covenant in a deed. *Lohmeyer v. Bower,* 170 Kan. 442, 227 P. 2d 102; *Josefowicz v. Porter,* 32 N.J. Super. 585, 108 A. 2d 865; *Lincoln Trust Co. v. Williams Bldg. Corporation,* 229 N.Y. 313, 128 N.E. 209; *Miller v. Milwaukee Odd Fellows Temple, Inc.,* 206 Wis. 547, 240 N.W. 193, 198; 55 Am. Jur., Vendor and Purchaser, § 250; Annotation, 175 A.L.R. 1056; Annotation, 57 A.L.R. 1424. Thus, the existence of the Subdivision Standard Control Ordinance of the city of Gastonia at the time the option agreement was executed did not cause the title of the defendant to be subject to an encumbrance and the option agreement did not constitute an undertaking by him to take any action to comply with the provision of that ordinance so as to permit the plaintiffs to resell the land at public auction as they contemplated doing.

The evidence introduced by the plaintiff does not show a viola-

tion of this ordinance by the defendant with respect to the land described in the option agreement. It merely shows that the defendant had not done those things which the ordinance provided must be done before lots are sold as parts of the subdivision. The option agreement not being an undertaking by the defendant to do these things, the injunction, subsequently issued as the result of advertising published by the plaintiffs, would not impose such obligation upon the defendant. The testimony of the plaintiffs' witness Garland, which is uncontradicted, is to the effect that the plaintiffs, by posting a bond to assure compliance with the requirements of the ordinance, might have proceeded with their plan for resale of the property at auction.

The plaintiffs do not proceed upon the theory that during the life of the option they tendered to the defendant the remainder of the agreed purchase price and he thereupon refused to execute the conveyance specified in the option agreement. Their evidence shows that they made no such tender. That being true, their right to recover the amount paid for the option agreement depends upon their proof of a defect in the title of the defendant or the existence of an encumbrance which it was his duty to remove under the terms of the option agreement. See 55 Am. Jur., Vendor and Purchaser, § 44. The burden of proof was upon them to show such defect or encumbrance and the record contains no evidence thereof. The trial court might properly have granted the defendant's motion for judgment of nonsuit or directed a verdict in favor of the defendant. If there was technical error in the charge, and we find none, it was not prejuricial to the plaintiffs. Their assignments of error cannot be sustained.

No error.

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

STATE v. ROBERT RANDOLPH, JR.

(Filed 28 February, 1968.)

1. Automobiles § 126; Criminal Law § 55—

The results of a breathalyzer test are admissible in evidence when the person making the test is shown to be qualified as an expert and the manner in which the test is made meets the requirements of G.S. 20-139.1.

2. Same; Constitutional Law § 33—

The requirements of *Miranda v. Arizona*, 384 U.S. 436, are inapplicable to a breathalyzer test administered pursuant to G.S. 20-139.1, since the taking of a breath sample from an accused for the purpose of the test is not evidence of a testimonial or communicative nature within the privilege against self-incrimination.

3. Automobiles § 126; Criminal Law § 55—

The technician operating a breathalyzer machine may properly request an accused to submit to the test. G.S. 20-16.2.

4. Criminal Law § 162—

Where the record fails to show exceptions to the testimony on the trial, an assignment of error to the admission of evidence does not properly present the question on appeal.

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

APPEAL by defendant from *McKinnon, J.*, August 1967 Regular Mixed Session of SCOTLAND. This case was docketed and argued at the Fall Term 1967 as No. 827.

Defendant was charged with operating a motor vehicle upon the highways of North Carolina while under the influence of intoxicating liquor, in Violation of G.S. 20-138.

State's witness J. E. Greene, a State Highway Patrolman, testified that on 3 March 1967, at about 10:50 p.m., he observed defendant as the latter accelerated to 65 mph in a 55 mph zone and, in a weaving manner, drove near and over the center line of the road. Greene stated that defendant was swaying after getting out of his car and that he detected alcohol on defendant's breath. After defendant was placed under arrest and taken to the police station, he told Greene that he drank twelve beers that night. In Greene's opinion defendant was under the influence of an intoxicating beverage. Defendant interposed no objections to Greene's testimony.

C. G. Gardner, of the State Highway Patrol, testified that he had completed all courses required by the State Board of Health and had been licensed by the State Board in 1966 to administer breathalyzer tests. He testified in detail as to the manner in which the test was given to defendant on 3 March 1967 at about 11:15 p.m. He further testified:

> ". . . We were sitting there talking, just carrying on a normal conversation, Mr. Randolph, Trooper Greene and myself. There was some conversation between me and the defendant about the test.

Q. Will you relate it?
A. He asked me the purpose —
"He asked me what the breathalyzer was; I told him it was a machine which determined the amount of alcohol in the blood, and registered at the time he blew in the machine. After I told him, I asked him if he wanted to take a test. He said he would cooperate."

Defendant moves to strike that portion of Officer Gardner's testimony within the quotation marks. Motion denied. Defendant excepts, and this constitutes Defendant's EXCEPTION #1.

"He said he would cooperate, for me to go ahead and make the test. I set the machine up and cleared the machine . . ."

"Q. What did the test you made on this occasion reflect?
A. The reading was .20 per cent alcohol in the blood."

G.S. 20-139.1 and G.S. 20-16.2 are statutes pertinent to this decision. G.S. 20-139.1 provides in part:

"(a) In any criminal action arising out of acts alleged to have been committed by any person while driving a vehicle while under the influence of intoxicating liquor, the amount of alcohol in the person's blood at the time alleged as shown by chemical analysis of the person's breath shall be admissible in evidence and shall give rise to the following presumptions:
If there was at that time 0.10 per cent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of intoxicating liquor."

G.S. 20-16.2 is, in part, as follows:

"Operation of motor vehicle deemed consent to alcohol test; manner of administering; refusal to undergo. — (a) Any person who operates a motor vehicle upon the public highways of this State or any area enumerated in G.S. 20-139 shall be deemed to have given consent, subject to the provisions of G.S. 20-139.1, to a chemical test of his breath for the purpose of determining the alcoholic content of his blood for any offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of intoxicating liquor. The test or tests shall be administered upon request of a law enforcement officer having reasonable grounds to believe the person to have been driving a motor vehicle upon the public

highways of this State or any area enumerated in G.S. 20-139 while under the influence of intoxicating liquor.

(b) If a person under arrest refuses to submit to a chemical test under the provisions of G.S. 20-16.2, evidence of refusal shall be permissible in any criminal action growing out of an alleged violation of driving a motor vehicle upon the public highways of this State or any area enumerated in G.S. 20-139 while under the influence of intoxicating liquor. . . ."

Defendant testified that he drank about four to six beers while shooting pool and within a period of two and three-quarter hours. He stated that he did not stagger and that he had control of his car at all times, and that the beer did not affect his operation of the automobile. He stated he was told that he did not have to take the test.

In rebuttal for the State, Patrolman Greene reiterated that defendant told him in the patrol office that he drank twelve beers that night.

The jury returned a verdict of guilty, and from sentence imposed defendant appealed.

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

Johnson, Hedgpeth, Biggs & Campbell for defendant.

PER CURIAM. Defendant assigns as error the trial court's action in refusing to strike testimony of Officer Gardner (1) relative to results of the breathalyzer test, and (2) the conversation between defendant and Officer Gardner relating to request of defendant to take the test.

The record shows that the manner in which the test was made and the qualifications of the person administering the test met the requirements of G.S. 20-139.1. Thus, nothing else appearing, the results would be competent evidence. *State v. Powell,* 264 N.C. 73, 140 S.E. 2d 705. However, defendant contends that the rules set out in *Miranda v. Arizona,* 86 Sup. Ct. 1602 (June 13, 1966), 384 U.S. 436, are applicable here. The *Miranda* rules apply to involuntary confessions obtained by compulsion or some means of enforced communication. The Federal Court clearly distinguishes and removes the instant case from application of *Miranda* in *Schmerber v. California,* 384 U.S. 757, 86 Sup. Ct. 1826 (June 20, 1966), where the Court approved the taking of a blood test to determine alcohol content over defendant's vehement objection (as compared here with defendant's cooperation). In *Schmerber* the Court stated:

> ". . . We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends."

Here, there was no involuntary confession or enforced communication by defendant. Further, the test was given by and with defendant's free consent after he had been advised as to the operation of the machine and that he did not have to take the test.

We see no merit in defendant's argument that the technician who operated the breathalyzer machine should be excluded from asking defendant to submit to the test. The arresting officer or the technician could have properly asked defendant to submit to the test. *A fortiori*, the technician, because of his complete impartiality, might be the more desirable of the two. Further, we construe that portion of G.S. 20-16.2 which provides that "the test or tests shall be administered upon request of a law enforcement officer having reasonable grounds to believe the person to have been driving a motor vehicle upon the public highways of this State . . . while under the influence of intoxicating liquor," to refer to the request being made by the officer to the technician who will give the test, rather than being directed to the suspect.

This assignment of error is overruled.

Defendant asserts that the court erred in failing to strike testimony of Officer Greene concerning statements made while defendant was under arrest.

Defendant, represented by competent counsel, failed to object to the testimony when offered on initial direct examination. He failed to ask permission to examine the witness in absence of the jury to show, if he could, that the statements were involuntary and therefore not competent. Thus, this question is not properly presented on appeal. *State v. Gaskill*, 256 N.C. 652, 124 S.E. 2d 873. Further, the only record evidence which touches on the compulsion or involuntary admissions by defendant shows that defendant was told he could have a lawyer, that he could make a call, and that he did not have to take the breathalyzer test. The whole record tends to show the admissions made and the test given were made and given in an atmosphere of free and voluntary choice rather than one of compulsion.

The trial judge correctly charged the jury as to the presumption raised by G.S. 20-139.1, *State v. Cooke*, 270 N.C. 644, 155 S.E. 2d 165, and from a careful examination of the entire charge we find no

reasonable grounds to believe the charge misled or misinformed the jury. *State v. Taft,* 256 N.C. 441, 124 S.E. 2d 169.

Defendant fails to show prejudicial error.

No error.

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

STATE v ROBERT ARNOLD GAY.

(Filed 28 February, 1968.)

1. **Criminal Law § 18—**

Upon appeal from a conviction in an inferior court, a person charged with a misdemeanor may be tried in the Superior Court, in the discretion of the solicitor, upon the original warrant or upon an indictment charging the same offense.

2. **Criminal Law § 91; Constitutional Law § 31—**

Trial of defendant on the same day the bill of indictment is returned does not deprive defendant of notice and an opportunity to prepare his defense where the case is on appeal from defendant's conviction in an inferior court upon a warrant charging the same offense as the indictment.

3. **Criminal Law § 174—**

Where defendant, on appeal from a conviction in the inferior court, is tried upon a bill of indictment and not upon the original warrant, any question as to the validity of the original warrant is not decisive on appeal to the Supreme Court.

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

APPEAL by defendant from *Snepp, J.,* 7 August 1967 Schedule C, Criminal Session of MECKLENBURG. This case was docketed and argued at the Fall Term 1967 as No. 272-Y.

On 4 February 1967 defendant was arrested and charged in a warrant, issued by one Eugene Rushing, a desk officer of the Charlotte Police Department, with operating a motor vehicle while under the influence of intoxicants, resisting arrest, and assault on an officer. He was tried under said warrant in Mecklenburg County Recorders Court and was found guilty. The record shows no motion to quash the warrant in that court. From judgment entered in Recorders Court defendant appealed to Superior Court of Mecklenburg County.

On 9 August 1967, bills of indictment were returned by the grand jury at the 7 August 1967 Schedule C, Criminal Session of Mecklenburg County Superior Court, charging defendant with operating a motor vehicle while under the influence of intoxicants, resisting arrest, and assault on an officer. The indictments were consolidated for trial. Upon call of the case for trial, on same date, defendant moved to quash the warrant and the bills of indictment. His motion to quash was denied and defendant was thereupon tried under the bills of indictment on all three charges. He entered pleas of not guilty, and the jury returned verdicts of not guilty as to the charges of driving while under the influence of intoxicants and assault upon an officer. The jury returned verdict of guilty of resisting arrest, and from judgment entered thereon defendant appealed.

Attorney General Bruton, Deputy Attorney General Lewis, and Trial Attorney Eugene A. Smith for the State.

Joel L. Kirkley, Jr., for defendant.

PER CURIAM. The sole question presented for decision is: Did the trial court err in denying defendant's motion to quash the warrant and indictments?

A person charged with a misdemeanor may be tried initially in the Superior Court upon an indictment or, upon appeal from conviction in an inferior court, he may be tried in a Superior Court upon the original accusation without an indictment. *State v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283. In such case it is entirely within the discretion of the solicitor whether he should send a bill to the grand jury and try the defendant upon the indictment or upon the original warrant. *State v. Razook,* 179 N.C. 708, 103 S.E. 67.

It is an essential of jurisdiction that a criminal offense shall be sufficiently charged in the bill of indictment. It is not essential that the bill of indictment be issued prior to his arrest or that defendant be arrested thereunder. *State v. Green,* 251 N.C. 40, 110 S.E. 2d 609.

In the instant case the solicitor chose to try defendant under bills of indictment, and there is no contention that the bill of indictment before us was not regular on its face or that it did not properly charge each and every element of the alleged offense.

> "The Constitution of North Carolina guarantees to the accused in all criminal prosecutions the right to be informed of the accusation against him. N. C. Const., Art. I, Sec. 11.
>
> "This constitutional guaranty is, in essence, an embodiment of the common law rule requiring the charge against the accused to be set out in the indictment or warrant with sufficient cer-

tainty to identify the offense with which he is sought to be charged, protect him from being twice put in jeopardy for the same offense, enable him to prepare for trial, and enable the court to proceed to judgment according to law in case of conviction. *S. v. Green,* 151 N.C. 729, 66 S.E. 564; *S. v. Lunsford,* 150 N.C. 862, 64 S.E. 765; *S. v. Harris,* 145 N.C. 456, 59 S.E. 115; 42 C.J.S., Indictments and Information, section 90." *State v. Jenkins,* 238 N.C. 396, 77 S.E. 2d 796.

Defendant does not contend that the bill of indictment under which he was tried should be quashed because (1) the charge against him is not set out with sufficient certainty to identify the offense, (2) that it would fail to protect him from being twice put in jeopardy for the same offense, or (3) that it would not enable the court to proceed to judgment in case of conviction. Rather, he contends that since the bill of indictment was returned on the same day of his trial, he did not have notice and was not subject to trial.

Defendant had been tried under a warrant in the Recorders Court of Mecklenburg County for the same offenses charged in the bills of indictment. He cannot now claim lack of notice which would have prevented him from preparing for trial, on the ground that the indictment was returned on the same day that trial was had.

It is stated in the case of *State v. Hackney,* 240 N.C. 230, 81 S.E. 2d 778: " 'There is no rule of law or practice that when a bill of indictment is found at one term the trial cannot be had until the next.' *State v. Sultan,* 142 N.C. 569, 54 S.E. 841. . . ."

The validity of the original warrant is not decisive of this case; however, had he been tried on the warrant in Superior Court, he would not be entitled to relief in this Court on the ground that it was issued by a desk officer. The record reveals that he pleaded to the warrant in Recorders Court of Mecklenburg County, and did not move to quash until the matter came on to be heard in Superior Court, where the judge, in the exercise of his discretion, denied his motion to quash. *State v. Matthews,* 270 N.C. 35, 153 S.E. 2d 791.

The trial court did not err in denying defendant's motion to quash.

No error.

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

STATE v. SOPHENIA RAY GOODSON.

(Filed 28 February, 1968.)

1. Criminal Law § 66—

Testimony of a witness on direct and on cross-examination sufficiently identifying defendant as the person who committed the crime is not rendered incompetent by her earlier testimony that she "could not see" who fired the fatal shot, it appearing that the witness was merely referring to the fact that she did not know the defendant.

2. Criminal Law § 86—

Defendant may be cross-examined as to his prior convictions of unrelated criminal offenses when the purpose of such examination is to impeach his credibility as a witness.

3. Criminal Law § 95—

When evidence competent for one purpose and not for another is offered and admitted, 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. Rule of Practice in the Supreme Court No. 28.

APPEAL by defendant from *Bundy, J.*, August 7, 1967 Regular Schedule A Criminal Session of MECKLENBURG.

Defendant was indicted for the murder of Robert Edward Yeldell. The State elected to prosecute for murder in the second degree. Evidence was offered by the State and by defendant. The jury returned a verdict of guilty of manslaughter. The court pronounced judgment imposing a prison sentence of ten years. Defendant excepted and appealed.

Attorney General Bruton and Staff Attorneys Vanore and Shepherd for the State.
William G. Robinson for defendant appellant.

PER CURIAM. A State's witness, Patsy Deloris Smith, testified she and Robert Edward Yeldell were walking on South Church Street, Charlotte, N. C., on the night of April 16, 1967, when Yeldell was shot twice and fell (mortally wounded) in the street. After testifying she "couldn't see who was doing it," she was permitted to testify on further direct examination over objections that defendant, who "was about six feet away" and who had "a big, old, shiny pistol in his hand," did the shooting. She testified she had not previously seen defendant and did not then know his name. In view of her subsequent testimony both on direct and cross-examination, it would seem the witness was confused when she testified she "couldn't see who was doing it," or that her intended meaning was that she

did not know the man who was doing it. Be that as it may, the record does not support defendant's contention that the solicitor's further inquiries as to the facts constituted an impeachment by the State of its own witness.

The court admitted in evidence over defendant's objection a statement signed by Patsy Deloris Smith at the police station on the night of April 16, 1967, in which she described the circumstances under which Yeldell was shot, gave a description of the person who did the shooting, and stated she could identify such person if she saw him again. The court instructed the jury the statement was not to be considered as substantive evidence but only as evidence tending to corroborate, if the jury found it did corroborate, the testimony of Patsy Deloris Smith at trial. The admission of the statement for this limited purpose was proper.

There was ample evidence that defendant intentionally shot Yeldell and thereby proximately caused his death. Defendant testified he shot Yeldell but contended that he did so in self-defense.

Defendant did not bring forward the assignment of error based upon his exception to the court's refusal to grant his motion for judgment as in case of nonsuit. He was well advised. There was ample evidence to require that the case be submitted to the jury.

When cross-examining defendant, the solicitor was permitted, over objections by defendant, to question defendant as to whether he had been convicted of specific unrelated prior criminal offenses. Defendant admitted having been convicted in certain specific instances and denied having been convicted in others.

Admissions as to convictions of unrelated prior criminal offenses 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. No request was made that the court so instruct the jury. "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; Stansbury, *op. cit.,* § 79; Rule 21, Rules of Practice in the Supreme Court, 254 N.C. 803. Compare *State v. Norkett,* 269 N.C. 679, 153 S.E. 2d 362, where a new trial was awarded because the court failed to comply with the *defendant's request* that such instruction be given.

Each of defendant's assignments of error has been considered.

None discloses prejudicial error. Hence, the verdict and judgment will not be disturbed.

No error.

STATE OF NORTH CAROLINA v. ROBERT LEE WALL.

(Filed 28 February, 1968.)

Indictment and Warrant § 4—

An indictment is not subject to quashal on the ground that the testimony of the witness who appeared before the grand jury was hearsay.

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

APPEAL by the State from *Crissman, J.*, 25 September 1967 Criminal Session of GUILFORD, High Point Division. This case was docketed and argued at Fall Term 1967 as No. 682-B.

Defendant Robert Lee Wall was charged in a bill of indictment with armed robbery. Prior to entering a plea, he moved to quash the bill of indictment on the ground that all the evidence before the grand jury was incompetent, in that it was hearsay.

On *voir dire*, Lindsay Royal, a detective with the High Point Police Department, testified in substance as follows:

Royal was the sole witness appearing before the grand jury. He had investigated this case and had signed the warrant against defendant. He did not have any independent knowledge of the case but had talked to a number of people, including the alleged victim, during the course of his investigation. Aside from a preliminary hearing in municipal court, no one had made statements to him implicating defendant in the latter's presence. In a conversation with defendant, he denied participation in the robbery.

> "THE COURT: That is what you told the Grand Jury, is what somebody else told you?
>
> THE WITNESS: That is correct."

During the course of his investigation Royal obtained the gun that was allegedly used in the robbery, which he exhibited to the grand jury. He determined that the owner of the gun was someone other than defendant.

The court entered order allowing defendant's motion to quash the bill of indictment. The State appealed.

Attorney General Bruton and Staff Attorney Vanore for the State.
Edward K. Washington for defendant.

PER CURIAM. It is not contended that the witness who appeared before the grand jury was disqualified from giving testimony as a matter of law. Thus, the sole question presented by this appeal is: Did the trial court err in allowing defendant's motion to quash on the ground that the indictment was returned solely on hearsay evidence?

In the case of *State v. Levy,* 200 N.C. 586, 158 S.E. 94, the defendant moved to quash the indictment on the ground that the grand jury had returned the indictment as a true bill "upon testimony which was incompetent because based entirely upon hearsay, and that no competent evidence had been heard by the grand jury." The defendant tendered witnesses who had testified before the grand jury to prove this contention, and the trial judge refused to hear testimony to this effect on the motion to quash, but stated that he would permit defendant to prove during the trial that the bill had been returned "upon improper and insufficient evidence."

Finding no error in the trial below, this Court stated:

> ". . . So, the main contention of the defendant is this: not merely that incompetent evidence was considered, but that no competent evidence was heard by the grand jury, and that for the latter reason the bill should have been quashed.
>
> . . .
>
> "The cases to which we have referred are not authority for the defendant's position. Nor are we inclined to accept his view, although it has the support of writers whose opinions are entitled to great respect. As Underhill remarked, 'It would be intolerable in practice to confine grand juries to the technical rules of evidence.' Criminal Evidence (3 ed.) sec. 71. The suggested practice would hinder the trial and result in useless delay. . . ."

This case was quoted from with approval by Lake, J., speaking for the Court in the case of *State v. Turner,* 268 N.C. 225, 150 S.E. 2d 406. See also *Costello v. U. S.,* 350 U.S. 359.

By authority of the cases herein cited, the action of the trial judge in allowing the motion to quash is

Reversed.

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

STATE OF NORTH CAROLINA v. FRANKLIN McIVER MOORE.

(Filed 28 February, 1968.)

1. Criminal Law § 101—

The fact that during trial a juror stated that he was ready to go home does not warrant a new trial.

2. Same—

The mere fact that an officer, who was a State's witness, opens the door for a lady juror to enter the courtroom does not warrant a mistrial.

3. Criminal Law § 126—

Motion by defendant to poll the jury is properly denied when the motion is made after the jury has been discharged.

APPEAL by defendant from *Hobgood, J.*, June, 1967 Session, SCOTLAND Superior Court.

The defendant, Franklin McIver Moore, was tried by jury in the Recorder's Court of Scotland County upon a warrant which charged that on August 27, 1966 he operated a motor vehicle upon the public highway while under the influence of intoxicating liquor. The jury returned a verdict of guilty. From the Recorder's judgment on the verdict, the defendant appealed to the Superior Court.

In the Superior Court the defendant entered a plea of not guilty. After the evidence was completed, defense counsel moved for a mistrial on two grounds: (1) A juror in the case had stated he had made up his mind and "he was ready to go home"; (2) Another juror had been talking to an officer who had testified as a State's witness. After the jury had returned a verdict of guilty, and before judgment, the Court examined the two jurors with respect to the complaint lodged by defense counsel. One of the jurors admitted he had stated to a companion juror "I am ready to go home"; that he had said nothing more. The other juror said she had not spoken to the officer. The officer testified that he was near when a lady juror came to the door and that he opened it for her to enter the courtroom. Nothing more was made to appear. The Court denied the motion for a mistrial.

Counsel for the defendant requested the Court that the jury be polled. He contends this request was made at the time or shortly after the verdict was rendered and while the jury was still in the box. The record clearly indicates, however, the motion for the poll came after the verdict was returned, accepted by the Court, and the jury had left the box. The Court denied the motion to have the jury polled upon the ground the request came too late.

The Court entered judgment that the defendant be confined in

common jail for 90 days, and suspended the judgment upon condition the defendant pay a fine of $100 and costs, and deliver his operator's license to the Clerk. The defendant excepted and appealed.

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

Bumpass, Belcher & Avant by George L. Bumpass, Nathaniel L. Belcher and Barry M. Storick.

PER CURIAM. The evidence was ample to go to the jury and sustain the verdict of guilty. The verdict is sufficient to support the judgment imposed. The Court examined the jurors whose conduct was questioned by the defense counsel, and ascertained that during some stage of the trial one of the jurors had stated he was ready to go home. Whether the conduct of the prosecution or the defense was the more boring to the juror, or the two sides were equally so, does not appear. Some jurors, especially businessmen, consider court proceedings more cumbersome and wasteful of time than ought to be the case and become impatient at the lack of dispatch in transacting the court's business. A juror is not disqualified because he prefers to be at home. Likewise, the mere fact that an officer, who has testified for the State, opens the door for a lady juror to enter is not sufficient to upset a trial. These matters were inquired into by the trial judge and determined in the exercise of his discretion. Clearly the request that the jury be polled came after the jury had left the box and was no longer the empaneled jury in the case. Judge Hobgood did not commit error in holding the request for the poll came too late.

No error.

TRUDY BUCK GASKINS v. WILLIAM EARL GASKINS.

(Filed 28 February, 1968.)

Divorce and Alimony § 16—

A wife may establish a right to alimony under G.S. 50-16 by a showing that she was compelled to leave home in fear of her safety as a result of defendant's assaults and cruel treatment, and in such case the husband will be deemed to have abandoned the wife, but the weight and the credibility of the wife's evidence is a matter for the jury.

APPEAL by plaintiff from *Bundy, J.*, 25 September 1967 Regular Civil Session of PITT.

Plaintiff and defendant were married on 23 January 1947 and lived together until 27 November 1966, when plaintiff left the home which she and defendant had occupied with their three children, aged 19, 16, and 13 years. Plaintiff alleged, and offered evidence tending to show:

On the day of the separation, defendant, "in one of his not unusual fits of temper," assaulted and threatened to kill plaintiff. Their children, who were present, prevented him from choking her. During the altercation, defendant fell to the floor, where he lay, bleeding from his face and apparently unconscious, for a half hour. Plaintiff was unable to go to his assistance because she was "in worse fix than he was," and she was also afraid to touch him. Later in the day, defendant permitted his father to order her from the premises, thereby forcing her to make her home with her parents. Since then, defendant has contributed nothing to her support and has refused to allow her to return to the family residence. During the twenty years she lived with defendant, she worked both in the home and on his farm; she was in all respects a diligent and dutiful wife.

Defendant's allegations and evidence tended to show: He is a farmer. For several years he has been incapacitated by arthritis and unable to do manual labor. On Sunday, 27 November 1966, plaintiff had an argument with their eldest daughter in the kitchen. When he went in to quell the disturbance, his wife threatened him with a knife. After his son had disarmed her, she attempted to scratch defendant, who tried to push her away from him. She continued, however, to slap and scratch him, and he collapsed on the floor. Defendant's children called his father, who called plaintiff's parents. They came and took plaintiff away with them. Relations between plaintiff and defendant had been unsatisfactory for the preceding five years. She had assaulted him on "any number of times before." Notwithstanding, on Christmas day 1966, defendant asked plaintiff to return home, but she refused.

The marriage of the parties (which was admitted) was established by the jury's answer to the first issue. The second issue, which the jury answered No, embraced the controversy: "Did defendant wrongfully abandon the plaintiff and fail to provide her with necessary subsistence on and after November 27, 1966, as alleged in the complaint?"

There was no exception to the two issues submitted, and no others were tendered. From judgment decreeing "that plaintiff is not entitled to permanent alimony from defendant," plaintiff appealed.

Sam B. Underwood, Jr., for plaintiff appellant.
M. E. Cavendish for defendant appellee.

PER CURIAM. To establish her right to alimony under G.S. 50-16, plaintiff undertook to prove that defendant, by his assaults and cruel treatment, had put her in such fear for her safety that she was compelled to leave home. In such a situation, the abandonment would be his — not hers — and the judge so instructed the jury. *Bailey v. Bailey,* 243 N.C. 412, 90 S.E. 2d 696; *Caddell v. Caddell,* 236 N.C. 686, 73 S.E. 2d 923; *Eggleston v. Eggleston,* 228 N.C. 668, 47 S.E. 2d 243. The crucial question, therefore, was who abandoned whom. The jury, under proper instructions, answered the determinative issue against plaintiff.

We have carefully examined each assignment of error, and in the trial we find

No error.

STATE v. GEORGE VOLNEY McCALL, JR.

(Filed 28 February, 1968.)

1. Escape § 1; Constitutional Law § 36—

Sentence of six months imprisonment imposed upon defendant's plea of guilty to a charge of felonious escape is not cruel and unusual in the constitutional sense, the sentence not exceeding the statutory maximum.

2. Escape § 1; Criminal Law § 138—

The court will not review defendant's loss of rewards and privileges for good conduct upon his conviction of felonious escape, since the Prison Commission has been given authority to promulgate and apply rules in this regard and the matter being administrative and not judicial. G.S. 148-13.

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

APPEAL by defendant from *Anglin, J.,* July 1967 Regular Criminal Session of HAYWOOD. This case was docketed and argued at the Fall Term 1967 as No. 13.

Defendant was serving a two-year prison sentence imposed at February 1965 Session of Superior Court of Transylvania County upon conviction of felonious assault. On or about June 1966 he escaped from the custody of the North Carolina State prison system and was apprehended 22 March 1967.

G.S. 148-13 authorizes the State prison system to grant certain privileges and rewards as an inducement to good conduct, including

the allowance of time for good behavior. At the time of his escape, defendant had earned approximately six months "good time", so that with this credit he had only about 28 days left to serve on the two-year sentence.

Bill of indictment was returned against defendant charging him with felonious escape, to which he entered a plea of guilty. The trial judge entered judgment that defendant be confined in the common jail of Haywood County for a period of six months, to be assigned to work under the State Prison Department.

Defendant appealed.

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

Millar & Alley for defendant.

PER CURIAM. Defendant contends that the sentence imposed constitutes cruel and unusual punishment within the prohibitions of Article I, Section 14 of the Constitution of North Carolina.

The sentence imposed does not exceed the maximum prescribed by the applicable statute, so as to violate defendant's constitutional rights. *State v. LePard,* 270 N.C. 157, 153 S.E. 2d 875; G.S. 148-45. Neither does the additional loss of the "good time" support defendant's contention.

> ". . . The prison rules and regulations respecting rewards and privileges for good conduct ("good time") are strictly administrative and not judicial. G.S. 148-13. The legislature has authorized the State Prison Commission to promulgate, publish, enforce and apply such rules. G.S. 148-11. Whether a prisoner shall benefit thereby depends on his own conduct. The giving or withholding of the rewards and privileges under these rules is not a matter with which the courts are authorized to deal." *State v. Garris,* 265 N.C. 711, 144 S.E. 2d 901.

Affirmed.

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

GEORGE C. MITCHELL, ON BEHALF OF HIMSELF AND ALL OTHERS OF THE SAME OR LIKE CLASS, PLAINTIFF APPELLANT, v. NORTH CAROLINA INDUSTRIAL DEVELOPMENT FINANCING AUTHORITY, A BODY POLITIC AND CORPORATE, AND WAYNE CORPENING, DIRECTOR OF THE DEPARTMENT OF ADMINISTRATION FOR THE STATE OF NORTH CAROLINA, G. ANDREW JONES, JR., STATE BUDGET OFFICER FOR THE STATE OF NORTH CAROLINA, AND G. H. BROOKS, STATE DISBURSING OFFICER FOR THE STATE OF NORTH CAROLINA, DEFENDANT APPELLEES.

(Filed 6 March, 1968.)

1. **Taxation § 7—**
The power of taxation and the power of appropriation of tax monies are subject to the constitutional proscription that tax revenues may not be used for private individuals or corporations, no matter how benevolent.

2. **Same; Constitutional Law § 10—**
The initial responsibility for determining what is a public purpose rests with the legislature and its findings are entitled to great weight, but an enactment for a private purpose is unconstitutional and cannot be saved by a legislative declaration to the contrary.

3. **Constitutional Law § 10—**
When a constitutional question is properly presented, it is the duty of the court to ascertain and declare the intent of the Constitution and to reject any legislative act in conflict therewith.

4. **Same—**
There is a presumption in favor of the constitutionality of a statute.

5. **Same—**
The court will not question the wisdom of the General Assembly in enacting a valid statute.

6. **Constitutional Law § 2—**
The Constitution of the State is a restriction of powers, and those powers not surrendered are reserved to the people through their representatives in the General Assembly.

7. **Taxation § 7—**
The concept of public purpose is incapable of fixed definition but expands with the population, economy, scientific knowledge, and with changing conditions.

8. **Same—**
For a use to be public it must benefit the public in common and not particular persons, interests or estates.

9. **Evidence § 3—**
The court will take judicial notice that the social order is not threatened by widespread unemployment such as confronted the nation during the depression years.

10. **Taxation § 7; Eminent Domain § 3—**
The term "public purpose" is generally used in the same sense in the law of taxation and in the law of eminent domain.

11. **Same—**
It is the rule in this State that government may not engage in private

enterprise, nor may the power of eminent domain be used in behalf of a private interest.

12. Taxation § 7—

The issuance of revenue bonds by the Industrial Development Financing Authority, pursuant to G.S. Chapter 123A, in order to acquire sites and to construct and equip buildings and other facilities thereon for lease to private industry, such bonds to be retired by the rental payments, is not a public use or purpose for which State tax funds may be appropriated to enable the Authority to commence its operations. N. C. Constitution, Art. V, § 3.

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

PARKER, C.J., dissenting.

BRANCH, J., joins in the dissenting opinion.

APPEAL by plaintiff from *McKinnon, J.*, 2 October 1967 Special Civil Session of WAKE docketed in the Supreme Court as Case No. 550 and argued at the Fall Term 1967. Before argument in the Court of Appeals, upon motion of all parties, this appeal was certified for transfer to this Court pursuant to G.S. 7A-31(b).

Plaintiff, a taxpayer, instituted this action to enjoin defendants, the Director of the Department of Administration for the State of North Carolina, the State Budget Officer, the State Disbursing Officer, and the North Carolina Industrial Development Financing Authority (Authority) from expending any money from the State's Contingency and Emergency Fund, or other tax funds, for or on behalf of Authority. Authority was created by Chapter 535 of the Session Laws of 1967, the "North Carolina Industrial Development Financing Act" (Act), now codified as Chapter 123A of the North Carolina General Statutes. This appeal involves the constitutionality of the Act. All material facts are stipulated.

The legislative findings, which preface the enactment, are: The creation of Authority as "a public agency and an instrumentality of the State" is necessary "to meet the challenge of attracting new industry posed by the inducements to industry offered through legislative enactments in other jurisdictions." Its purposes, specifically declared to be "public," are to promote industry and the natural resources of the State, increase gainful employment and purchasing power, improve living conditions, advance the general economy, expand facilities for research and development, increase vocational training opportunities, and otherwise contribute to the prosperity and welfare of the State "by providing facilities for operation by private operators useful for industrial and research pursuits. . . ." G.S. 123A-2.

The material portions of the Act, except when quoted, are summarized below:

The projects which Authority may undertake are the rehabilitation, enlargement, construction, operation, maintenance, and equipment of any building or structure (with necessary appurtenances thereto) for use as a factory, mill, processing, fabricating, or assembly plant, distribution center, or facility for industrial, medical, electronic or other types of research and development. "[N]o retail or wholesale store and no office, storage or other commercial facility not incidental" to the foregoing uses, however, shall be included in any project. G.S. 123A-3(7).

Authority is composed of seven members: the State Treasurer, the Chairman of the Department of Conservation and Development, and five gubernatorial appointees, who shall have the qualifications specified in G.S. 123A-4(a). Authority is empowered to appoint an executive director, a secretary, and such other officers as it deems advisable.

In addition to all the usual powers incidental and necessary to routine corporate existence, G.S. 123A-5(1)-(13) gives Authority the following powers (enumeration ours):

(a) To issue industrial revenue bonds (and revenue refunding bonds) to provide funds to pay the cost of acquiring sites and the construction and equipment of projects thereon; (b) to make all contracts necessarily incident to such acquisition, construction and financing; and (c) to lease, sell, or otherwise dispose of any real or personal property.

The "criteria and requirements" which shall govern Authority in undertaking a project are:

(1) The project "shall make a significant contribution to the economic growth" of the governmental unit "in which it shall be located"; (2) it shall not involve the relocation of an existing industrial or research facility to some other part of the State "unless the Authority determines that there is a clear and justifiable reason therefor"; (3) the proposed lessee of any project shall be financially responsible, willing and able to operate, repair and maintain the leased project at its own expense; and (4) the local governmental unit in which the project is to be located must "be able to cope satisfactorily with the impact of such project" by providing the services and facilities necessary to its construction, operation, and maintenance.

Authority's determination whether the foregoing "criteria and requirements" have been met is final. G.S. 123A-6.

The governmental body of the local unit must approve a project

and request Authority to finance and construct it before Authority may do so. G.S. 123A-7(b).

Authority's bonds shall be designated "North Carolina Industrial Development Financing Authority Revenue Bonds . . . . Series," each series being designated by the name of the local unit in which the project is to be located. The bonds shall mature as Authority designates (but not later than 40 years) and may be redeemable under conditions fixed by it prior to the issuance of the bonds. The proceeds of each issue shall be used only to pay the cost of the project for which such bonds are issued. G.S. 123A-14(b).

Authority's bonds, by the express provisions of G.S. 123A-13, "shall not be deemed to constitute a debt, liability or obligation of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any such political subdivisions," but principal and interest "shall be payable solely from the revenues and other funds provided therefor." Each bond issued shall contain a statement to this effect on the face thereof.

Notwithstanding any recitals in Authority's bonds, they are made negotiable instruments under the laws of this State, subject only to the provisions for registration in any resolution authorizing them and to any trust agreement securing them. G.S. 123A-19. The bonds are made legal and proper investments for public officers or agencies, insurance companies, trust companies, banking associations, investment companies, and all fiduciaries. They are also made securities which may be deposited with any state or municipal agency "for any purpose for which the deposit of bonds or obligations of the State is now or may hereafter be authorized by law." G.S. 123A-20.

Authority shall not mortgage any part of any project, but it may secure its bonds by a trust agreement whereby "the fees, rents, charges, proceeds from the sale of any project, . . . insurance proceeds, condemnation awards and other funds and revenues to be received therefor" are pledged to a corporate trustee. G.S. 123A-15.

Construction contracts may be awarded in the manner Authority decides will best promote free and open competition. It may, however, award contracts "upon a negotiated basis." G.S. 123A-10. No member of Authority shall be interested in any contract with it unless Authority determines his interest to be "so minor as not to be within the purview" of G.S. 123A-11.

After a project is constructed, Authority shall lease it to one or more persons, firms, or private corporations for operation and maintenance. Neither Authority nor any other governmental agency may operate any project financed under the Act except temporarily in order to protect its interest in the project pending its leasing. G.S.

123A-8. Authority's lease agreements may provide, *inter alia:* (a) Lessee shall operate and maintain the facility at its own expense; pay a rental sufficient to pay principal, interest, and redemption premiums, if any, on the bonds issued by Authority to finance the leased premises, plus any costs of construction or financing not paid out of the proceeds of the bonds or otherwise; (b) the lease shall not terminate before all bonds and other obligations incurred by Authority in connection with the leased project shall be fully paid, or adequate funds for such payment shall be deposited in trust; and (c) lessee may extend or renew the lease or purchase the project upon conditions consistent with the Act and in accordance with the provisions of G.S. 123A-8(5).

The lessee of any project is required to list it for taxation in the manner of an owner and to pay "an amount equal to the total amount of *ad valorem* taxes that would . . . be levied" upon the leased property if it were owned by a private citizen. G.S. 123A-9. Authority, however, shall not be required to pay any taxes on any property which it owns under the provisions of the Act or upon any income derived therefrom. Its revenue bonds, their transfer, and the income derived therefrom (including any profit made from a sale thereof) shall also be free from taxation by the State or any of its political subdivisions. The bonds are, however, subject to inheritance and gift taxes, and the leasehold interest of the lessee in a project is not exempt from taxation.

When all bonds and all costs incurred by Authority for any project have been paid (or sufficient money deposited in trust for their payment), Authority shall convey its interest in the project by quitclaim deed to the local unit in which the project is located if its governing body consents to the conveyance. This conveyance will be subject to any agreement, lease, option, covenants, limitations, liens, and other encumbrances affecting the project. "Any property so conveyed may be administered and used by the local unit for the purposes of this chapter or any other lawful purpose." G.S. 123A-22.

In order to enable Authority to organize and commence its operations, G.S. 123A-12 authorizes the Governor and the Council of State to transfer to it out of the Contingency and Emergency Fund such amounts, not otherwise obligated, as they shall deem necessary to enable Authority to organize and operate during the first two years of its existence.

On the same day the General Assembly passed the Act (19 May 1967), it also adopted Resolution No. 52. This resolution recited that North Carolina — reluctantly, with reservations, and as a defensive measure — had joined thirty-five states in authorizing the issuance

of industrial revenue bonds. It urged the President and the other forty-nine states to request the Congress of the United States "to make the interest received by the owners of so-called industrial revenue bonds hereafter issued subject to all applicable federal income tax laws."

The five members of Authority appointed by the Governor are defendants Wilbur Clark, Frank H. Kenan, T. Huber Hanes, Jr., J. Carlton Fleming, and David L. Ward, Jr. On 16 August 1967, Authority was duly constituted and organized. It now has a chairman, a secretary, and an acting executive director.

Pursuant to Authority's request, and purporting to act under the authority of G.S. 123A-12, the Governor and Council of State approved an allotment in the sum of $37,062.00 from the State's Contingency and Emergency Fund for the use of Authority for the fiscal year 1967-68. The Contingency and Emergency Fund represents money collected from citizens, residents, associations, and corporations of the State through various forms of taxation.

On 6 September 1967, plaintiff instituted this action to restrain the payment of any money from the Contingency and Emergency Fund to Authority and to enjoin Authority from accepting and spending any such funds. Plaintiff alleges that the Act is unconstitutional in that (1) it authorizes the use of public funds for other than a public purpose in violation of N. C. Constitution article 5, § 3 and article 1, § 17 and the 14th Amendment, § 1 of the United States Constitution; (2) it authorizes lending the credit of the State to private entities without a vote of the people in violation of N. C. Constitution article 5, § 4 and article VII, § 6; (3) it delegates legislative authority contrary to the provisions of N. C. Constitution article 1, § 8; (4) it authorizes the creation of a debt in contravention of N. C. Constitution article 7, § 6 or article 5, § 4; and (5) it exempts property from taxation in violation of N. C. Constitution article 5, § 5.

Answering the complaint, defendants admitted each allegation of fact and controverted each conclusion of law set out therein. Defendants prayed the court to declare the Act constitutional in every respect and to deny plaintiff the equitable relief he seeks.

When the case was called for trial, Judge McKinnon heard the cause upon the parties' stipulation of facts. *Inter alia,* this stipulation contained the facts detailed above. It also contained a list of thirty-nine states "allowing industrial development" bonds; estimates of the total amount of such bonds issued each year since 1951; statements with reference to the bonded indebtedness of the State of North Carolina and its tax revenues; statements compiled by the

U. S. Chamber of Commerce purporting to show the effect upon an area of every one hundred new factory workers; and statements which suggest that "several large industrial firms" permitted options upon industrial sites in North Carolina to expire because this State did not "afford financing of industrial sites through tax-exempt industrial revenue bonds."

Judge McKinnon found the facts to be in accordance with the stipulations. He adjudged that the Act promoted a public purpose; that it violated no provision of the State or Federal Constitution; and that it was in every respect a valid enactment. From the judgment denying plaintiff any relief and dismissing the action, plaintiff appealed.

Johnson & Gamble for plaintiff appellant.

Attorney General T. Wade Bruton and Deputy Attorney General Harry McGalliard for Wayne Corpening, G. Andrew Jones, Jr., and G. H. Brooks, defendant appellees.

Herman Wolff, Jr., for North Carolina Industrial Development Financing Authority, defendant appellee.

SHARP, J. This case, brought to test the constitutionality of the North Carolina Industrial Development Financing Act, does not call into question the actual operation of Authority nor does it involve the validity or tax status of any bond issue, for no bonds have been issued. As the Wisconsin court said in *State v. Barczak,* 34 Wis. 2d 57, 148 N.W. 2d 683, 687, "The case before us involves only a threshold expenditure. It does not go to the pith of the functions or the operations of an industrial development corporation." The question for decision is whether an initial appropriation of $37,062.00 of tax money from the State's Contingency and Emergency Fund may be made to enable Authority to organize and commence its operations.

N. C. Const. art. V, § 3 provides: "The power of taxation shall be exercised in a just and equitable manner, *for public purposes only,* and shall never be surrendered, suspended, or contracted away." (Emphasis added.) This limitation of taxing power was contained in the Constitution of 1868 and reaffirmed by the vote of the people in 1962 when Article V, § 3 of the Constitution was revised. The power to appropriate money *from* the public treasury is no greater than the power to levy the tax which put the money in the treasury. Both powers are subject to the constitutional proscription that tax revenues may not be used for private individuals or corporations, no matter how benevolent. *Horner v. Chamber of Commerce,* 231 N.C. 440, 57 S.E. 2d 789. The crucial question, therefore, is whether

Authority was created for a public purpose. If so, it may be activated by the questioned appropriation of tax funds; otherwise not. *Britt v. Wilmington,* 236 N.C. 446, 73 S.E. 2d 289.

The initial responsibility for determining what is and what is not a public purpose rests with the legislature, and its findings with reference thereto are entitled to great weight. If, however, an enactment is in fact for a private purpose, and therefore unconstitutional, it cannot be saved by legislative declarations to the contrary. When a constitutional question is properly presented, it is the duty of the court to ascertain and declare the intent of the framers of the Constitution and to reject any legislative act which is in conflict therewith. *State v. Felton,* 239 N.C. 575, 80 S.E. 2d 625; *Nash v. Tarboro,* 227 N.C. 283, 42 S.E. 2d 209; 1 Strong, N. C. Index, Constitutional Law § 10 (1957). The presumption, however, is in favor of constitutionality, and all doubts must be resolved in favor of the act. *State v. Furmage,* 250 N.C. 616, 109 S.E. 2d 563; *Wells v. Housing Authority,* 213 N.C. 744, 197 S.E. 693. The State's Constitution is a restriction of powers; those powers not surrendered are reserved to the people to be exercised through their representatives in the General Assembly. Therefore, so long as an act is not forbidden, the wisdom of the enactment is exclusively a legislative decision. *McIntyre v. Clarkson,* 254 N.C. 510, 119 S.E. 2d 888; *Yarborough v. Park Commission,* 196 N.C. 284, 145 S.E. 563; *Hudson v. Greensboro,* 185 N.C. 502, 117 S.E. 629. If the use is public, the expediency or necessity for establishing it is exclusively for the legislature. *Dennis v. Raleigh,* 253 N.C. 400, 116 S.E. 2d 923; *Redevelopment Commission v. Bank,* 252 N.C. 595, 114 S.E. 2d 688; *Nash v. Tarboro, supra; Wells v. Housing Authority, supra; Yarborough v. Park Commission, supra.*

A slide-rule definition to determine public purpose for all time cannot be formulated; the concept expands with the population, economy, scientific knowledge, and changing conditions. As people are brought closer together in congested areas, the public welfare requires governmental operation of facilities which were once considered exclusively private enterprises, *Fawcett v. Mt. Airy,* 134 N.C. 125, 45 S.E. 1029, and necessitates the expenditure of tax funds for purposes which, in an earlier day, were not classified as public. *Keeter v. Lake Lure,* 264 N.C. 252, 141 S.E. 2d 634. Often public and private interests are so co-mingled that it is difficult to determine which predominates. It is clear, however, that for a use to be public its benefits must be in common and not for particular persons, interests, or estates; the ultimate net gain or advantage must be the public's as contradistinguished from that of an individual or private entity. *Briggs v. Raleigh,* 195 N.C. 223, 141 S.E. 597.

"It has been said that the term 'public purpose' is merely a classification distinguishing objects for which the government is to provide from those which are left to private inclination, interest, or liberality. A private enterprise, on the other hand, is one which is ordinarily pursued by individuals in cultivating the soil, manufacturing articles for sale, dealing in merchandise, and the various and numerous other activities which enlist individual energy in a complex and advancing civilization. . . . The term 'public purpose,' as used in a constitutional provision that taxes shall be levied for public purposes only, is synonymous with 'governmental purpose' in the broad connotation given the latter term under the modern concept of government and the relation between government and society." 51 Am. Jur. *Taxation* § 326 (1944).

This Court has, on at least two occasions, quoted with approval the following creed: " 'If there is any restriction implied and inherent in the spirit of the American Constitutions, it is that the government and its subdivisions shall confine themselves to the business of government. . . .' 38 Am. Jur., Municipal Corporations § 395." Bobbitt, J., in *Dennis v. Raleigh, supra* at 403-04, 116 S.E. 2d at 926; Denny, J. (later C.J.), in *Nash v. Tarboro, supra* at 285, 42 S.E. 2d at 211. When we have approved this statement, however, we are back where we started. What is the business of government? To say that it is a proper function of the State to promote the health, safety, morals, and general welfare of the community is quite true, *Fawcett v. Mt. Airy, supra,* but it is not to decide a particular case. Is it today a proper function of government for the State to provide a site and equip a plant for a private industrial enterprise?

In the interstate competition for industry, an overwhelming majority of the states now authorize the use of industrial development bonds. Although the plans vary in detail, they are basically the same. Local governmental units, or some agency of the state created for this specific purpose, pay for a site and construct a plant with funds derived from the issuance of revenue bonds. The facility is then leased to a manufacturer whose rental payments are used to retire the bonds. When the bonds are paid, the industry, if it so desires, may exercise an option to buy the facility or it may continue to lease it, depending upon its agreement with the lessor. This arrangement enables the manufacturer to expand or relocate without a heavy investment of its own capital. For a history of the inception and growth of governmental aid financing, see Abbey, *Municipal Industrial Development Bonds,* 19 Vand. L. Rev. 25 (1965); Pinsky, *Public Industrial Financing,* 111 U. Pa. L. Rev. 265 (1963). See Notes, 59 Col. L. Rev. 619, 629 (1959) & 14 Vand. L. Rev. 621 (1961);

Bridges, *State and Local Inducements for Industry,* 18 Nat'l Tax J. 1 (1965).

At the time the General Assembly passed the Act, it declared in Resolution No. 52 that it considered the Act bad public policy. It explained that it felt compelled to authorize industrial revenue bonds in order to compete for industry with neighboring states which use them. As proof of its reluctance to join the industry-subsidizing group of states, the General Assembly requested the President and the other forty-nine states to petition Congress to make the interest on all such bonds thereafter issued subject to all applicable income-tax laws.

"It is the Internal Revenue Code of 1954, not the public credit, which makes industrial development bonds work. . . . The issuing sources of the revenue bonds would be immaterial if the same federal tax benefits could otherwise be obtained." Note, *Industrial Development Bonds: Judicial Construction vs. Plant Construction,* 15 U. Fla. L. Rev. 262, 296 (1962). See also Herring & Miller, *Florida Public Bond Financing — Comments on the Constitutional Aspects,* 21 U. Miami L. Rev. 1, 30 (1966).

Section 103(a)(1) of the Internal Revenue Code of 1954 provides that gross income does not include interest on the obligations of a state, a territory, or a possession of the United States, or of any political subdivision of the foregoing. Under revenue rulings, income from revenue bonds which are obligations of a political subdivision is excluded "notwithstanding the fact that the bonds were issued to finance the construction of industrial plants for lease to private concerns," with payment to be made from the revenues of the lease rather than the general revenues of the municipality. Michie's Federal Tax Handbook ¶ 631 (1966); Revenue Ruling 54-106, 1954-1 CB 28; 1 Merton, Law of Federal Income Taxation § 8.17 (1962). See also Revenue Ruling 57-187, 1957-1 CB 65; Revenue Ruling 63-20, 1963-1 CB 24.

Because the interest on revenue bonds of a state agency is excluded from federal and state income taxes, the rate is generally lower than that which private borrowers pay, and this saving is usually passed to the industry in the form of lower rentals. Furthermore, rental payments are deductible under both federal and state laws as an operating expense. By buying the bonds itself, it is possible for an industry to realize a net profit on its occupancy of the facility in consequence of a net tax savings resulting from rent deductions and receipt of non-taxable interest-income. For figures showing this accomplishment, see Note, 15 U. Fla. L. Rev. 262 at 269-270 (1962). See also Note, *The "Public Purpose" of Municipal Financing for Industrial Development,* 70 Yale L. J. 789 (1961).

Since the tax advantage is the primary appeal which these industrial bonds make to purchasers, the elimination of this status would curtail their use to finance private business expansion — as the General Assembly recognized in Resolution 52. The Supreme Court of Wyoming also noted this fact when it passed upon the constitutionality of the Wyoming Industrial Development Project Act in *Uhls v. State,* 429 P. 2d 74. It said: "Such financing (industrial revenue bonds) has been resorted to because municipal bonds are exempt from Federal taxation, and small communities have been able to use this tax-exempt status to encourage local industrial development. No doubt it is only a matter of time until Congress will see fit to remove tax exemptions for municipal revenue bonds." *Id.* at 82. Bills to end the tax-exempt status of industrial aid bonds have been introduced in Congress. 5 Nation's Cities 29 (1967); Note, 20 Vand. L. Rev. 685 (1967).

According to an item in Newsweek, January 29, 1968, p. 59: "The Treasury Department and the Securities and Exchange Commission will campaign this year for a crackdown on the growing use of tax exempt industrial revenue bonds to finance private business expansion. During 1967, the worth of such bonds issued by state and local governments exceeded $1 billion." The National League of Cities and the North Carolina League of Municipalities say that tax-free revenue bonds pose a growing threat to the financial stability of city government; that they amount to a subsidy to "blue ribbon" industry; that they compete with general-purpose municipal bonds, thereby reducing the market and raising the interest rates on such bonds; and that they endanger the entire tax-exempt status accorded income from governmental bonds. Southern City, February 1967; 5 Nation's Cities 29 (Dec. 1967); Spiegel, *Financing Private Ventures with Tax-Exempt Bonds: A developing "Truckhole" in the Tax Law,* 17 Stan. L. Rev. 224 (1965).

Whatever may be the ultimate fate of governmental industrial revenue bonds, our research indicates that at least forty-two states (not counting North Carolina) have held that governmental financing for industrial development serves a public purpose. The courts of the twenty-one jurisdictions listed below have, without constitutional amendments, upheld the validity of legislation authorizing governmental industrial aid bonds or other types of financial assistance. They have either assumed the public purpose of such acts or reasoned as follows: An inadequate number of jobs means an oversupply of labor, which results in low wages. Unemployment and low wages lead to hunger, ill health, and crime. The continued existence of an established industry and the establishment of new industry

provide jobs, measurably increase the resources of the community, promote the economy of the state, and thereby contribute to the welfare of its people. The stimulation of the economy is, therefore, an essential public and governmental purpose. The fact that a private interest incidentally benefits from such governmental aid is not fatal if substantial public benefits also result. See generally, Note, *The "Public Purpose" of Municipal Financing for Industrial Development,* 70 Yale L. J. 789 (1961); Note, 20 Vand. L. Rev. 685 (1967).

Alabama: Newberry v. City of Andalusia, 257 Ala. 49, 57 So. 2d 629 (1952) (Public purpose assumed; two justices dissenting); *Alaska: DeArmand v. Alaska State Development Corporation,* 376 P. 2d 717 (1962); *Connecticut: Roan v. Connecticut Industrial Building Commission,* 150 Conn. 333, 189 A. 2d 399 (1963) (State Industrial Building Commission to insure mortgages on industrial projects); *Delaware: In re Opinion of the Justices,* 54 Del. 366, 177 A. 2d 205 (1962) (Act held for a public purpose without reliance on Const. art. VIII, § 4 allowing public money to be appropriated to private corporations upon vote of three-fourths of all members of the General Assembly); *Iowa: Green v. City of Mt. Pleasant,* 256 Iowa 1184, 131 N.W. 2d 5 (1964); *Kansas: State v. City of Pittsburg,* 188 Kan. 612, 364 P. 2d 71 (1961); *Kentucky: Faulconer v. City of Danville,* 313 Ky. 468, 232 S.W. 2d 80 (1950); see also *Industrial Development Authority v. Eastern Kentucky Reg. pl. Comm.* (Ky. C.A.), 332 S.W. 2d 274 (1960); *Maryland: City of Frostburg v. Jenkins,* 215 Md. 9, 136 A. 2d 852 (1957) (One Justice dissenting); *Michigan: City of Gaylord v. Beckett,* 378 Mich. 273, 144 N.W. 2d 460 (1966) (One dissent); *Mississippi: Albritton v. City of Winona,* 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436 (1938), *appeal dismissed,* 303 U.S. 627; *New Hampshire: Opinion of the Justices,* 106 N.H. 237, 209 A. 2d 474 (1965); *Opinion of the Justices,* 103 N.H. 258, 169 A. 2d 634 (1961); *Cf. In re Opinion of the Justices,* 99 N.H. 528, 114 A. 2d 514 (1955); *Opinion of the Justices,* 106 N.H. 180, 207 A. 2d 574 (1965); *New Jersey: Roe v. Kervick,* 42 N.J. 191, 199 A. 2d 834 (1964); *New Mexico: Village of Deming v. Hosdreg Co.,* 62 N.M. 18, 303 P. 2d 920 (1956) (two justices dissenting); *North Dakota: Gripentrog v. City of Wahpeton,* 126 N.W. 2d 230 (1964); *Oklahoma: Harrison v. Claybrook,* 372 P. 2d 602 (1962). (Constitution permits the State to engage in any occupation or business for *public purposes,* except agriculture; see also, *Application of Oklahoma Industrial Finance Authority,* 360 P. 2d 720 (1961) for constitutional provision authorizing limited pledge of State's credit for industrial development;) *South Carolina: Elliott v. McNair,* ...... S.C. ......, 156 S.E. 2d 421

(1967); *Tennessee: McConnell v. City of Lebanon,* 203 Tenn. 498, 314 S.W. 2d 12 (1958) (two Justices dissenting; proposition required to be affirmed by the voters); *Holly v. City of Elizabethton,* 193 Tenn. 46, 241 S.W. 2d 1001 (1951); *Virginia: Fairfax County Industrial Develop. Auth. v. Coyner,* 207 Va. 351, 150 S.E. 2d 87 (1966); *West Virginia: State v. Bane,* 148 W. Va. 392, 135 S.E. 2d 349 (1964); *State v. Demus,* 148 W. Va. 398, 135 S.E. 2d 352 (1964); *Wisconsin: State v. Barczak,* 34 Wis. 2d 57, 148 N.W. 2d 683 (1967) (Act held *prima facie* for a public purpose; court did not pass on actual operation of authority); *Wyoming: Uhls v. State,* 429 P. 2d 74 (1967).

The following eleven states have passed acts authorizing industrial revenue bonds under express constitutional authority:

Arkansas: In 1957, Arkansas amended its constitution to permit counties and cities of the first or second class, with the consent of a majority of the qualified voters of the unit, to issue bonds in the approved amount for the purpose of securing and developing industry. Amendment Number 49. An act of the legislature also permits the state to purchase the bonds issued by private, nonprofit development finance corporations chartered by the State Bank Commission. The Arkansas Supreme Court, in *Andres v. First Arkansas Development Finance Corp.,* 230 Ark. 594, 324 S.W. 2d 97 (1959), held that the State's purchase of these bonds was not a loan of the State's credit.

Georgia: The General Assembly may amend the constitution to establish County Development Authority. Bonds approved in *Smith v. State,* 217 Ga. 94, 121 S.E. 2d 113 (1961); bonds disapproved in *Smith v. State,* 222 Ga. 552, 150 S.E. 2d 868 (1966).

Louisiana: Art. 14, § 14 of the constitution authorizes municipalities to issue industrial revenue bonds. *Miller v. Police Jury of* Washington Parish, 226 La. 8, 74 So. 2d 394 (1954); *Hebert v. Police Jury of West Baton Rouge Parish,* ...... La. ......, 200 So. 2d 877 (1967).

Maine: Constitution art. IX, § 8, as amended in 1962, permits a municipality, when authorized by a majority of the registered voters, to issue bonds in order to construct facilities for lease or sale to industries, firms, or corporations. See *Opinion of the Justices,* 161 Me. 182, 210 A. 2d 683 (1965). In addition, art. IX, § 14-A permits the legislature to insure payment of mortgage loans on industrial real estate within the state. See *Martin v. Maine Savings Bank,* 154 Maine 259, 147 A. 2d 131 (1958); *Opinion of the Justices,* 153 Me. 202, 136 A. 2d 528 (1957).

Missouri: Art. VI, § 23(a) allows cities to issue general obligation bonds for industrial financing by ⅔ vote; art. VI, § 27 allows city to issue revenue bonds for industrial financing of 4/7 vote.

Nebraska: Constitution art. XV, § 16 authorizes local units to acquire and develop property for lease to industry and to issue revenue bonds for the same purposes. (See further discussion of this amendment post.) See *State v. County of Lancaster,* 173 Neb. 195, 113 N.W. 2d 63 (1962).

New York: Effective January 1, 1967, an amendment to the constitution authorized the state to lend money "to a public corporation to be organized for the purpose of making loans to nonprofit corporations to finance the construction" of new or expanding industrial or manufacturing plants. N. Y. Const. art. VII, § 8; art. XI, § 7.

Ohio: Constitution art. VIII, § 13, as amended in 1965, declares industrial development financing to be a public purpose and allows the issuance of bonds for financing industrial development. See *State v. Greater Portsmouth Growth Corp.,* 7 Ohio St. 2d 34, 218 N.E. 2d 446 (1966).

Rhode Island: Constitution art. IV, §§ 10, 14, permits the appropriation of public funds for private purposes with the assent of two-thirds of the members of the General Assembly. *Opinion to the Governor,* 79 R.I. 305, 88 A. 2d 167 (1952); *Opinion to the Governor,* 88 R.I. 202, 145 A. 2d 87 (1958).

Texas: The 1967 Legislature enacted the Texas Industrial Development Act, which would authorize municipalities and navigation districts to issue limited obligation bonds in aid of industry provided a proposed constitutional amendment is adopted by the electorate at the 1968 general election. The proposed amendment would add section 52a to Article III of the constitution and would grant the legislature the power to authorize local units to issue revenue bonds for industrial development. 1967 Acts of Texas, 60th Leg. S. J. R. No. 14.

Washington: In 1966, Washington amended art. VIII, § 8 of its constitution so that it now allows the use of public funds by port districts for industrial development in such manner as may be prescribed by the legislature.

Five states, Arizona, California, Massachusetts, Oregon, and South Dakota, apparently have not authorized industrial revenue bonds. Our research has disclosed no cases which have passed upon the validity of the acts of the following states: Colorado, Hawaii, Indiana, Minnesota, Montana, Nevada, New York, Pennsylvania, Utah, and Vermont. (See *Port Authority of City of Saint Paul v. Fisher,* 275 Minn. 157, 145 N.W. 2d 560 (1966) for decision upholding act authorizing use of industrial revenue bonds by St. Paul's Port Authority.) The present status of the Illinois Industrial De-

velopment Authority Act is unclear. See *Bowes v. Howlett,* 24 Ill. 2d 545, 182 N.E. 2d 191 (1962), in which the Supreme Court of Illinois held unconstitutional a continuing appropriation of $500,000.00 to the Authority from the general revenue fund.

The Supreme Courts of at least *six* states — Florida, Idaho, Maine, Nebraska, Ohio, and Washington — have held acts such as the one we now consider not to be for a public purpose and therefore unconstitutional. After these decisions, Maine, Nebraska, Ohio, and Washington amended their constitutions to permit legislation authorizing industrial revenue bonds.

In 1952, the Town of North Miami, Florida, proposed to issue revenue bonds to purchase lands upon which to erect an aluminum plant for lease to a private industry for twenty years. The bonds were to be paid from the net rental derived from the property and were not an obligation of the town. In *State v. Town of North Miami,* 59 So. 2d 779 (1952), the Supreme Court of Florida held the proposed issue unconstitutional. The court said that it had long been the policy of the State to advertise the advantages of Florida to induce new people and new capital to come there because such programs inured to the benefit of all the citizens of the governmental units affected and not a particular private entity. However, in none of the cases decided under Florida's present constitution, the court continued, had it "approved any special legislative acts which authorized any of the political subdivisions or governmental units of the State to acquire property and erect buildings thereon for the exclusive use of a private corporation for private gain and profit." *Id.* at 784.

"Every new business, manufacturing plant, or industrial plant which may be established in a municipality will be of some benefit to the municipality. A new super market, a new department store, a new meat market, a steel mill, a crate manufacturing plant, a pulp mill, or other establishments which could be named without end, may be of material benefit to the growth, progress, development and prosperity of a municipality. But these considerations do not make the acquisition of land and the erection of buildings, for such purposes, a municipal purpose.

"Our government was founded upon the firm foundation that private property cannot be taken except when it will serve a public purpose. . . . If private property may be purchased by the municipality for the use and benefit of a private corporation, then it may be acquired by the great power of eminent domain for such a purpose.

"Our organic law prohibits the expenditure of public money for a private purpose. It does not matter whether the money is derived

by *ad valorem* taxes, by gift, or otherwise. It is public money and under our organic law public money cannot be appropriated for a private purpose or used for the purpose of acquiring property for the benefit of a private concern. It does not matter what such undertakings may be called or how worthwhile they may appear to be at the passing moment. The financing of private enterprises by means of public funds is entirely foreign to a proper concept of our constitutional system. Experience has shown that such encroachments will lead inevitably to the ultimate destruction of the private enterprise system." *Id.* at 784-85.

The Town of North Miami's proposed bond issue was without legislative authority, but the court made it quite clear that the basis of decision was not the absence of statutory authority because, it said, the legislature "cannot authorize a municipality to spend public money or lend or donate, directly or indirectly, public property for a purpose which is not public." *Id.* at 785. In *State v. Clay County Development Authority,* 140 So. 2d 576 (1962), the court reaffirmed the ruling in *State v. Town of Miami* by invalidating a proposed issue of revenue bonds under legislative authority. See Note, 15 U. Fla. L. Rev. 262 (1962); see also, Tew, *Industrial Bond Financing and the Florida Public Purpose Doctrine,* 21 U. Miami L. Rev. 171 (1966).

The Supreme Court of Nebraska, saying that *State v. Town of North Miami* pointed the way to the correct conclusion, invalidated that state's industrial bond act in *State v. City of York,* 164 Neb. 223, 82 N.W. 2d 269 (1957). The City of York had proposed to issue revenue bonds and, with the proceeds thereof, to purchase a cold storage and packing plant and to lease it back to the vendor as a packing plant for slaughtering hogs. The court, after considering the opinions in other states which had held that such bonds were issued for a public purpose, concluded that these decisions were based on "fundamental fallacies of reasoning."

Although conceding that the location of a packing company in the city might give employment to its citizens and tend to balance a restricted economy, the court said: "But general benefit to the economy of a community does not justify the use of public funds of the city unless it be for a public as distinguished from a private purpose. This is simply a case where the city is attempting to use the powers, credits, and public moneys of the city to purchase land and erect industrial buildings thereon for the use of a private corporation for private profit and private gain. It serves no public or municipal purpose. The Act purports to grant powers to cities which are beyond the authority of the Legislature to confer." *Id.* at 230, 82 N.W. 2d at 274.

As a result of the decision in *State v. City of York, supra,* in 1960, Nebraska amended its constitution to authorize municipalities to aid industrial enterprises by means of revenue bonds, which shall not become obligations of the governmental subdivision issuing them. *Inter alia,* the amendment also provided: (1) All real or personal property so acquired by a government unit "shall be subject to taxation to the same extent as private property during the time it is leased to or held by private interests"; (2) "The acquiring, owning, developing, and leasing of such property shall be deemed for a public purpose, *but the governmental subdivision shall not have the right to acquire such property by condemnation* (Italics ours); (3) No governmental subdivision shall have the power to operate any such property as a business or in any manner except as the lessor thereof." Art. XV, § 16.

In *Village of Moyie Springs, Idaho v. Aurora Mfg. Co.,* 82 Idaho 337, 353 P. 2d 767 (1960), the Supreme Court of Idaho, following the reasoning of the courts of Florida and Nebraska, held unconstitutional an industrial revenue bond act similar to Nebraska's. In commenting upon the decisions which had held such acts constitutional, the court said: "Such decisions read like apologies to constitutional limitations, dictated by expediency." *Id.* at 345, 353 P. 2d at 772. In denying the public purpose of such acts and the power of the legislature to exempt industrial revenue bonds and their income from taxation, the Idaho court said:

". . . An exemption which arbitrarily prefers one private enterprise operating by means of facilities provided by a municipality, over another engaged, or desiring to engage, in the same business in the same locality, is neither necessary nor just. . . . It is obvious that private enterprise, not so favored, could not compete with industries operating thereunder. If the state-favored industries were successfully managed, private enterprise would of necessity be forced out, and the state, through its municipalities, would increasingly become involved in promoting, sponsoring, regulating and controlling private business, and our free private enterprise economy would be replaced by socialism. The constitutions of both state and nation were founded upon a capitalistic private enterprise economy and were designed to protect and foster private property and private initiative. . . .

"Moreover, the tax exemption granted to industries under the act, would result in casting an additional tax burden upon the other citizens and industries, not only of the municipalities directly participating, but of the entire state." *Id.* at 349-50, 353 P. 2d at 775.

In 1959, the Supreme Court of Washington held that an act of

the legislature which, *inter alia,* authorized the Port of Seattle to condemn private lands for the development and sale to private entities as industrial sites was unconstitutional as authorizing the condemnation of private property for the private use of others. *Hogue v. Port of Seattle,* 54 Wash. 2d 799, 341 P. 2d 171 (1959). A constitutional amendment followed in 1966.

The exposition in the preceding Florida, Nebraska, Idaho, and Washington cases paralleled the dissent of Anderson, J., in the case of *Albritton v. Winona,* 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436 (1938). In that case, the Supreme Court of Mississippi upheld the constitutionality of that state's "Balance Agriculture with Industry Plan." This, the first of the municipal-industrial financing acts, was enacted "during, and presumably in response to, the depression." Notes, 70 Yale L. J. 789 (1961) and 20 Vand. L. Rev. 685 (1967); see *Elliott v. McNair,* ...... S.C. ......, 156 S.E. 2d 421, 425 (1967). In his dissent, Anderson, J., said:

"The logic of the majority opinion leads to this: The Legislature, if it found necessary to relieve the unemployment, could authorize a municipality to take over, under the power of eminent domain, all property and all business of every kind within its corporate limits, and to manage and operate it as a public utility. And, of course, what the state could authorize municipalities to do, it could do itself." *Id.* at 118, 178 So. at 812, 115 A.L.R. at 1454-55.

In 1957, the legislature of the State of Maine considered a bill which would have authorized the City of Bangor to acquire by purchase, lease, *or the right of eminent domain* sites for the use of industrial development. In response to its request for an advisory opinion, the Supreme Court of Maine informed the legislature that the act would not be constitutional. The Justices said:

"We are unable to escape the conclusion that action under the Act would be for the direct benefit of private industry. An existing shoe factory or paper mill, let us say, within the proposed industrial area or park could not, for reasons clear to all, be authorized under our Constitution to acquire additional facilities by eminent domain. That such a course could well be of great value to the particular enterprise and so to the city or community would not affect the application of the law.

"The test of public use is not the advantage or great benefit to the public. 'A public use must be for the general public, or some portion of it, who may have occasion to use it, not a use by or for particular individuals. It is not necessary that all of the public shall have occasion to use. It is necessary that every one, if he has occa-

sion, shall have the right to use.' *Paine v. Savage,* 126 Me. 121, 126." *Opinion of the Justices,* 152 Me. 440, 446-47, 131 A. 2d 904, 907 (1957).

In 1962, Maine amended its Constitution to permit a municipality, when authorized by a majority of its registered voters, to issue bonds in order to construct facilities for lease or sale to industries. Maine Const. art. IX, § 8-A. Notwithstanding this constitutional provision, the Supreme Court of Maine has continued to hold that state financing of industrial facilities does not serve a public purpose. It advised its legislature that a statute which declared that industrial projects financed under its Municipal Industrial and Recreational Obligation Act "shall be deemed to be used for a public purpose and shall be exempt from taxation so long as title to the project shall remain in the name of the municipality" violated Article IX, § 8 of the Maine Constitution. This section provides that "all taxes upon real and personal estate, assessed by authority of this State shall be apportioned and assessed equally, according to the first value thereof." The court said:

"The industrial and recreational projects envisioned by the proposed legislation are inescapably designed to serve private purposes in spite of legislative fiat to the contrary and a tax exemption obviously intended to be predicated upon the existence of a public purpose would, where no such purpose exists, violate constitutional prohibitions." *Opinion of the Justices,* 161 Me. 182, 207, 210 A. 2d 683, 697-98 (1965).

Massachusetts is also generally grouped with those jurisdictions which hold industrial revenue bonds to be invalid. The case relied upon, however, did not involve an industrial revenue bond act. In response to its request for an advisory opinion, the Supreme Judicial Court of Massachusetts informed the senate that a proposed act authorizing the city of Boston "to acquire by eminent domain or otherwise" a 28-acre abandoned railway yard within the city and sell it to a corporation to develop for both public and private uses, was unconstitutional. It was expected that adjacent areas and the city as a whole would profit from the development of the yard. Notwithstanding, the Massachusetts court said: "[O]ne proposition is thoroughly established practically everywhere, and so far as we are aware without substantial dissent, and that is that public money cannot be used for the primary purpose of acquiring either by eminent domain or by purchase private lands to be turned over or sold to private persons for private use." *In Re Opinion of the Justices,* 332 Mass. 769, 781-82, 126 N.E. 2d 795, 802 (1955).

In *St. v. Brand,* 176 Ohio St. 44, 197 N.E. 2d 328 (1964), the Supreme Court of Ohio invalidated that state's industrial bond act

upon grounds other than the absence of public purpose. As a result of this case, the Constitution of Ohio was amended to authorize "the lending of aid and credit" by the state and governmental subdivisions to private industry to create new employment. *State v. Greater Portsmouth Growth Corp.*, 7 Ohio St. 2d 34, 218 N.E. 2d 446 (1966).

The reasoning of the courts of Florida, Idaho, Maine, Massachusetts, Nebraska, and Washington has been that of this Court — and we still consider it sound. The financing of private enterprise with public funds contravenes the fundamental concept of North Carolina's Constitution.

Ours is still an expanding economy. According to the stipulations, in 1961, the Commissioner of Revenue collected 456.2 million dollars in taxes; in 1967, 801.3 million. In each of the intervening years there was an increase in collections. In 1963, new and expanded plant investments in North Carolina amounted to $386,929,000; in 1966, $613,581,000. For the first half of 1967, industrial investments amounted to $313,850,000. There is no suggestion in the record, and the Court judicially notices, that our social order is not threatened by widespread unemployment such as confronted the entire nation during the depression years, which began in 1929. No drastic "pump-priming" legislation is presently required to save the economy. The State is not losing population because of the lack of job opportunities. (See *McConnell v. City of Lebanon, supra,* where such critical conditions were used to justify municipal aid to industry.)

The rule in North Carolina is that it is not the function of government to engage in private business. *Nash v. Tarboro,* 227 N.C. 283, 42 S.E. 2d 209 (1947), was an action to enjoin the Town of Tarboro from issuing bonds (which the legislature had authorized and the electorate had approved) for the construction of a hotel. The Town had no adequate hotel facilities. Notwithstanding, this Court held that the cost of constructing and maintaining a hotel was not a public purpose within the meaning of N. C. Const. art. V, § 3, and that the act of the legislature authorizing the expenditure was unconstitutional. In writing the opinion, Denny, J. (later C.J.), said:

"It may be desirable for the Town of Tarboro to have additional hotel accommodations. Such facilities would, no doubt, serve a useful purpose and tend to enhance the value of property generally, as well as to promote the commercial life of the community, but ordinarily such benefits will be considered too incidental to justify the expenditure of public funds. . . . Every legitimate business in a community promotes the public good. . . . But 'It may be safely stated that no decision can be found sustaining taxation by a mu-

nicipality, where its principal object is to promote the trade and business interests of the municipality, and the benefit to the inhabitants is merely indirect and incidental. . . . Many objects may be public in the general sense that their attainment will confer a public benefit or promote the public convenience, but not be public in the sense that the taxing power of the State may be used to accomplish them.' . . ." *Id.* at 289-90, 42 S.E. 2d at 214.

The opinion quoted with approval the following statement from *Savings & Loan Ass'n v. Topeka,* 87 U.S. 655, 22 L. Ed. 455:

"'. . . If it be said that a benefit results to the local public of a town by establishing manufacturers, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town.'" *Id.* at 286, 42 S.E. 2d at 211.

The Michigan court in *Gaylord v. Beckett,* 378 Mich. 273, 144 N.W. 2d 460 (1966), cited *Nash v. Tarboro* as putting North Carolina among the jurisdictions representing "the minority view" that municipal industrial aid financing cannot be upheld.

The cases upon which appellees rely are not inconsistent with *Nash v. Tarboro.* In *Ports Authority v. Trust Co.,* 242 N.C. 416, 88 S.E. 2d 109 (1955), this Court approved the issuance of revenue bonds by the North Carolina State Ports Authority to construct a grain-handling facility upon the Authority's premises at its Morehead City Port. It also approved a 5-year lease of this property to a private corporation, which had successfully operated other such facilities. The rental would retire the bonds. These bonds were clearly for a public purpose. The lease, made for an adequate consideration, was a method of securing experienced and expert operators of an essential port facility. *Hudson v. Greensboro,* 185 N.C. 502, 117 S.E. 629 (1923), involved a municipal loan (authorized by legislation and approved by a vote of the people) to the Southern Railway Company, a public utility, to enable it to construct terminal facilities which were then urgently needed.

The State does not engage in a private enterprise when it undertakes a project of slum clearance. *Wells v. Housing Authority,* 213 N.C. 744, 197 S.E. 693 (1938). Slums are a serious menace to society; they breed both disease and crime. As Seawell, J., pointed out in *Wells v. Housing Authority, supra,* the State can combat these

two evils in overcrowded areas only by "the removal of physical surroundings conducive to these conditions." *Id.* at 748, 197 S.E. at 696. The existence of a slum area proves the impotency or unwillingness of private enterprise to cope with the problem, and "where community initiative has failed and authority alone can prevail," government must deal with the emergency created. *Id.* at 748, 197 S.E. at 696. If slums are to be cleared, an Authority with the power of eminent domain is necessary to eliminate them. That power is greater than the power "which might be given by the Legislature in aid of any private enterprise." *Id.* at 750, 197 S.E. at 697.

In *Dennis v. Raleigh,* 253 N.C. 400, 116 S.E. 2d 923 (1960), it was held that an appropriation of $2,500 by the City (made under statutory authority) to advertise the advantages of Raleigh was for a public purpose albeit not a necessary expense. As the opinion pointed out, the purpose of the contemplated advertising was to promote the public interest and general welfare of the City, not a private business or property interest. Appropriations for such advertising, therefore, could be made from any surplus funds not derived from taxation.

It is the public policy of this State (as it is in Florida) to advertise the advantages of North Carolina in an effort to attract tourists and to induce industry to locate here. "If there is a benefit it is one that, unlike direct financial supports to an industry, does not aid primarily one private organization but rather inures to the entire community." Note, 40 Minn. L. Rev. 681, 682 (1956). According to the stipulations, the North Carolina Department of Conservation and Development annually expends approximately $750,000 in advertising and industry hunting. However, such efforts by the State and its subdivision are to induce industries to locate here "on their own" — a far cry from providing a site and plant, built to specifications, to induce a particular industry to locate here.

In passing upon the validity of an act, this Court must consider the consequences of its decision. Were we to hold that Authority serves a public purpose when it acquires a site, constructs a manufacturing plant, and leases it to a private enterprise, we would thereby authorize the legislature to give Authority the power to condemn private property as a site for any project which it undertook. "For the most part the term 'public purposes' is employed in the same sense in the law of taxation and in the law of eminent domain." 1 Cooley, Taxation § 176 (4th Ed. 1924).

That the legislature may grant the power of eminent domain to any state agency which needs to acquire property for a public purpose or use was clearly enunciated by Parker, J. (now C.J.), in *Re-*

development Commission v. Bank, 252 N.C. 595, 603, 114 S.E. 2d 688, 694 (1960): "In the exercise of the power of eminent domain, private property can be taken only for a public purpose, or more properly speaking, a public use, and upon payment of just compensation." If, however, a project is for a public use, the grant of the power of eminent domain "is a clear and valid exercise of legislative power, for the power of eminent domain is merely the means to the end." *Id.* at 603, 114 S.E. 2d at 694.

Prescott, Judge, dissenting in *City of Frostburg v. Jenkins,* 215 Md. 9, 136 A. 2d 852, pointed out the possibilities inherent in holding an act such as the one we consider here to be for a public purpose:

". . . Suppose A owns a parcel of land in Frostburg and desires to erect thereon a manufactory to make shoes. B is interested in conducting a shirt manufactory, and the desirable location therefor is A's parcel of ground. Are there many persons who would consider that B's undertaking is such a 'public purpose' as would entitle the City of Frostburg to condemn A's property in order to erect an establishment for B, paying both for the property and the erection of the building from the proceeds of the bonds issued in pursuance of the act being considered? I think not; yet the majority opinion holds that the bonds to be issued are for a 'public purpose'." *Id.* at 27, 136 A. 2d at 861.

That the power of eminent domain should or could ever be used in behalf of a private interest is a concept foreign to North Carolina, and it transcends our Constitution. If public purpose is now to include State or municipal ownership and operation of the means of production — even on an interim basis; if we are to bait corporations which refuse to become industrial citizens of North Carolina unless the State gives them a subsidy, the people themselves must so declare. Such fundamental departures from well established constitutional principles can be accomplished in this State only by a constitutional amendment.

We hold that Authority's primary function, to acquire sites and to construct and equip facilities for private industry, is not for a public use or purpose; that it may not expend the challenged appropriation of tax funds for its organization; and that the Act which purports to authorize the expenditure violates Article V, § 3 of the Constitution. This ruling makes it unnecessary for us to consider the other questions debated in the briefs.

The judgment of the court below is reversed and the case remanded to the Superior Court for the entry of judgment in accordance with plaintiff's prayer for relief.

Reversed and remanded.

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

PARKER, C.J., dissenting: Article V, section 3, of the North Carolina Constitution provides: "The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away."

This is said in *Purser v. Ledbetter,* 227 N.C. 1, 40 S.E. 2d 702:

> "Concededly, from its nature and purpose, a constitution is intended to be a forward-looking document, expressing the basic principles on which government is founded; and where its terms will permit, is to be credited with a certain flexibility which will adapt it to the continuous growth and progress of the State."

In *Helvering v. Davis,* 301 U.S. 619, 81 L. Ed. 1307, 109 A.L.R. 1319, Mr. Justice Cardozo said for the Court:

> "Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times."

In *Mayo v. Commissioners,* 122 N.C. 5, 29 S.E. 343, this Court held in a divided opinion that "the erection and operation of an electric light plant for lighting the streets of a town is not a 'necessary expense' within the meaning of section 7, Article VII of the State Constitution." Clark, J., vigorously dissented. This Court five years later in *Fawcett v. Mt. Airy,* 134 N.C. 125, 45 S.E. 1029, overruled the decision in the *Mayo* case and held "an expense incurred by a city or town for the purpose of building and operating plants to furnish water and light is a necessary expense. . . ." The *Fawcett* case overruled the *Mayo* case because the Court realized the expanding need of all the people for such a holding.

The legislative findings and purposes which preface the enactment of the Act challenged here (Ch. 535, Session Laws of North Carolina 1967) are as follows:

> "Legislative Findings and Purposes. The General Assembly finds and determines that in order to meet the challenge of attracting new industry posed by the inducements to industry offered through legislative enactments in other jurisdictions and to continue the State's progress in industrial development, it is necessary to establish a public agency and an instrumentality of the State to facilitate the provision of facilities promoting industrial development in the State and otherwise effectuating

the purposes of this Act, *without the levy of any additional taxes therefor.* The purposes of this Act are to promote the industry and natural resources of the State, increase opportunities for gainful employment, increase purchasing power, improve living conditions, advance the general economy, expand facilities for research and development, increase vocational training opportunities and otherwise contribute to the prosperity and welfare of the State and its inhabitants by providing facilities for operation by private operators useful for industrial and research pursuits, such purposes being, and are hereby declared to be, public purposes." (Emphasis mine.)

Although the legislative findings and policy purposes have no magical quality to make valid that which is invalid, and are subject to judicial review, they are entitled to weight in construing the statute and in determining whether the statute promotes a public purpose or use under the North Carolina Constitution. *Redevelopment Commission v. Bank,* 252 N.C. 595, 114 S.E. 2d 688.

This is said in the majority opinion:

"The lessee of any project is required to list it for taxation in the manner of an owner and to pay 'an amount equal to the total amount of *ad valorem* taxes that would . . . be levied' upon the leased property if it were owned by a private citizen. G.S. 123A-9."

This is a stipulation of facts agreed to by the parties:

"26. Statistical data from the Chamber of Commerce of the United States indicates that every 100 new factory workers bring to an area the following:

"359 more people
91 more school children
$710,000 more personal income per year
100 more households
$229,000 more bank deposits
3 more retail establishments
97 more passenger cars registered
65 more employed in non-manufacturing
$331,000 more retail sales per year."

In *Briggs v. Raleigh,* 195 N.C. 223, 141 S.E. 597, the Court, speaking by Stacy, C.J., said:

". . . However, the term 'public purpose' is not to be construed too narrowly. [Citing authority.] It is not necessary, in

order that a use may be regarded as public, that it should be for the use and benefit of every citizen in the community. It may be for the inhabitants of a restricted locality, but the use and benefit must be in common, and not for particular persons, interests or estates.

* * *

". . . It is only when the unconstitutionality of an act of the Legislature is clear that the courts, in the exercise of their judicial powers, are required to hold it for naught. Hence, every presumption is indulged in favor of the validity of the legislation called in question. *S. v. Yarboro,* 194 N.C. 498; *S. v. Revis,* 193 N.C. 192, 136 S.E. 346; *S. v. Manuel,* 20 N.C. 154.

" 'To justify a court in declaring a tax invalid on the ground that it was not imposed for the benefit of the public, the absence of a public interest in the purpose for which the money is raised by taxation must be so clear and palpable as to be immediately perceptible to every mind.' Norval, J., in *S. v. Cornell,* 53 Neb. 556, 74 N.W. 59, 39 L.R.A. 513, 68 Am. St. Rep. 629. Or as said by the Supreme Court of Illinois: 'The inquiry into the validity of an act of the Legislature is an inquiry whether the will of the people as expressed in the law, is or is not in conflict with the will of the people, as expressed in the Constitution; and unless it be clear that the Legislature has transcended its authority, the courts will not interfere.' *Lane v. Dorman,* 4 Ill. 238."

In *Yarborough v. Park Commission,* 196 N.C. 284, 145 S.E. 563, Justice Adams, one of the most scholarly judges who has served upon this Bench, said for the Court:

"It is not easy to frame a definition of the term 'public use' which would be of universal application, but it is settled by our decisions that whether a use is public is for the ultimate decision of the courts and that if a particular use is public the expediency or necessity for establishing it is exclusively for the Legislature."

In *Shoemaker v. United States,* 147 U.S. 282, 297, 37 L. Ed. 170, 184, the Court said:

"In the memory of men now living, a proposition to take private property, without the consent of its owner, for a public park, and to assess a proportionate part of the cost upon real estate benefited thereby, would have been regarded as a novel exercise of legislative power.

* * *

". . . However that may be, there is now scarcely a city of any considerable size in the entire country that does not have, or has not projected, such parks.

"The validity of the legislative acts erecting such parks, and providing for their cost, has been uniformly upheld."

In *Highway Commission v. Thornton,* 271 N.C. 227, 156 S.E. 2d 248, this Court in a divided opinion held as correctly summarized in the nineteenth headnote in our Reports:

> "The road in question was constructed for a distance of some 700 feet over the land of respondents, and ended in a *cul de sac* at the freight terminal of a truck carrier. *Held:* While a finding, supported by evidence, that the road was used by the truck carrier 24 hours a day in going to and from the public highway would not alone support the conclusion that the condemnation of the land for the road was for a public purpose, such finding with additional findings that some 700 employees of the carrier use the road for their own benefit in going to and from work, and that other members of the public used the road to transact business with the carrier, are together sufficient to support the conclusion that the road was for a public purpose."

The facts in the *Thornton* opinion written by Justice Lake showing a public purpose or use for the expenditure of tax funds in that case are far weaker than the facts showing a public purpose or use for the expenditure of public funds in this case, and the opinion in the *Thornton* case cannot be supported by opinions from twenty-one states showing the expenditure of public funds was for a public purpose or use as in this case. These supporting cases are cited further in this dissenting opinion. In my opinion the majority opinion in this case gravely impairs the authority of the decision in the *Thornton* case, if it does not in effect overrule it. The author of the majority opinion in the present case dissented in the *Thornton* case on the ground that "this decision, however, establishes the power of the State Highway Commission to condemn a right-of-way for a road to the plant of any private industry with a payroll which the Chamber of Commerce, or some other group able to influence the Highway Commission, decides is large enough to benefit the economy of the community."

This is said in the majority opinion:

> "Whatever may be the ultimate fate of governmental industrial revenue bonds, our research indicates that at least forty-

two states (not counting North Carolina) have held that governmental financing for industrial development serves a public purpose. The courts of the twenty-one jurisdictions listed below have, without constitutional amendments, upheld the validity of legislation authorizing governmental industrial aid bonds or other types of financial assistance. They have either assumed the public purpose of such acts or reasoned as follows: An inadequate number of jobs means an oversupply of labor, which results in low wages. Unemployment and low wages lead to hunger, ill health, and crime. The continued existence of an established industry and the establishment of new industry provide jobs, measurably increase the resources of the community, promote the economy of the state, and thereby contribute to the welfare of its people. The stimulation of the economy is, therefore, an essential public and governmental purpose. The fact that a private interest incidentally benefits from such governmental aid is not fatal if substantial public benefits also result. See generally, Note, *The 'Public Purpose' of Municipal Financing for Industrial Development*, 70 Yale L. J. 789 (1961); Note, 20 Vand. L. Rev. 685 (1967)."

North Carolina is no longer a predominantly agricultural community. We are developing from an agrarian economy to an agrarian and industrial economy. North Carolina is having to compete with the complex industrial, technical, and scientific communities that are more and more representative of a nation-wide trend. All men know that in our efforts to attract new industry we are competing with inducements to industry offered through legislative enactments in other jurisdictions as stated in the legislative findings and purposes of this challenged Act. It is manifest that the establishment of new industry in North Carolina will enrich a whole class of citizens who work for it, will increase the per capita income of our citizens, will mean more money for the public treasury, more money for our schools and for payment of our school teachers, more money for the operation of our hospitals like the John Umstead Hospital at Butner, and for other necessary expenses of government. This to my mind is clearly the business of government in the jet age in which we are living. Among factors to be considered in determining the effect of the challenged legislation here is the aggregate income it will make available for community distribution, the resulting security of their income, and the opportunities for more lucrative employment for those who desire to work for it. We read daily in the press and hear over radio and television and from public speakers that North Car-

olina is near the bottom of the states in per capita income and in furnishing public funds for public education. I am strongly of the opinion that public education and the establishment of public hospitals like the John Umstead Hospital at Butner by the State are a public necessity. Mr. Justice Oliver Wendell Holmes, a distinguished lawyer and scholar and a Justice of the Supreme Court of the United States, paid this eloquent tribute to the advantages of University training:

> "The University is a place from which men start for the Eternal City. In the University are pictured the ideals which abide in the City of God. Many roads lead to that haven, and those who are here have traveled by different paths toward the goal. . . . My way has been by the ocean of the law. On that I have learned a part of the great lesson, the lesson not of law, but of life."

This is stated in the majority opinion:

> "Ours is still an expanding economy. According to the stipulations, in 1961, the Commissioner of Revenue collected 456.2 million dollars in taxes; in 1967, 801.3 million. In each of the intervening years there was an increase in collections. In 1963, new and expanded plant investments in North Carolina amounted to $386,929,000; in 1966, $613,581,000. For the first half of 1967, industrial investments amounted to $313,850,000. There is no suggestion in the record, and the Court judicially notices, that our social order is not threatened by widespread unemployment such as confronted the entire nation during the depression years, which began in 1929. No drastic 'pump-priming' legislation is presently required to save the economy. The State is not losing population because of the lack of job opportunities."

When the majority opinion in this case strikes down the challenged Act, will these conditions continue when forty-two states of the Union, including six in close proximity to us, are inducing industry by legislative enactments similar to our Act to settle within their borders? It seems not, because the parties when this case was tried entered into the following stipulations:

> "27. There is a trend for States that lack a well balanced industrial economy to lose population to other areas of the country.

"28. Records of the Department of Conservation and Development of the State of North Carolina disclose that:

"(a) Several large industrial firms with options to purchase industrial sites in North Carolina have permitted their options to expire, and said industries have ultimately located outside of North Carolina in states that afford financing of industrial sites through tax exempt industrial revenue bonds; and

"(b) Several other large industries have made plans to locate plants within the State of North Carolina in reliance upon financing being available through tax exempt industrial revenue bonds, as authorized by Chapter 535, Session Laws of 1967."

The General Assembly did not think so because of the enactment of this Act and their legislative findings and purposes stated in the preamble. The Legislature was motivated to do all that they thought in their discretion was proper to raise North Carolina from its low rank in the states in per capita income and in appropriations for education, and to give it a means of competing with the other states and to take rank among the more prosperous states of the Union, as all of us wish it could do.

Three of the states adjoining our borders (Virginia, Tennessee, and South Carolina) and three states in close proximity to this State (Maryland, West Virginia, and Kentucky) have held that government financing for industrial development serves a public purpose: *Fairfax County Industrial Develop. Auth. v. Coyner,* 207 Va. 351, 150 S.E. 2d 87; *Elliott v. McNair,* ...... S.C. ......, 156 S.E. 2d 421; *McConnell v. City of Lebanon,* 203 Tenn. 498, 314 S.W. 2d 12; *City of Frostburg v. Jenkins,* 215 Md. 9, 136 A. 2d 852; *State v. Demus,* 148 W. Va. 398, 135 S.E. 2d 352; *Industrial Development Authority v. Eastern Kentucky Regional Planning Commission* (Ky. C.A.) 332 S.W. 2d 274; *Holly v. City of Elizabethton,* 193 Tenn. 46, 241 S.W. 2d 1001.

The Supreme Court of Appeals of Virginia said in the *Fairfax* case, a unanimous opinion:

"Even a casual reading of the provisions of Chapter 643 reveals that the primary and dominant purpose of the Act is to promote the economy of the State and to contribute to the welfare of its people within the areas designated.

* * *

"The fact that the Authority proposes to issue revenue bonds

for the financing and construction of an industrial facility to be leased to a private user does not make the Act unconstitutional. Even though some private individual or corporation incidentally benefits from the financing, construction and use of the proposed facility, its public purpose and character are not destroyed. *Harrison v. Day, supra* [202 Va. 967, 972-73, 121 S.E. 2d 615, 619]; *Button v. Day,* 205 Va. 629, 638, 139 S.E. 2d 91, 97. Nor does the granting of an option to Karloid to purchase the property at the termination of Hazleton's lease destroy the public character of the enterprise. See *Darnell v. County of Montgomery,* 202 Tenn. 560, 308 S.W. 2d 373, 374, 375.

"Having held that authorities created for the purpose of acquisition and development and operation of produce markets, harbor and port facilities, and marinas for public use were for a public purpose and a proper governmental function, it would indeed be an anomaly for us to say that an authority created for the purpose of stimulating and promoting industrial development, which would contribute to the economy of the State and create jobs for its people, was not for a public purpose and thus not a proper function of government."

In the *Elliott* case, a unanimous opinion, the Supreme Court of South Carolina said:

"The question as to whether the Act is violative of Article I, Section 5, of the Constitution, as constituting legislation for private rather than for public purpose, is a question which has given us much concern. All legislative action must serve a public rather than a private purpose. There is no doubt of the fact that the economy of South Carolina has undergone a startling change in the last few years. The inhabitants of this state were for many years dependent almost entirely upon agriculture and related industries for their livelihood. Agriculture no longer provides the livelihood of those who only a few years ago were almost entirely supported by it. The Act here under consideration recites that South Carolina has promoted industrial expansion and has actively supported the State Development Board, for which public moneys have been appropriated, and through it has endeavored to promote the industrial development of the state for the welfare of its inhabitants. This has been done as a matter of state policy. It is the purpose of the Act to empower the governing bodies of the several counties of the state, under the terms and conditions of this Act, to

provide such assistance and to that end to acquire, own, lease, and dispose of properties, through which the industrial development of the state will be promoted, and trade developed by inducing manufacturing, and other commercial enterprises to locate in and remain in the state, and to utilize and employ the manpower, agricultural products and natural resources of the state.

"In the case of *Duke Power Co. v. Bell,* 156 S.C. 299, 152 S.E. 865, decided in 1930, this court observed that:

> "'Ours is distinctively an industrial age, and the prosperity of counties and of states, as well as of cities and towns, is becoming increasingly dependent upon the opportunity afforded their people for employment in manufacturing industries.'

"The activities of the state in the development of its ports has reduced transportation costs and made new markets available in a manner which has been of significant benefit to the industries of the state, thus indirectly promoting the influx of additional industries and the expansion of existing industries. Waterworks and other utilities have been made available to industries located beyond the corporate limits of municipalities and have thus done much to promote expanded industrial activity.

* * *

"The Legislature has found the Act here is for a public purpose and thus a proper function of government. The question of whether an act is for a public purpose is primarily one for the Legislature, and this court will not interfere unless the determination by that body is clearly wrong."

The Supreme Court of Tennessee said in the *McConnell* case (two justices dissented):

"It is a widely known fact that the North and East have been losing industry to the South and West in this country; that industry is being located in States where all things are most favorable; that population shift is controlled by the location of industry. The result is, as reflected by the record herein, the matter of inducing industry to locate in this State has become a matter of great public concern, as so made to appear in Section 3 of the questioned Act.

"The modern tendency is to meet that challenge by appropriate legislation. [Citing voluminous authority.]

> "The alternative of the failure to do so is to make probable a gradual lowering of the standard of living of the mass of citizens of this State. An inadequate number of jobs means an oversupply of labor, which usually results ultimately in a lowering of wages. Low wages and unemployment are twin evils that usually lead to a substandard diet, hunger, ill health and even crime.
>
> "To provide against such evils is clearly a public or corporate purpose."

The Supreme Court of Tennessee said in the *Holly* case:

> "The promotion of the industry authorized by the hereinbefore mentioned provisions of Chapter 137 is clearly of incidental public benefit to the municipality where such industry may be located at least, to the extent that it will furnish employment to a substantial number of its inhabitants. It is, then, at least incidentally for a public purpose, though it results in the promotion of and gain to a private corporation."

In the *City of Frostburg* case the Court of Appeals of Maryland said, with one judge dissenting:

> "The only declaration of public policy in the enabling act before us is the statement that the power is granted 'in order to encourage industrial development.' The legislative purpose, however, is somewhat amplified in the allegations of the answer, which are admitted for the purpose of this case, and we might, indeed, take judicial notice of the fact that the location of new industry in a municipality furnishes employment and measurably increases the resources of the community and its financial well-being. As the Supreme Court recognized in the *Carmichael* case, *supra* [301 U.S. 495, 57 S. Ct. 868, 81 L. Ed. 1245], the relief of unemployment is a legitimate public purpose. The fact that incidental benefits are passed on to the locating corporation is not fatal, if there are substantial public benefits to support the action taken. . . .
>
> "In the instant case there are obvious benefits passing to the private corporation, and enuring to the benefit of its stockholders. One benefit is the financing of its building program at a favorable interest rate. It is common knowledge that municipal bonds can usually be floated at a lower yield than industrial bonds, because of the tax immunities, and because they are supported by tax revenues instead of earnings. Although interest

rates are not fixed in the Ordinance, we assume that the scheme contemplates that the saving be passed on to the corporation under its contract to purchase the land and building in installments in twenty-five years. Another benefit may arise from the fact that title will remain in the City during that period. We assume that the property so held would not be subject to property taxes. But whether these private benefits outweigh the public benefits accruing from the location of the plant within the municipality seems to us to be primarily a legislative rather than a judicial problem.

* * *

"The Constitution does not guarantee a static condition of society, or write into our basic law the economic doctrine of *laissez-faire*. So long as the legislation has a substantial relation to the public welfare and can fairly be said to serve a public purpose, it is not the courts' function to strike it down, merely because we fear it may lead to unwise or unfortunate results. We think the legislation in the instant case is not beyond the bounds of legislative power."

The majority opinion in the instant case closes with a quotation from Judge Prescott, who dissented in the *City of Frostburg* case. That quotation is simply Judge Prescott's idea of the law, and his opinion was repudiated by the other six members of the Court who ruled differently.

In the *Demus* case, a unanimous opinion, the Supreme Court of Appeals of West Virginia held that the Industrial Development Bond Act was not in contravention of Sections 1, 6 and 8 of Article X or Sections 9 and 10 of Article III of the West Virginia Constitution and not in violation of the Fourteenth Amendment to the Constitution of the United States.

In the Industrial Development Authority case the Court of Appeals of Kentucky, with two judges dissenting, said:

"In the present instance, KRS 154-005 clearly sets out the legislative determination that the purpose of the Act is to promote the health, safety, morals, right to gainful employment, business opportunities and general welfare of Kentuckians and recites that the Authority 'shall exist and operate for the public purpose of alleviating unemployment and furthering the utilization of natural and man-made resources by the promotion and development of industrial and manufacturing enterprises in local

communities of the Commonwealth.' The consummation of these objects shall be 'public purposes for which public money may be spent.'

"As the central aim of the Act is to foster industrial development by attracting new industry to all parts of the state in order to reduce unemployment and in order to use the natural and man-made resources of the state as a whole, the inquiry is raised as to whether such an aim is a public purpose so as to warrant the expenditure of tax funds therefor. This Court in the fairly recent case of *Dyche v. City of London, Ky.*, 288 S.W. 2d 648, held that the relief of unemployment in the City of London and the surrounding area was a 'public purpose' within the purview of the taxing power of that city, and that the City of London could lawfully incur a bonded indebtedness to construct an industrial building in an effort to attract new industry and thereby reduce unemployment. In *Faulconer v. City of Danville,* cited above, we held that the acquisition and ownership by the City of Danville of an industrial building was a 'public project' within the application of KRS Chapter 58 which authorized the issuance of revenue bonds for such an object.

"From the foregoing authorities we conclude it is clearly established in this jurisdiction that the relief of unemployment is a public purpose that would justify the outlay of public funds."

In accord with the foregoing decisions from Virginia, Tennessee, South Carolina, Maryland, West Virginia, and Kentucky: See *Newberry v. City of Andalusia,* 257 Ala. 49, 57 So. 2d 629; *DeArmond v. Alaska State Development Corporation (Alaska)*, 376 P. 2d 717; *Roan v. Connecticut Industrial Building Commission,* 150 Conn. 333, 189 A. 2d 399; *In re Opinion of the Justices,* 54 Del. 366, 177 A. 2d 205; *Green v. City of Mt. Pleasant,* 256 Iowa 1184, 131 N.W. 2d 5; *State v. City of Pittsburgh,* 188 Kan. 612, 364 P. 2d 71; *Faulconer v. City of Danville,* 313 Ky. 468, 232 S.W. 2d 80; *City of Gaylord v. Beckett,* 378 Mich. 273, 144 N.W. 2d 460; *Albritton v. City of Winona,* 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436, appeal dismissed 303 U.S. 627; *Opinion of the Justices,* 106 N.H. 237, 209 A. 2d 474; *Opinion of the Justices,* 103 N.H. 258, 169 A. 2d 634; *Opinion of the Justices,* 106 N.H. 180, 207 A. 2d 574; *Roe v. Kervick,* 42 N.J. 191, 199 A. 2d 834; *Village of Deming v. Hosdreg Co.,* 62 N.M. 18, 303 P. 2d 920; *Gripentrog v. City of Wahpeton (North Dakota)*, 126

N.W. 2d 230; *Harrison v. Claybrook (Oklahoma),* 372 P. 2d 602; *State v. Bane,* 148 W. Va. 392, 135 S.E. 2d 349; *State v. Barczak,* 34 Wis. 2d 57, 148 N.W. 2d 683; *Uhls v. State* (*Wyoming*), 429 P. 2d 74.

The majority opinion has adopted a very minority view in this country. In my opinion the majority opinion construes what is for a public purpose or use too narrowly, influenced by the concept of the horse-and-buggy days, when, in Mr. Justice Cardozo's words, "needs were narrow or parochial." We have moved into a jet age, characterized by gigantic mergers of corporations and struggles between the states of this Nation to get new industry; and, in the language of the legislative findings and purposes, this Act is necessary for the State's progress and growth in order "to meet the challenge of attracting new industry posed by the inducements to industry offered through legislative enactments in other jurisdictions and to continue the State's progress in industrial development." In this jet age conditions for industrial development are critical or urgent, and, in Mr. Justice Cardozo's words, "What is critical or urgent changes with the times." North Carolina's efforts to attract new industry will be hampered, according to stipulation of facts No. 28 between the parties which has been set forth heretofore, if the majority opinion becomes the law in this State.

Whether in my opinion the purposes of the challenged Act will be beneficial or not to the people of North Carolina cannot influence my vote as a judge. It is not the Court's function to strike the Act down merely because we fear it may lead to unwise or unfortunate results. This is said by Lake, J., for a unanimous Court in *Hobbs v. Moore Co.,* 267 N.C. 665, 149 S.E. 2d 1: "It is also well established that this Court will not adjudge an act of the General Assembly unconstitutional unless it is clearly so. *Kornegay v. Goldsboro,* 180 N.C. 441, 105 S.E. 187. Where a statute is susceptible of two interpretations, one of which will render it constitutional and the other will render it unconstitutional, the former will be adopted." This is said by Moore, J., speaking for the Court, in *S. v. Warren,* 252 N.C. 690, 114 S.E. 2d 660: "The presumption is that an act passed by the Legislature is constitutional, and it must be so held by the courts unless it appears to be in conflict with some constitutional provision. *Roller v. Allen, supra* [245 N.C. 516, 518, 96 S.E. 2d 851]; *State v. Dixon, supra* [215 N.C. 161, 1 S.E. 2d 521]; *State v. Hurlock* (Ark. 1932), 49 S.W. 2d 611, 612. The legislative department is the judge, within reasonable limits, of what the public welfare requires, and the wisdom of its enactments is not the concern of the courts. As to whether an

act is good or bad law, wise or unwise, is a question for the Legislature and not for the courts — it is a political question. The mere expediency of legislation is a matter for the Legislature, when it is acting entirely within constitutional limitations, but whether it is so acting is a matter for the courts."

I have restricted my dissent to the one question as to whether the expenditure is for a public purpose or use because that is the sole reason why the majority opinion strikes the Act down. This serious question arises upon the record: Does the money which will be received by the Authority become impressed with a trust restricting its use to the public purpose for which it was obtained, the construction of the project; and for that reason does the money not become public money whose expenditure would otherwise be confined to the general public good? However that may be, it is not necessary to decide that question here, because it has not been discussed or mentioned in the majority opinion, though it would seem that under the facts of this case the answer to the question posed would be "No," except for the allotment in the sum of $37,062 from the State's Contingency and Emergency Fund for the use of the Authority for the fiscal year 1967-68, and the expenditure of this fund is surely under the circumstances of the case for a public purpose or use. It is to be specially noted that the Authority in this case has not been empowered by the General Assembly to issue general obligation bonds of the State payable from the proceeds of *ad valorem* tax levies, but that power has been positively denied to it by the Act of the General Assembly as set forth above. See *Elliott v. McNair, supra.*

The General Assembly in the preamble to the challenged Act has interpreted the needs of the State and declared its policy. If the result of today's action by this Court is to hamper the State in meeting the "challenge of attracting new industry posed by the inducements to industry offered through legislative enactments in other jurisdictions," and to curtail "the State's progress in industrial development," I want to go on record that no part of the responsibility or blame is mine. I believe the challenged Act, construed in the light of conditions existing today, clearly permits the expenditure of public funds for a public purpose or use; and my vote is to uphold the constitutionality of the Act, insofar as challenged here, because this enactment is not prohibited by any provision of the State or Federal Constitution so far as it is challenged on the present record. Consequently, my vote is to affirm the judgment of the court below.

BRANCH, J., joins in this dissent.

THE BOARD OF PROVINCIAL ELDERS OF THE SOUTHERN PROVINCE OF THE MORAVIAN CHURCH, OR UNITAS FRATRUM v. DAVID R. JONES AND THE BIBLE MORAVIAN CHURCH.

(Filed 6 March, 1968.)

1. Appeal and Error § 6—

An appeal to the Supreme Court lies from an order granting an interlocutory injunction.

2. Injunctions § 13—

The purpose of an interlocutory injunction is to preserve the status quo of the subject matter of the suit pending trial on the merits.

3. Injunctions § 12; Appeal and Error § 58—

The sole question before the trial court at a hearing upon an order to show cause is whether an injunction should issue to restrain defendant from the action complained of pending final hearing on the merits, and upon appeal of the trial court's ruling, the Supreme Court is limited to a determination of the same question.

4. Appeal and Error § 58—

Upon appeal from an order granting an interlocutory injunction, the Supreme Court is not bound by the findings of fact made by the court below but may review the evidence and find facts for itself.

5. Injunctions § 12; Appeal and Error § 58—

Neither the findings of fact or the conclusions of law of the trial court upon the hearing of an application for an interlocutory injunction, nor the findings or conclusions of the Supreme Court on appeal, are binding upon, or are to be considered by, the Superior Court at the final hearing of the matter.

6. Injunctions § 13—

The burden is upon the applicant for an interlocutory injunction to prove a probability of substantial injury from the continuance of the activity complained of pending the final determination of the action.

7. Injunctions § 13—

An injunction *pendente lite* should not be granted where there is a serious question as to the right of defendant to engage in the activity complained of and where to restrain defendant pending the final determination of the matter would cause defendant greater damage than plaintiff would sustain from the continuance of the activity.

8. Same; Religious Societies and Corporations § 3; Trademarks and Trade-Names—

In a hearing upon the Board of Elders' application for an interlocutory injunction to restrain defendants from using the names "Moravian" or "Unitas Fratrum" in connection with their religious activities, the granting of an injunction *pendente lite is held* erroneous in the absence of a showing that plaintiff would probably suffer substantial injury to its reputation, doctrine, membership or contributions.

PARKER, C.J., dissenting.

HIGGINS and SHARP, JJ., join in the dissenting opinion.

APPEAL by defendants from *Johnston, J.* in Chambers in FORSYTH, 17 June 1967, docketed and argued as case No. 463 at Fall Term 1967.

This is an action to enjoin the defendants from using the names "Moravian" or "Unitas Fratrum" in connection with any religious or church activity and to compel the defendant church to delete the word "Moravian" from its corporate name. Upon an application by the plaintiff for the issuance of a temporary injunction, the defendants were ordered to appear and show cause why "the injunction as prayed for by the plaintiff should not be granted until the final determination of this cause." Following such hearing, Johnston, J., entered the order from which appeal is taken and which provided:

> "IT IS ORDERED, ADJUDGED AND DECREED that the named defendants and each of them, and all persons acting in concert with them or under their direction or the directions of any of them, and all other persons to whom notice and knowledge of this order may come are until the further orders of this Court, hereby enjoined and restrained from using the name 'Moravian' or 'Unitas Fratrum' in connection with any religious or church activity."

At the show cause hearing, the court considered the pleadings of the parties as affidavits and other evidence consisting of oral testimony and documents introduced as exhibits. The order recites that upon the consideration of such evidence, the following appeared to the court (summarized, except as indicated):

> The plaintiff was chartered by a special act of the Legislature as the governing body for the regulation of the Moravian Churches in the Southern Province, including North Carolina. There are 47 such churches, all except one bearing the name "Moravian." The defendant church is incorporated in North Carolina, having its principal place of business in Winston-Salem, which is within the territorial limits of the plaintiff. The defendant was organized under the name "The Bible Moravian Church," without the knowledge or consent of the plaintiff and it is not affiliated in any manner with the plaintiff or with any congregation represented by the plaintiff. The defendant Jones

is conducting services "under the name of The Bible Moravian Church in Forsyth County * * * and the said defendant is not affiliated in any manner whatsoever with the plaintiff or any of the Moravian Churches represented by the plaintiff." All churches in the United States which bear the name "Moravian," with the sole exception of the defendant church, are affiliated with either the Northern Province or the Southern Province of the Moravian Church in America and were organized under the authority of the Synods of these Provinces and are governed by the Board of Provincial Elders of the Province in which located. "[T]he name of the Moravian Church is of great value, not only because of the business carried on and property held in that name, but also because thousands of members associate with the name the most sacred of their personal relationships in the holiest of their family traditions; that the plaintiff and the Moravian Churches represented by the plaintiff actively support by contributions and other means its affiliated educational institutions * * * and that the plaintiff and all of the Moravian Churches affiliated with the plaintiff are dependent upon the contributions of their members and the general public for means to carry on their work."

Upon these findings, the court below concluded:

"[T]herefore, the plaintiff is entitled to protection against the use of the same name by the defendants; that the unauthorized use of the name of the Moravian Church by the defendants in this action will result in irreparable injury and lasting damage to the plaintiff and the many congregations of the Moravian Churches of the Southern Province of the Moravian Church in America, all of whom are organized and exist under one unified body and have been known and recognized for many years for their unity. * * *"

The complaint, introduced as an affidavit, alleges (summarized, except as indicated):

"The Moravian Church in America is organized with a hierarchial form of government and is divided into two provinces, the Northern Province and the Southern Province." The plaintiff is the highest administrative authority for the Moravian Churches in the Southern Province and is the governing board for the regulation of their temporal concerns. All 47 Moravian

congregations which comprise the Southern Province were organized under the authority of the Synod of the province and each, with the exception of "The Little Church on the Lane" in Charlotte, includes "Moravian" in its name. Two of these churches are in Virginia, two in Florida and the remainder in North Carolina. The defendant church was incorporated in North Carolina on 3 April 1967, with its principal place of business in Winston-Salem, which is "within the territorial limits of the Southern Province of the Moravian Church." The corporate defendant was organized under the name "The Bible Moravian Church" without the knowledge or consent of the plaintiff. The corporate defendant is not affiliated in any manner whatsoever with the plaintiff or with any of the congregations represented by the plaintiff. With the exception of the corporate defendant, all congregations of churches in the United States bearing the name "Moravian" are affiliated with either the Northern Province or the Southern Province of the "Moravian Church in America," and were organized under the authority of the Synod of such provinces and governed by the Board of Provincial Elders of the province in which located.

The Southern Province, which had its beginning in 1753, includes 47 Moravian Churches, with more than 22,000 members and substantial property holdings. "The name of the church is of great value, not only because of the business carried on and property held in that name, but also because of thousands of members associate with the name the most sacred of their personal relationships and the holiest of their family traditions." The Southern Province is affiliated with and supports a vast network of mission fields in various parts of the world, and "actively supports by contributions and other means its affiliated educational institutions, Salem College in Winston-Salem and Moravian College in Bethlehem, Pennsylvania, as well as other educational and charitable causes. The plaintiff and all of the Moravian Churches affiliated with the plaintiff are dependent upon the contributions of their members and the general public for means to carry on their work and, therefore, the plaintiff is entitled to protection against the use of the same name by the defendants and the threatened confusion of and misleading of the public with the attendant loss or lessening of contributions and donations upon which the veritable life and charitable activity of the plaintiff depends.

"The unauthorized use of the name of the Moravian Church by the defendants in this action will result in irreparable in-

> jury and lasting damage to the plaintiff and the many congregations of Moravian Churches of the Southern Province of the Moravian Church of America, all of whom are organized and exist under one unified body and have been known and recognized for many years for their unity. A large portion of any community is not well informed about ecclesiastical matters, and for defendants to use the name Moravian Church will enable them to appear in the eyes of the community as a part of the Moravian Churches of the Southern Province and will result in much confusion and dispute with respect to contributions and support of colleges, societies, foundations, archives, missionaries, and provincial women's organizations carried on or sponsored by the aforesaid Moravian Churches of the Southern Province."

The defendants filed a joint answer. It admits the incorporation and organization of the defendant church under the name "The Bible Moravian Church" without the knowledge or consent of the plaintiff. It admits that neither the corporate defendant nor the individual defendant is affiliated in any manner whatsoever with the plaintiff or with any congregation represented by the plaintiff. The answer admits that "the name of the church is of great value, not only because of the business carried on and property held in that name, but also because of thousands of members associate with the name the most sacred of their personal relationships and the holiest of their family traditions." It also admits the allegations of the complaint with reference to the missionary, educational and charitable activities carried on by the plaintiff and its affiliated congregations. It denies that the plaintiff has the right to exclude other congregations in its territorial limits from using "Moravian" in the name of their churches, and denies that the plaintiff will suffer damage by the use by the corporate defendant of its name "The Bible Moravian Church."

For further answers and defenses, the defendants allege: (1) The corporate defendant has acquired the right to use its name by the issuance to it of its corporate charter; (2) to grant the injunction prayed for by the complaint would violate the right of the defendants guaranteed to them by Article I, § 26, of the Constitution of North Carolina; (3) to grant the injunction prayed for in the complaint would violate the rights of the defendants guaranteed to them by the Fourteenth Amendment to the Constitution of the United States; (4) the defendants seek only to conduct religious services in accordance with their convictions, they have made no effort to mislead the public or to divert funds intended for the plaintiff, but have

openly held themselves out to be separate from the plaintiff and the plaintiff has suffered no pecuniary or other loss through the use of "Moravian" by the corporate defendant, (5) the word "Moravian" has wide usage, is descriptive of the people of a part of Czechoslovakia, is highly commercialized, especially in the community of Winston-Salem, and the plaintiff has no exclusive right to its use; (6) the use of "Moravian" in the name of their church identifies it with the worship, doctrine and ordinances constituting a precious religious heritage to the members of the defendant church.

In addition to its complaint, offered as an affidavit, the plaintiff introduced in evidence documents relating to the origin and development of the Moravian denomination and of the plaintiff and the churches affiliated with it, together with their plan of organization and internal government and their widespread missionary, educational and charitable interests and activities. The plaintiff's exhibits also show that the individual defendant, formerly the pastor of one of the churches affiliated with the plaintiff, resigned his pastorate and advised the plaintiff that he was "separating from the Moravian Church." Thereupon, his ordination as a minister was revoked by the plaintiff, or by an affiliated organization. He is now the pastor of "The Bible Moravian Church," which assembles for its services in the basement of his home. It would appear from these documents that the beliefs of the defendant Jones and those of the plaintiff concerning the infallibility of the Bible differ somewhat, but the evidence does not disclose the precise nature or extent of those differences of opinion.

Documentary evidence and oral testimony presented at the hearing indicate that in the past there have been religious bodies which used "Moravian" in their names and which were not affiliated with the plaintiff, its predecessors or associates, but these organizations presently do not exist or have discontinued the use of "Moravian" in their official names. The corporate defendant is the only church in North Carolina with the word "Moravian" in its name which is not affiliated with the plaintiff.

Evidence introduced by the defendants, in addition to their verified answer which was used as an affidavit, is to the effect that the corporate defendant has 69 members who now meet for worship services in the basement of the Jones residence. Their separation from the plaintiff has been widely publicized by them. The defendant Jones testified:

> "We have separated from the Moravian Governing Synod; this has been well publicized over more than 600 radio stations

in the United States and Canada, through mimeographed statements which I have mailed out to all of the Moravian ministers, or almost all of them, to the best of my knowledge, and missionaries; it was on the front page of the Journal-Sentinel, the daily newspaper, the morning edition, in this city [Winston-Salem]; and it has been well publicized in the Bishop's circular letter, sent to all of the pastors, and circularized in many cases to individual members of the congregation; I might add that the Wachovia Moravian, the official organ for the Southern Moravian Church, South, goes free of charge to all members of the Moravian Church, South. Our offerings are free-will offerings, gathered in the services themselves, and there is no attempt made to solicit funds from the Moravian Churches or their members."

The plaintiff stipulated at the hearing on the order to show cause:

"This is not a controversy over church property; it is not a controversy over doctrine; we don't contend that the defendants have taken any of the real estate, or property of the plaintiff; it is an action to enjoin the use of the name 'Moravian' or 'Moravian Church'; that's the main action only."

Hayes and Hayes by James M. Hayes, Jr., and W. Warren Sparrow for defendant appellants.

Womble, Carlyle, Sandridge & Rice by I. E. Carlyle and Charles F. Vance, Jr., for plaintiff appellee.

LAKE, J. The plaintiff's motion to dismiss the appeal as premature is denied. This Court has entertained many appeals from orders granting interlocutory injunction. See: *Milk Commission v. Food Stores,* 270 N.C. 323, 154 S.E. 2d 548; *Conference v. Creech,* 256 N.C. 128, 123 S.E. 2d 619; *Church v. College,* 254 N.C. 717, 119 S.E. 2d 867; *Restaurant, Inc. v. Charlotte,* 252 N.C. 324, 113 S.E. 2d 422. The order entered below denies the defendant the right to use "Moravian" in connection with their church organization and services until the final hearing in this action. The plaintiff sought this order on the ground that the use of the word "Moravian" in its name by the defendant, during this interval, would do the plaintiff irreparable injury because this name is of great value to a religious body. The plaintiff is in a poor position to contend, as it does in its motion to dismiss, that a denial to the defendants of the use of this

name, during this same period, is of no substantial importance to the defendants.

The purpose of an interlocutory injunction is to preserve the status quo of the subject matter of the suit until a trial can be had on the merits. *Huskins v. Hospital,* 238 N.C. 357, 78 S.E. 2d 116. At the time this action was instituted, the corporate defendant had come into existence and had been granted by the State a charter giving it the name "The Bible Moravian Church." It was already conducting services and engaged in other church activities under that name.

The sole question before Judge Johnston at the hearing upon the order to show cause was whether an injunction should be issued requiring the defendant to discontinue the use of the corporate defendant's name in such church services and activities from the entry of the injunction to the final hearing on the merits. *Carroll v. Board of Trade,* 259 N.C. 692, 131 S.E. 2d 483; *Whaley v. Taxi Company,* 252 N.C. 586, 114 S.E. 2d 254; *Lewis v. Harris,* 238 N.C. 642, 78 S.E. 2d 715. That is the only question before us on this appeal. *Conference v. Creech, supra.* In determining it, we are not bound by the findings of the court below but may review the evidence and make our own findings of fact. *Conference v. Creech, supra.*

Neither the findings of fact nor the conclusions of law of the trial judge, at the hearing before him on the application for the temporary injunction, are binding upon, or are to be considered by, the superior court at the final hearing of the matter. *Huskins v. Hospital, supra.* The same is true of our decision upon this appeal and our statement of the facts upon which our conclusion rests. The facts relating to the right of the defendant to call itself "The Bible Moravian Church" have not been finally determined.

It is apparent from a review of the evidence at the hearing below that the defendants are just as desirous as is the plaintiff that the public be aware of their separation from the plaintiff and its affiliated congregations. The plaintiff offered no evidence to contradict the testimony of the defendants that they gave wide publicity to the fact of the separation and have made no effort to solicit funds as an affiliate of the plaintiff. There is no evidence whatever in the record to show that any person joined the defendant church or attended any service conducted by it under the belief that it was associated with the plaintiff. There is no evidence whatever in the record to show that any contribution has been made to the defendant church by a donor under the impression that the defendant church is affiliated with the plaintiff. There is no evidence whatever in the record to show that any contribution which otherwise would have been made to the plaintiff, or to any of its affiliated organiza-

tions, has not been made by reason of the existence of the corporate defendant and its use of its corporate name.

There is no evidence whatever in the record to suggest that any service, declaration of belief or doctrine, or any other activity of either defendant has reflected upon or endangered the excellent reputation of the plaintiff and congregations affiliated with it. There is nothing in the record to indicate that either of the defendants contemplates any such action or any defamation or criticism of the plaintiff or of any organization affiliated with it. The plaintiff has stipulated that this "is not a controversy over doctrine."

There is nothing in the record to suggest that the defendants have used or contemplated any use of the term "Unitas Fratrum" (Unity of the Brethren) in or in connection with any of their activities. The only act with which they are charged by the plaintiff is the use of the word "Moravian" in their church name. The defendants admit that this name is precious to the plaintiff and the members of its affiliated churches because they "associate with the name the most sacred of their personal relationships and the holiest of their family traditions," but the defendants say that it is equally precious to them for the same reasons, they having the same religious heritage. They appeal from the order which denies them the use of this name prior to a final determination of the plaintiff's claim that it has the exclusive right to its use.

The burden is upon the applicant for an interlocutory injunction to prove a probability of substantial injury to the applicant from the continuance of the activity of which it complains to the final determination of the action. See: *Carroll v. Board of Trade, supra; Conference v. Creech, supra; Ingle v. Stubbins,* 240 N.C. 382, 82 S.E. 2d 388; *Huskins v. Hospital, supra;* McIntosh, North Carolina Practice and Procedure, 2d ed., § 2196; 28 Am. Jur., §§ 22 and 25. G.S. 1-485(1) authorizes the granting of an application for a temporary injunction "when it appears by the complaint that the plaintiff is entitled to the relief demanded, and this relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, *during the litigation,* would produce injury to the plaintiff." (Emphasis added.) An injunction *pendente lite* should not be granted where there is a serious question as to the right of the defendant to engage in the activity and to forbid the defendant to do so, pending the final determination of the matter, would cause the defendant greater damage than the plaintiff would sustain from the continuance of the activity while the litigation is pending. *Huskins v. Hospital, supra.*

To compel the defendants to discontinue the use of the corporate defendant's name, pending the final determination of its right to do so, would obviously handicap the defendants greatly and would be a grave injustice to them if they should ultimately prevail in this action. In the absence of any evidence to show any enticement of members of congregations affiliated with the plaintiff into the services of the defendant church, or the attraction to it of any contribution as the result of the donor's confusion concerning its affiliation with the plaintiff, it is difficult to believe that the plaintiff, and its many worthy enterprises, could be seriously damaged by permitting the corporate defendant to use the word "Moravian" as part of its name until the trial of the action and the final determination of its right to do so.

Counsel for the plaintiff argued in this Court that for the defendants to call their church "The Bible Moravian Church" tends to create in the minds of the public the inference that the plaintiff and churches affiliated with it do not accept the authority of the Bible and, therefore, threatens to damage the plaintiff pending the outcome of this litigation. This position is inconsistent with the contention that the name of the defendant church will cause the public to believe the defendant is affiliated with the plaintiff. It would seem to indicate that the plaintiff, itself, is not clear as to how, if at all, the use of the corporate defendant's name pending the final hearing of this matter will injure the plaintiff. If there is no clear and present danger of such injury, the injunction *pendente lite* should not have been issued. "Injunctive relief is granted only when irreparable injury is real and immediate." *Hall v. Morganton*, 268 N.C. 599, 151 S.E. 2d 201. This is especially true with reference to the issuance of a preliminary injunction. *Carroll v. Board of Trade, supra;* McIntosh, North Carolina Practice and Procedure, 2d ed., § 2196; 28 Am. Jur., Injunctions, § 52.

For the reason that the evidence fails to show a reasonable probability of substantial injury to the plaintiff through use by the corporate defendant of its corporate name until its right to do so can be finally determined, we hold that it was error to grant the temporary injunction, and it should be and is hereby vacated.

Upon this appeal it is not necessary for us to determine whether the defendants have a right under either the Constitution of this State or the Constitution of the United States to name their church "The Bible Moravian Church," and we express no opinion upon that question.

It is likewise unnecessary upon this appeal to determine the ex-

tent to which the rules devised by courts of equity to regulate competition between those who trade for profit in the market place apply to those who seek contributions from the followers and friends of the Prince of Peace. It may not be amiss in such a situation to bear in mind the advice of a great lawyer of long ago to an established religious body, concerned lest it be injured by the activities of a small group of former associates: "Refrain from these men, and let them alone, for if this counsel or this work be of men, it will come to naught, but if it be of God, ye cannot overthrow it." Acts 5:38.

This Court has not decided the question of whether an injunction may be issued to forbid one church to use a name similar to that of another church. We do not now decide that question. The leading case supporting the issuance of such injunction is *Purcell v. Summers,* 145 F. 2d 979. There, former members of the Methodist Episcopal Church, South, dissatisfied with its merger with two other Methodist bodies to form the present Methodist Church, organized a new body which they named "The Methodist Episcopal Church, South," — the exact name of the former organization so merged into the present Methodist Church. The Circuit Court of Appeals for the Fourth Circuit held they could and should be enjoined, at the suit of bishops of the Methodist Church, from using the name "Methodist Episcopal Church, South." The ground for the decision was that for the defendants to use the name would be unfair competition, confusing to prospective communicants and contributors and likely to cause litigation over property rights. Under those circumstances, the court there said the "principles ordinarily applied in the case of business and trading corporations are equally applicable in the case of churches and other religious and charitable organizations."

One of those principles applied in the case of business and trading corporations is that an injunction will not issue to prevent use by the defendant of a generic or descriptive word contained in the name of the plaintiff, at least in the absence of fraudulent intent. 52 Am. Jur., Trademarks, Tradenames and Trade Practices, § 130. Thus in *Purcell v. Summers, supra,* the court said:

> "It is said that the words 'Methodist' and 'Episcopal' are generic terms and that defendants have the right to use them for that reason, but defendants are not proposing to use either of these words in a new name so different from the old that no confusion could result. They are using the precise name of the old church; and the question is, not whether they have the right

> to use 'Methodist' or 'Episcopal' in a new name so constructed as to avoid confusion, but whether they have the right to use the old name in a way that amounts, as we think it does, to implied misrepresentation to the damage of plaintiffs."

The preliminary injunction, granted below, forbids the defendant church to use in its name the word "Moravian," irrespective of whether other words are used with it in the name so as to avoid misrepresentation and confusion. This goes beyond the decision in *Purcell v. Summers, supra.* Surely, some combination of words, including "Moravian," could be found which would convey no impression of affiliation with the plaintiff. Whether the addition of the word "Bible" is sufficient for this purpose cannot be determined from the evidence in this record. The argument before us by counsel for the plaintiff would lend support to that view. Of course, neither he nor we intend to suggest thereby that the plaintiff and its affiliates do not accept, properly interpret, and follow the Bible. That is not a question proper for courts to determine, but the question of whether the full name of the defendant church is such as to give to prospective communicants and contributors a false impression that the defendant church is an affiliate of the plaintiff is a question for judicial determination in litigation of this kind. It cannot be determined upon this record.

It also cannot be determined upon this record whether the word "Moravian," used in connection with a church, is a generic, descriptive term primarily signifying acceptance of certain doctrines, sacramental ceremonies and theological beliefs, or is a word which primarily signifies an affiliation with the plaintiff and its associated groups. Undoubtedly, it is a word which members of the defendant church, as well as those belonging to congregations affiliated with the plaintiff, revere and use with affection as it is associated with "the most sacred of their personal relationships and the holiest of their family traditions" — to use the language of *Purcell v. Summers, supra,* quoted in the plaintiff's complaint.

The defendants should not be enjoined from their use of "Moravian" in the name of their church until the matter is finally heard and the exclusive right of the plaintiff, and its affiliated groups, to use it is established by evidence.

Reversed.

PARKER, C.J., dissenting: The Southern Province of the Moravian Church had its beginning with the settlement of Bethabara

in 1753, Bethania in 1760, and Salem in 1766. The Province has grown to include forty-seven Moravian Churches with more than twenty-two thousand members. All the congregations of the churches of the United States which bear the name "Moravian," with the sole exception of defendant, "The Bible Moravian Church," are affiliated either with the Northern Province or Southern Province of the Moravian Church in America, and said congregations were organized under the authority of the Synods of the said Provinces and are governed by the Board of Provincial Elders of the Province in which they are located.

The corporate defendant was organized with its principal place of business designated as Winston-Salem, North Carolina, being within the territorial limits of the Southern Province of the Moravian Church. The said defendant was organized under the name "The Bible Moravian Church" without either the knowledge or the consent of the plaintiff, and the said defendant is not affiliated in any manner whatsoever with the plaintiff or any of the Moravian congregations represented by the plaintiff.

In the leading case of *Purcell v. Summers,* 145 F. 2d 979, the Court held, as stated in the first headnote:

> "In order to prevent litigation, confusion, and to prevent new church from making old church appear as an intruder, the Methodist Church, composed of a union of the Methodist Episcopal Church, the Methodist Episcopal Church, South, and the Methodist Protestant Church, to which union 37 of the 38 Conferences of the Methodist Episcopal Church, South, had assented, as successor of the Methodist Episcopal Church, South, was entitled to an injunction restraining dissident former members from using the name Methodist Episcopal Church, South, as the name of a new rival church organization."

I think that what the Court said in that case, speaking through Parker, J., is relevant and controlling here:

> "Upon these facts, we do not think that there can be any doubt as to the right of plaintiffs to the injunction prayed. The use by one organization of the name of another for the purpose of appropriating the standing and good will which the other has built up is a well recognized form of the wrong known to the law as unfair competition, against which courts of equity have not hesitated, in any jurisdiction, to use the full power of the injunctive process. The general rule with adequate citation of

supporting authority was thus stated by the Supreme Court of South Carolina in the comparatively recent case of *Planters' Fertilizer & Phosphate Co. v. Planters' Fertilizer Co.*, 135 S.C. 282, 133 S.E. 706, 708:

" 'A court of equity has jurisdiction to enjoin the use of the same name by another corporation, or the use of a name so nearly similar as to be misleading, thereby injuring its business. [Citing authority.]'

* * *

"We have no doubt that these principles ordinarily applied in the case of business and trading corporations are equally applicable in the case of churches and other religious and charitable organizations; for, while such organizations exist for the worship of Almighty God and for the purpose of benefiting mankind and not for purposes of profit, they are nevertheless dependent upon the contributions of their members for means to carry on their work, and anything which tends to divert membership or gifts of members from them injures them with respect to their financial condition in the same way that a business corporation is injured by diversion of trade or custom. As was well said in the case of *Master et al. v. Machen et al.*, 35 Pa. Dist. & Co. R. 657, which involved the use of the name of one of the branches of the Presbyterian Church:

" 'The close similarity raises an inference of resulting confusion. This confusion is bound to react to the disadvantage of the plaintiff. When we say disadvantage, we are not restricting ourselves to the spiritual side alone. We are aware that churches are established for the promulgation of faith under the regulations of definite religious organizations, but we are also aware that such organizations, through some administrative channels, own property, real and personal, and require funds to carry on their purposes. These funds come from contributions, gifts, donations, and bequests. No large church organization could live by faith alone, and if its income were stopped or substantially reduced, its scope for spreading its religion, as enunciated by its doctrines, would be seriously hampered. Thus, any project or movement of another religious organization using a name so similar to an established one as to create confusion and thereby interfering with the spiritual and final progress of that established church and its agencies is inequitable and will be restrained.'

"The question of protecting by injunction an eleemosynary or charitable organization, as distinguished from a business cor-

poration, from unfair competition in the use of its name, was before us in *Grand Lodge I. B. P. O. Elks v. Grand Lodge I. B. P. O. Elks,* 4 Cir., 50 F. 2d 860, 862, in which we examined the question thoroughly and laid down the rule, with the supporting authorities, as follows:

" 'It is well established that a benevolent, fraternal or social organization will be protected in the use of its name by injunction restraining another organization from using the same or another name so similar as to be misleading. [Citing authority.] The reasons underlying the rule are thus stated in Nims on Unfair Competition and Trademarks (3d Ed.) § 86: "The fact that a corporation is an eleemosynary or charitable one and has no goods to sell, and does not make money, does not take it out of the protection of the law of unfair competition. Distinct identity is just as important to such a company, oftentimes, as it is to a commercial company. Its financial credit — its ability to raise funds, its general reputation, the credit of those managing it and supporting it, are all at stake if its name is filched away by some other organization, and the two become confused in the minds of the public." ' "

The defendants contend that the word "Moravian" is a generic term and that they have the right to use it for that reason. That is a deceptively simple argument. The defendants are not proposing to use the word in a name so different from the plaintiff that no confusion would result. The word "Bible" in defendants' corporate name does not tend to distinguish the defendants from the other Moravian Churches, but tends to emphasize the similarity by following the pattern of names used by the plaintiff in designating its congregations, such as Advent Moravian Church, Immanuel Moravian Church, Home Moravian Church, etc.

In my opinion it is manifest from the evidence and findings of fact of the trial judge that the name "The Bible Moravian Church" adopted by the defendants is so similar to the old and firmly established name of plaintiff that confusion will certainly result to the disadvantage of the plaintiff. "We are aware that churches are established for the promulgation of faith under the regulations of definite religious organizations, but we are also aware that such organizations, through some administrative channels, own property, real and personal, and require funds to carry on their purposes. These funds come from contributions, gifts, donations, and bequests. No large church organization could live by faith alone, and if its income were stopped or substantially reduced, its scope for spreading

its religion, as enunciated by its doctrines, would be seriously hampered." *Purcell v. Summers, supra,* quoting *Master et al. v. Machen et al.,* 35 Pa. Dist. & Co. R. 657. I believe that the danger of irreparable injury to the plaintiff is real and immediate, and that the defendants should be restrained. Defendants would sustain only slight damage if the injunction were granted. Upon the evidence and the findings of fact of the trial judge, I vote to affirm Judge Johnston's order restraining defendants, pending a final determination of the matter, "from using the name 'Moravian' or 'Unitas Fratrum' in connection with any religious or church activity."

HIGGINS and SHARP, JJ., join in this dissent.

HAROLD GENE EUBANKS, PLAINTIFF, v. BRENDA WALKER EUBANKS AND BONNIE C. WALKER, GUARDIAN AD LITEM OF BRENDA WALKER EUBANKS, DEFENDANTS.

(Filed 6 March, 1968.)

1. Divorce and Alimony §§ 2, 13—

A defendant wife may plead the invalidity of a separation agreement by rebutter in her husband's suit for divorce where the husband, in reply to the wife's cross-action for alimony without divorce, sets up a deed of separation as a bar to the cross-action.

2. Divorce and Alimony § 13—

A defendant wife in an action for divorce may not attack the legality of the separation until the deed of separation entered into between the parties has been rescinded.

3. Same; Husband and Wife § 4—

A married woman may attack the certificate of her acknowledgment and privy examination respecting her execution of a deed of separation upon the ground of mental incapacity, infancy, or fraud of the grantee.

4. Infants § 2; Husband and Wife § 4—

In the absence of a statute to the contrary, the contract of an infant with his spouse is voidable at his election within a reasonable time after he comes of age.

5. Divorce and Alimony § 13; Husband and Wife § 11—

A 17-year-old wife may attack the validity of a separation agreement on the ground of her infancy and thereby disaffirm the agreement insofar as it releases the plaintiff husband from the obligation to support her, and the statute, G.S. 52-13 [now G.S. 52-10], relates only to the release of an interest in property and has no bearing whatever on the right of a wife to support.

6. Divorce and Alimony § 10—

In the husband's action for divorce, evidence that the defendant wife was mentally disturbed, that her husband knew of her condition and had made an appointment for her with a psychiatrist, but that he took her to the office of his attorney where she was induced for $100, and without representation by her own attorney, to sign a deed of separation releasing the husband from all obligations to support her and waiving all her interest in his property, *is held* sufficient to be submitted to the jury on the issue of the wife's lack of mental capacity to execute the agreement.

7. Husband and Wife § 1—

The relationship between husband and wife is the most confidential of all relationships and transactions between them, to be valid, must be fair and reasonable.

8. Husband and Wife § 10—

To be valid, a separation agreement must be untainted by fraud and must have been entered into without coercion or the exercise of undue influence and with full knowledge of all the circumstances, conditions and rights of the contracting parties.

9. Divorce and Alimony § 13—

The husband's action under G.S. 50-6 for absolute divorce on the ground of one year's separation may be defeated by the wife's allegations and proof of abandonment.

10. Descent and Distribution § 4—

In the absence of evidence to the contrary, the term of pregnancy is presumed to be ten lunar months or 280 days.

11. Parent and Child § 1—

The law presumes the legitimacy of a child born in wedlock, but such presumption may be rebutted by proof of the husband's impotency or his nonaccess to the wife, or, if the husband had the opportunity of access, then by proof of the wife's living in open adultery.

12. Appeal and Error § 49—

The exclusion of evidence cannot be held prejudicial when the record fails to show what the witness would have testified had he been permitted to answer.

13. Divorce and Alimony § 13— Jury findings that plaintiff lived apart from wife more than one year but was father of her child conceived after date of separation warrant new trial.

In the husband's action for absolute divorce on the ground of one year's separation, the defendant wife set up a cross-action alleging, *inter alia*, that plaintiff had abandoned her and their child. By reply plaintiff denied defendant's allegations of abandonment and paternity. On the evidence in the case, the presumption arose that the child was conceived after plaintiff had separated from defendant. There was no evidence that defendant had lived in adultery after the separation but there was evidence that plaintiff had an opportunity of access to the wife. The jury found on the trial court's peremptory instruction that plaintiff had lived apart from

defendant for more than one year, but also found that plaintiff was the father of the child. *Held:* The trial court should have instructed the jury that if they answered the issue of separation in the affirmative, the issue of plaintiff's paternity should then be answered in the negative, and its failure to do so was error.

LAKE and HUSKINS, JJ., took no part in the consideration or decision of this case.

APPEAL by plaintiff and defendant from *Morris, E.J.*, March 1967 Assigned Civil Session of WAKE, docketed and argued at the Fall Term 1967 as Case No. 543.

Plaintiff husband instituted this action on 21 March 1966 for an absolute divorce on the ground of separation for one year. Upon his motion, a guardian *ad litem* was appointed for defendant wife, a minor, on 19 August 1966. The answer, filed on 30 January 1967, denied the separation alleged by plaintiff and set up a cross action for alimony without divorce. In brief summary, defendant alleged:

In March 1965, plaintiff abandoned defendant without cause when he took her to her mother's home to stay "until her nerves got straightened out." He continued, however, to have sexual relations with her until sometime in April. During this period she became pregnant with plaintiff's child, Rhonda Kay Eubanks, who was born 7 January 1966. Plaintiff, an able-bodied man, has never supported this child, and he has contributed nothing to defendant's support since about 7 March 1965. Defendant's prayer for relief was that she be granted alimony without divorce and the custody of the child, and that plaintiff be required to support the child.

By reply, plaintiff denied that he was the father of Rhonda as well as all other material allegations in the answer. He also averred that, on 10 March 1965, he and defendant had entered into a duly executed separation agreement.

To the reply defendant filed a rebutter in which she alleged that on the day she signed the deed of separation she was only 17 years old and that her IQ of 61 put her "in the mild to moderately retarded range"; that plaintiff got her from her mother's home upon the pretext of taking her to the doctor; that he took her to the courthouse, where he coerced her into signing a deed of separation, which was grossly unfair to her; that thereafter plaintiff and defendant had sexual relations, which invalidated the deed of separation. She prayed that the deed of separation be declared null and void.

Upon the trial, plaintiff offered evidence which tended to show: Plaintiff was then 24 years of age. He married defendant on 27 April 1963, when she was 16 years old. Defendant found it "kind of

hard to get adjusted to married life. . . . [H]er tension span was real short." Plaintiff is a truck driver for Thurston Motor Lines, earning $100-$125 a week. His trips begin in Raleigh and last from 10-48 hours; ninety percent of his driving is done at night. On 6 March 1965, plaintiff and defendant separated and have had no marital relationship since. He continued to live in Apex, and she lived with her mother in Cary. On 11 March 1965, after telephoning an attorney and requesting him to prepare a deed of separation, plaintiff took defendant from the home of her mother, Mrs. Walker, without disclosing he was taking her daughter to an attorney's office. He told Mrs. Walker he was taking his wife to see a doctor. After seeing the doctor, they went to the office of the attorney. There, defendant signed the deed of separation by which — for a consideration of $100.00 in cash — she released plaintiff from all further obligation to support her, gave him possession of all their household belongings, and quitclaimed all her right, title, and interest in the home and in any other property he then owned or might thereafter acquire. Plaintiff did not tell defendant she needed a lawyer to represent her, nor did he offer to employ one for her. After they signed the deed of separation, the attorney accompanied them to the courthouse. Defendant acknowledged the deed of separation before the Clerk of the Superior Court, and the instrument was recorded. Plaintiff then returned defendant to the home of her mother, where he remained about ten minutes, but he did not tell Mrs. Walker what they had done. Since that day, he has not spoken to defendant except on the telephone and has contributed nothing to her support. He has never contributed to the support of the child Rhonda.

Defendant's evidence tended to establish these facts: After plaintiff and defendant were married, they lived in a trailer in Apex. Defendant was afraid to stay there alone when plaintiff was away at night. His unwillingness to allow her to stay with her mother in Cary during his absences was the cause of most of their disputes. Later, they purchased and moved into a new house in Apex. Defendant cooked for plaintiff, kept the house clean, and washed and ironed his clothes. On 2 June 1964, she had a miscarriage; after that plaintiff began to accuse her of infidelity. On one occasion, he struck defendant. He said she could not cook right. On 6 March 1965, plaintiff took her to her mother's home and asked Mrs. Walker to keep her for a month because her "nerves were real bad," and he had to go to work in Charlotte. Mrs. Walker agreed to do this. At that time, defendant was not herself. She was nervous and upset; she cried a lot and had to be told what to do and what not to do. Her father was then a patient in the State Hospital. On March 8th and 15th, 1965,

plaintiff took defendant to a doctor, and he told Mrs. Walker that he had made an appointment with a psychiatrist to see defendant on March 22nd. When defendant told her mother about the separation, Mrs. Walker called plaintiff, who told her that he had defendant "sign some papers about the house." At that time defendant was 17 years old. The day after plaintiff took defendant to the courthouse, they went back to the home in which they had lived, went in, and "talked about separating and all." After that, plaintiff came to see her at her mother's home, but she did not go off with him. Defendant gave birth to the child Rhonda on 7 January 1966.

At the conclusion of all the evidence, plaintiff's motion that defendant's cross action be dismissed was allowed, and defendant excepted. The court submitted, and the jury answered, issues as follows:

"1. Has the plaintiff been a resident of the State of North Carolina for more than six months next preceding the institution of the action? ANSWER: Yes.

"2. Were the plaintiff and defendant married as alleged in the complaint? ANSWER: Yes.

"3. Have the plaintiff and defendant lived separate and apart from each other continuously for more than one year next preceding the institution of this action, as alleged in the complaint? ANSWER: Yes.

"4. Is the plaintiff the father of the minor child, Rhonda K. Eubanks, as alleged in the Further Answer and Counterclaim of the defendant? ANSWER: Yes.

"5. Has the plaintiff willfully failed and neglected to provide adequate support for said child as alleged in the Further Answer and Counterclaim of the defendant? ANSWER: Yes."

The court entered judgment granting plaintiff an absolute divorce from defendant, awarding defendant the custody of the child Rhonda, and ordering plaintiff to pay to defendant $20.00 a week for the child's support.

Both plaintiff and defendant excepted to the judgment and appealed.

Boyce, Lake & Burns for plaintiff appellant-appellee.

Dupree, Weaver, Horton, Cockman & Alvis for defendant appellant-appellee.

SHARP, J. Plaintiff appeals from the adjudication that he is the father of defendant's child, Rhonda. Defendant appeals from the judgment dismissing her cross action and from the decree awarding plaintiff an absolute divorce.

Plaintiff's complaint alleges a cause of action for divorce on the ground of one year's separation. G.S. 50-6. Defendant's answer denies the separation as alleged and sets up a cross action for alimony without divorce upon allegations that plaintiff had abandoned her and their child, born after plaintiff had separated himself from defendant. G.S. 50-16. By reply plaintiff denies defendant's allegations of abandonment and paternity and, in bar of alimony, pleads that the agreement of 10 March 1965 had legalized their separation from that date and released him from any further obligation to defendant. By rebutter, defendant pleads the invalidity of the separation agreement. This method of pleading was approved in *Lawson v. Bennett,* 240 N.C. 52, 81 S.E. 2d 162.

In addition to her allegation that the deed of separation had been rescinded by subsequent sexual relations, *Jones v. Lewis,* 243 N.C. 259, 90 S.E. 2d 547, defendant alleges that it was invalid because (a) at the time she executed it she was an infant, 17 years of age; (b) she lacked sufficient mental capacity to execute the instrument; and (c) the agreement was fraudulently obtained and grossly unfair to her.

Until the deed of separation is rescinded, defendant cannot attack the legality of the separation or obtain alimony from plaintiff. *O'Brien v. O'Brien,* 266 N.C. 502, 146 S.E. 2d 500; *Edmisten v. Edmisten,* 265 N.C. 488, 144 S.E. 2d 404; *Fuchs v. Fuchs,* 260 N.C. 635, 133 S.E. 2d 487. A married woman may attack the certificate of her acknowledgment and privy examination respecting her execution of a deed of separation, *inter alia,* upon the grounds of her mental incapacity, infancy, or the fraud of the grantee. *Lee v. Rhodes,* 230 N.C. 190, 52 S.E. 2d 674. See *Van Every v. Van Every,* 265 N.C. 506, 144 S.E. 2d 603; *Joyner v. Joyner,* 264 N.C. 27, 140 S.E. 2d 714; *Lawson v. Bennett, supra.*

Defendant's evidence tended to show that at the time she signed the deed of separation, she was an infant 17 years of age. Absent an enabling statute which provides a different rule, an infant's contract with his or her spouse is subject to the general principle that the deeds and contracts of an infant (except for a narrowly limited class of contracts not applicable here) are voidable at his election within a reasonable time after he comes of age. 27 Am. Jur. *Infants* § 16; 3 Lee, N. C. Family Law § 270 (1963); *Fisher v. Motor Co.,* 249

N.C. 617, 107 S.E. 2d 94; *Jackson v. Beard,* 162 N.C. 105, 78 S.E. 6.

Since 3 June 1965, G.S. 52-10.1 has empowered any married couple, both of whom are 18 years of age or over, to execute a binding separation agreement upon compliance with its terms. In no event could this statute have any application to the agreement in suit, which was acknowledged 11 March 1965. At that time, the applicable statute, G.S. 52-13 (now G.S. 52-10), provided that "any persons of full age about to be married, and, subject to § 52-12 (now 52-6), any married person, may release and quitclaim such rights which they might respectively acquire or may have acquired by marriage in the property of each other. . . ." However, it was held in *Motley v. Motley,* 255 N.C. 190, 120 S.E. 2d 422, "that the foregoing statute (G.S. 52-13) relates to the release of an interest in property, *but has no bearing whatever on the right of a wife to support.*" *Id.* at 193, 120 S.E. 2d at 424. (Emphasis added.)

In defendant's rebutter, she has pled her infancy and prayed that the deed of separation be declared null and void. Even if G.S. 52-13 be construed as empowering all married minors to release their rights in the *property* of their spouses, it did not authorize the minor wife to release her right to support, and her prayer that the deed of separation be declared null and void was a sufficient disaffirmance of the agreement insofar as it purported to release plaintiff from this obligation. *Millsaps v. Estes,* 137 N.C. 535, 542, 50 S.E. 227, 229.

With reference to her pleas that she lacked sufficient mental capacity to execute the agreement, and that it was unfair and fraudulent as to her, defendant's evidence, taken in the light most favorable to her, was sufficient to establish these facts: She was mentally disturbed, and plaintiff, who had made an appointment with a psychiatrist to see defendant on 22 March 1965, well knew her condition. Notwithstanding, on 11 March 1965, he took her to the office of his attorney where, for $100.00 in cash, she was induced to sign a deed of separation releasing plaintiff from all obligation to support her and waiving all her interest in his property. Defendant had no attorney to advise her.

From the foregoing facts, the jury could find that at the time defendant signed the separation agreement she lacked the mental capacity to understand the nature of the act in which she was engaged, its scope and consequences; that the agreement was grossly unfair to her; and that she had been overreached. *Goins v. McLoud,* 231 N.C. 655, 58 S.E. 2d 634.

The relationship between husband and wife is the most confidential of all relationships, and transactions between them, to be valid,

must be fair and reasonable. *Fulp v. Fulp,* 264 N.C. 20, 140 S.E. 2d 708. Under the circumstances disclosed by this record, an inference of fraud arises from plaintiff's dealings with his minor, mentally disturbed wife. To be valid, "a separation agreement must be untainted by fraud, must be in all respects fair, reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties." *Taylor v. Taylor,* 197 N.C. 197, 201, 148 S.E. 171, 173.

Defendant's evidence was also plenary to support a finding by the jury that plaintiff, without just cause, abandoned defendant on 6 March 1965, as alleged. *Richardson v. Richardson,* 268 N.C. 538, 151 S.E. 2d 12. Where the husband sues the wife under G.S. 50-6 for an absolute divorce on the ground of one year's separation, she may defeat his action by alleging and proving that the separation was caused by his abandonment of her. *O'Brien v. O'Brien, supra; Taylor v. Taylor,* 257 N.C. 130, 125 S.E. 2d 373. Had the issue of abandonment been submitted to the jury — as it should have been — when the issues in the divorce action were submitted, an affirmative answer to it would have precluded plaintiff's divorce. Plaintiff's action for divorce, the issue of the paternity of the child Rhonda, and defendant's cross action for alimony cannot be separated. These issues, which determine the rights of the parties, are so interrelated that they must be decided in one action.

The court erred in dismissing defendant's cross action. This error made any further proceedings in plaintiff's action for divorce likewise erroneous. Defendant's assignments of error must be sustained.

Plaintiff's appeal and assignments of error bear upon the fourth issue, the jury's answer to which established that he was the father of the child Rhonda, born 7 January 1966. If the fourth issue be answered YES, the fifth must also be answered in the affirmative, since plaintiff admits he has never supported the child and denies his responsibility.

The usually accepted average period of pregnancy is 280 days. 2 Taylor, Principles and Practice of Medical Jurisprudence 24 (12th Ed. 1965). "[I]n the absence of evidence to the contrary, the term of pregnancy is presumed to be ten lunar months or 280 days. . . . Whether, according to the laws of nature, the term of pregnancy may extend 322 days or more from the moment of conception, is a proper subject of testimony by qualified medical experts." *Byerly v. Tolbert,* 250 N.C. 27, 34-35, 108 S.E. 2d 29, 35. Protracted pregnancies of more than 280 days, while uncommon, are not considered

extraordinary. Schatkin, Disputed Paternity Proceedings 519-538 (3d Ed. 1953); 3 Lee, N. C. Family Law § 250 (3d Ed. 1963).

When a child is born in wedlock, the law presumes it to be legitimate, and this presumption can be rebutted only by facts and circumstances which show that the husband could not have been the father, as that he was impotent or could not have had access to his wife. *State v. McDowell,* 101 N.C. 734, 736, 7 S.E. 785, 786, quoted with approval in *State v. Rogers,* 260 N.C. 406, 408, 133 S.E. 2d 1, 2; *accord, State v. Tedder,* 258 N.C. 64, 127 S.E. 2d 786; *State v. Green,* 210 N.C. 162, 185 S.E. 670. To render the child of a married woman illegitimate, unless impotency be established, proof of the nonaccess of her husband is required, and neither the wife nor the husband is a competent witness to prove such nonaccess. *Ray v. Ray,* 219 N.C. 217, 13 S.E. 2d 224. "The evidence of nonaccess, if there be such, must come from third persons." *State v. Wade,* 264 N.C. 144, 145, 141 S.E. 2d 34, 35. If there was access, there is a conclusive presumption that the child was lawfully begotten in wedlock. *Ray v. Ray, supra; Ewell v. Ewell,* 163 N.C. 233, 79 S.E. 509; *Rhyne v. Hoffman,* 59 N.C. 335. However, even though the husband, residing in the same community, had the opportunity of access, "[t]hat the wife is notoriously living in open adultery is a potent circumstance tending to show nonaccess," for it is unreasonable to suppose that, under those circumstances, he would avail himself of such opportunity. *Ray v. Ray, supra* at 220, 13 S.E. 2d at 226.

This record is devoid of any evidence that defendant has committed any act of adultery. At the conclusion of defendant's evidence, however, counsel for plaintiff informed the court that he "would like to offer some additional evidence on the question of paternity." The court declined to permit plaintiff to offer such evidence, and plaintiff assigns this ruling as error. The record does not disclose the identity of the proposed witnesses or what their testimony would have been. It cannot be determined, therefore, whether either the witness or his testimony would have been competent. "Failure to show what the witness would have answered renders the ruling nonprejudicial." *Westmoreland v. R. R.,* 253 N.C. 197, 198, 116 S.E. 2d 350, 351. Notwithstanding, for the reasons hereinafter indicated, the jury's answer to the fourth issue must be set aside.

To entitle plaintiff to an absolute divorce, he was required to prove that he and defendant had lived continuously separate and apart for at least one year next preceding the institution of this action on 21 March 1966. On this record, the law presumes that plaintiff is the father of Rhonda and that she was conceived on or about 3 April 1965, a time within the year next preceding the institution of

the action. Yet the court peremptorily instructed the jury that if they found the facts to be as all the evidence tended to show, they would answer the third issue YES. As plaintiff correctly points out, "We have the anomalous situation of a jury determination that the parties have lived continuously separate and apart from each other during the period of gestation but that one of the parties is the father of the child of the other party." On this record, the third and fourth issues may not each be answered YES, and the court should have instructed the jury that if they answered the third issue YES, they would answer the fourth issue No.

Fundamental error pervaded the trial of this case. Since the judgments dismissing defendant's cross action and awarding plaintiff an absolute divorce must be set aside, justice requires that the adjudication of paternity likewise be vacated and that a trial *de novo* be had on *all* issues raised by the pleadings. Defendant's pleadings are minimal. If so advised, she may move for permission to replead.

The decision is this: On defendant's appeal, the judgment dismissing the cross action is reversed; the decree of absolute divorce is vacated and a new trial ordered. On plaintiff's appeal, the adjudication of paternity is set aside and a new trial ordered.

Plaintiff's appeal,
New trial.
Defendant's appeal,
Reversed and remanded.

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

MARIE MOOSE WILLIAMS, PLAINTIFF, v. CARL WAYNE BRAY, DEFENDANT.

(Filed 6 March, 1968.)

1. Appeal and Error § 28; Process §4—

On motion to dismiss for invalid service on defendant, the court is not required to make findings of fact, absent a request, and it is presumed that the court on proper evidence found facts sufficient to support its judgment.

2. Actions § 10—

A civil action is commenced by the issuance of summons, G.S. 1-88, and the date it bears is *prima facie* evidence of the date of issuance. G.S. 1-88.1.

3. Process § 3—

The summons must be served on defendant by the officer to whom it is addressed within twenty days of its issuance, and if the summons is not served within the twenty days it must be returned to the clerk who issued it with a notation thereon of its nonservice and the reasons therefor. G.S. 1-89.

4. Process §§ 2, 3; Actions § 10—

A summons is "issued" within the meaning of G.S. 1-88 when it is delivered by the clerk, expressly or impliedly, to the sheriff, or to someone for him, for service.

5. Process §§ 2, 3—

Where the evidence shows the summons was given by the issuing clerk to plaintiff's attorney who then transmitted it to the proper officer for service, and where defendant's evidence fails to rebut the presumption that the summons was issued when dated, the summons is "issued" within the meaning of G.S. 1-88 and is a proper basis for the issuance of an alias summons.

6. Process § 3; Actions § 11—

If the original summons is not served on defendant within twenty days of its issuance it becomes *functus officio*, and plaintiff must then cause an alias summons to be issued and served in accordance with G.S. 1-95 to prevent a discontinuance of the action.

7. Process § 3—

Plaintiff may sue out an alias or pluries summons either by oral or written application to the clerk, and no order of court is necessary to the issuance of such process.

8. Same—

An alias summons issues only when the original summons has not been served.

9. Same—

Where the return on the original summons was that defendant could not be found, and where it appeared on the face of the summons that service had not been made within twenty days of its issuance, which is tantamount to a return of nonservice, the original summons was a proper basis for the issuance of an alias summons.

10. Same; Actions § 11—

A summons issued within ninety days from the date of the original summons, and which referred back to the original summons, is a valid alias summons and prevents a discontinuance of the action as originally instituted.

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

APPEAL by defendant from *Hasty, J.*, 24 April 1967 Non-Jury Civil Session of GUILFORD (Greensboro Division). This case was docketed and argued at Fall Term 1967 as No. 688.

Civil action to recover damages for personal injuries allegedly resulting from automobile collision occurring on 20 October 1963.

On 19 October 1966, at plaintiff's request, an assistant clerk of superior court of Guilford County issued a summons directed to the Sheriff of Rockingham County, to be served on the defendant. At the same time, upon plaintiff's application, an order was entered extending time to file complaint until 8 November 1966. The officer's return on said summons showed receipt of summons on 9 November 1966, and that defendant was not to be found in the county.

On 8 November 1966 plaintiff filed complaint in this cause and the clerk entered an order directing service thereof on defendant. On the same date plaintiff caused to be sued out of the Guilford County Superior Court an "alias and pluries" summons, directed to the Sheriff of Rockingham County, to be served on the defendant, said summons reciting in part:

> "You having heretofore on the 19th day of October, 1966 been commanded to summon the defendant hereinafter named, and said summons not having been served, and this being an alias summons issued within ninety days after the date of issue of the next preceding summons in the chain of summonses:"

The officer's return thereon showed receipt of the summons and service on defendant on 16 November 1966.

On 8 December 1966, defendant entered a special appearance in the Guilford County Superior Court to vacate, set aside and quash (1) the original summons because it was never issued, and (2) the alias summons because it was improperly signed. Defendant moved to dismiss the action for the reason that the court had not properly acquired jurisdiction over the person of defendant.

On 28 December 1966, plaintiff caused to be prosecuted out of the Guilford County Superior Court an alias summons directed to the Sheriff of Rockingham County to be served on defendant. The officer's return showed receipt thereof and service on defendant on 3 January 1967. Again, on 25 January 1967, defendant, by special appearance, made a motion to dismiss.

On 1 February 1967 an order was entered directing service of the complaint. The officer's return showed receipt and service of the same on 10 February 1967. On 8 March 1967, defendant again, by special appearance, made a motion to dismiss the action.

On 24 April 1967, plaintiff's attorney filed affidavit of his secretary, Mary Ann Hyatt, which stated therein that she mailed a letter to the Sheriff of Rockingham County, containing the summons

issued on 19 October 1966. She placed the letter in a mailbox before the first scheduled morning mail pick-up, on 7 November 1966.

The cause was heard before Judge Fred H. Hasty upon defendant's motion to vacate and set aside the original summons and other motions to vacate and dismiss, filed 8 December 1966, 25 January 1967, and 8 March 1967. Thereafter Judge Hasty entered his order which, in pertinent part, provided:

> "IT APPEARING TO THE COURT AND THE COURT FINDING AS A FACT after a thorough consideration of all matters and things presented as appear of record, of all things presented in open court, and of argument of counsel, that the motion to vacate and set aside the original summons should be disallowed.
>
> IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED:
>
> 1. That the Defendant's motion to vacate and set aside the original summons be and the same are hereby disallowed;"

Defendant appealed.

Max D. Ballinger for plaintiff.
Jordan, Wright, Henson & Nichols and William L. Stocks for defendant.

BRANCH, J. Appellant assigns as error the failure of the trial judge to make findings of fact relating to his motion to dismiss.

In the case of *Construction Co. v. Electrical Workers Union,* 246 N.C. 481, 98 S.E. 2d 852, the defendant made motion to dismiss the action on the ground of invalid service. The trial judge heard evidence on the motion, found no facts, and denied and overruled the motion. Defendant did not request findings of fact upon its motion to dismiss. Overruling defendant's assignment of error in respect to the motion to dismiss, this Court stated:

> ". . . There is no statute which required Judge Sharp to find the facts on this 'motion to dismiss and special demurrer,' and in the absence of a request that findings of fact be made, 'it is presumed that the Judge, upon proper evidence, found facts to support his judgment.' *Holcomb v. Holcomb,* 192 N.C. 504, 135 S.E. 287."

See also Supplement, Vol. 1 Strong's N. C. Index, Appeal and Error, § 22, and the cases cited thereunder.

Here, appellant made no request for findings of fact. The evidence heard by the trial judge was uncontradicted. By authority of

cases above cited, appellant's assignment of error as to failure of the trial judge to make findings of fact is overruled.

Appellant contends that his motion to vacate and set aside the original summons was erroneously denied. This assignment of error presents the question of whether the original summons was *issued.*

A civil action is commenced by the issuance of summons, G.S. 1-88, and the date it bears is *prima facie* evidence of the date of issuance. G.S. 1-88.1. Such summons must be served by the sheriff to whom it is addressed within twenty days after the date of its issue; and if not served within twenty days after the date of its issue upon every defendant, it must be returned by the officer holding the same for service to the clerk of court issuing the summons, with notation thereon of its nonservice and the reasons therefor. G.S. 1-89.

This Court has many times considered the meaning of the word "issue" in relation to summons as affecting commencement of actions. A review of some of these cases is helpful in considering the matters decisive of this appeal.

In the case of *Webster v. Sharpe,* 116 N.C. 466, 21 S.E. 912, the Court considered when a summons was issued in connection with a plea of the statute of limitations as a bar to the action. The Court stated:

> "*The presumption is that it (summons) issued at the time it bears date, and the burden is on defendant to show that it did not.* . . . (Emphasis ours.)
>
> "An action is commenced by issuing a summons. *Code,* sec. 199. And an action is commenced when a summons is issued against a defendant. *Code,* sec. 161. This involves the question as to what is meant by the word 'issue,' and we are of the opinion that it means going out of the hands of the clerk, expressed or implied, to be delivered to the sheriff for service. If the clerk delivers it to the sheriff to be served, it is then issued; or if the clerk delivers it to the plaintiff, or some one else, to be delivered by him to the sheriff, this is an issue of the summons; or, as is often the case, if the summons is filled out by the attorney of plaintiff, and put in the hands of the sheriff. This is done by the implied consent of the clerk, and in our opinion constitutes an issuance from the time it is placed in the hands of the sheriff for service. But a summons simply filled up and lying in the office of an attorney would not constitute an issuing of the summons, as provided for in *The Code.*"

The facts in the case of *McClure v. Fellows,* 131 N.C. 509, 42 S.E. 951, show that summons was filled out and signed by the clerk,

but remained in the office of the clerk and were never issued to the sheriff or to any one for him. An order of publication of summons and of a warrant of attachment was duly signed by the clerk, and the same was duly published. Defendants entered a special appearance and moved to vacate the attachment upon the ground that *no summons had issued.* The trial judge overruled the motion. Holding that the trial judge erred, this Court stated:

> "The summons was not *issued.* It did not pass from the hands of the Clerk. It was never delivered to the Sheriff, nor to any one for him, expressly or impliedly. Therefore, it was never issued. *Webster v. Sharpe,* 116 N.C. 466 (at page 471). It was in process of issuance, and had it been delivered to the Sheriff, or to some one for him, its issuance would have become complete, and been in force and of effect from the time of the filling out and dating by the Clerk."

In the case of *Green v. Chrismon,* 223 N.C. 724, 28 S.E. 2d 215, this Court in considering the issuance and service of summons, stated:

> "It seems clear that the rule prescribed by these statutes is that in order to bring a defendant into court and hold him bound by its decree, in the absence of waiver or voluntary appearance, a summons must be issued by the clerk and served upon him by the officer within ten days after date of issue, and that if not served within that time the summons must be returned by the officer to the clerk with proper notation. Then, if the plaintiff wishes to keep his case alive, he must have an *alias* summons issued. In the event of failure of service within the time prescribed, the original summons loses its vitality. It becomes *functus officio.* There is no authority in the statute for the service of that summons on the defendant after the date therein fixed for its return, and if the plaintiff desires the original action continued, he must cause *alias* summons to be issued and served."

Defendant relies heavily on the case of *Deaton v. Thomas,* 262 N.C. 565, 138 S.E. 2d 201, where Thomas, on 3 April 1963, had summons issued to the sheriff of Mecklenburg County by the deputy clerk of the Superior Court of Gaston County against Deaton and another. The Mecklenburg County sheriff made his return thereof on 17 April 1963 to the effect that Deaton was not to be found in Mecklenburg County. Thomas filed complaint on 23 April 1963 and was allowed ten additional days for service. An order was entered 23 April 1963 on the original summons extending the time of service of

the summons until 13 May 1963. The order and summons were not sent to the sheriff of any county and no attempt was made to serve the summons; instead, counsel for Thomas took the summons from the clerk's office and kept it in his possession until 20 May 1963, at which time he took the original summons and order to the clerk, who endorsed a 20-day extension on the summons, dating from 20 May 1963. The summons as extended was delivered to counsel for Thomas and kept in his possession without delivery to anyone. Time for service of the summons and complaint was purportedly extended to 1 August 1963 for 20 days and was sent to the sheriff of Mecklenburg County on 2 August 1963 and served on Deaton on 3 August 1963.

Deaton commenced his action in the Superior Court of Mecklenburg County against Thomas on 5 July 1963. Summons was sent to the sheriff of Gaston County on 9 July 1963 and duly served on Thomas the same day. A duly verified complaint, filed 19 July 1963, and order of service were served on Thomas on 22 July 1963.

In his answer Thomas pleaded the pendency of his action instituted in Gaston County Superior Court on 3 April 1963 in bar of Deaton's right to maintain his action. This Court, affirming the lower court's decision which overruled the plea in abatement, stated:

> ". . . when the order was entered on the original summons on 23 April, 1963, extending the time in which to serve the summons until 13 May 1963, the original summons became *functus officio* at the expiration of the extended time since it was never delivered to the Sheriff of Mecklenburg County for service but was kept in the possession of counsel for Grady Thomas, Jr., who made no effort to have it served. Consequently, when the order was entered on 1 August 1963 extending the time for service for twenty days, more than ninety days had elapsed since the original summons was issued on 3 April 1963. Likewise, more than ninety days had elapsed since the return of the unserved summons by the Sheriff of Mecklenburg County on 17 April 1963; in the meantime, the original summons had not been kept alive."

The *Deaton* case is factually distinguishable from the instant case, in that in *Deaton* there was a discontinuance because counsel kept summons in his possession without any delivery or attempted delivery to the serving officer.

In the instant case summons left possession of the issuing officer and was delivered to plaintiff's attorney for delivery to the sheriff. Plaintiff's attorney caused the summons to be transmitted to the

proper officer for service. Defendant's evidence did not rebut the presumption that the summons issued at the time it was dated. The summons was "issued," and was a proper basis for the issuance of an alias summons.

We recognize, however, that since the original summons has lost its vitality, to prevent a discontinuance of the action (and thereby toll the statute of limitations), plaintiff must cause alias summons to be issued and served. *Green v. Chrismon,* 223 N.C. 724, 28 S.E. 2d 215.

G.S. 1-95, in part, provides:

> ". . . where the defendant in a civil action or special proceeding is not served with summons within twenty days, the plaintiff may sue out an alias or pluries summons, returnable in the same manner as original process. An alias or pluries summons may be sued out at any time within ninety days after the date of issue of the next preceding summons in the chain of summonses. . . ."

The duty is placed upon plaintiff to sue out the alias or pluries summons, if preceding writs have proved ineffectual, in order to avoid a discontinuance of the action. In order for the plaintiff to cause an alias or pluries summons to issue, he may apply orally or in writing to the clerk of superior court, and no order of court is necessary to authorize the clerk to issue such summons. *McIntyre v. Austin,* 232 N.C. 189, 59 S.E. 2d 586.

Appellant contends that the alias summons issued on 8 November 1966 was improper since the original summons was not in the file of the clerk of superior court of Guilford County to show whether service had been effected.

We find authority in this jurisdiction for the proposition that an alias summons issues only when the original summons has not been served. *Cherry v. Woolard,* 244 N.C. 603, 94 S.E. 2d 562; *Hatch v. R. R.,* 183 N.C. 617, 112 S.E. 529. The authorities examined do not decide the effect of attempted issuance of alias summons before return of the original summons showing no service, nor is it necessary that this question be decided in the instant case.

If the summons designated "alias and pluries" and issued on 8 November 1966 was not void because it was issued before return of the original summons, it otherwise complied with the law as being a process successively and properly issued and served so as to preserve a continuous single action referable to the date the original summons was issued. On the other hand, if the writ be void, its purported

issuance becomes surplusage and we must consider the effect of the writ designated "alias summons" which plaintiff sued out of the office of the clerk of superior court of Guilford County on 28 December 1966. The writ showed the following return:

"OFFICER'S RETURN

"Received December 1966 Jan. 3, 1967. Served December 1966 Jan. 3, 1967, by delivering to, placing in hand with, and leaving with Cary Wayne Bray a copy of:

1. This Alias Summons.
2. Application for Extension of Time to File Complaint and Order Extending Time to File Complaint.
3. Summons for Relief Where Time is Extended to File Complaint issued October 19, 1966.
4. Complaint filed in the cause on November 8, 1966.
5. Order Directing Service of Complaint, dated December 28, 1966.

Fee, $1.50 Paid $1.50
CARL H. AXSOM, Sheriff
Rockingham County
By: W. R. Lovelace, Deputy."

The summons in its body contained the following:

"You having heretofore on the 19th day of October, 1966, been commanded to summon the defendant hereinafter named, and said summons not having been served, and this being an alias summons issued within ninety days after the date of issue of the next preceding summons in the chain of summonses: . . ."

This writ marked "Alias Summons" was issued after the original summons had been returned to the office of the clerk of superior court of Guilford County. The original summons indicated that defendant was not to be found, and showed that the service had not been made within twenty days of its issue, which is tantamount to a return of nonservice. Thus, the original summons and the return thereon show the original to be a proper basis for the issuance of an alias summons. Further, the summons was issued within ninety days from the date of the original, and the information contained on its face made it referable and relate back to the original, so that the

action dated from the date of the issuance of the original summons. *Hatch v. R. R., supra; Ryan v. Batdorf,* 225 N.C. 228, 34 S.E. 2d 81; *Webb v. R. R.,* 268 N.C. 552, 151 S.E. 2d 19. If the writ dated 8 November 1966 did not avoid a discontinuance of the action, the process labeled "Alias Summons," which was issued 28 December 1966 and which referred back to the original summons, was a valid alias summons and was effectual in avoiding a discontinuance.

There was no discontinuance of the action as originally instituted. The trial court correctly disallowed defendant's motions to vacate and set aside the original summons.

Affirmed.

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

GEORGE WALTON WILLIAMS v. CARL WAYNE BRAY.

(Filed 6 March, 1968.)

APPEAL by defendant from *Hasty, J.,* 24 April 1967 Non-Jury Civil Session of GUILFORD (Greensboro Division). This case was docketed and argued at Fall Term 1967 as No. 689.

Civil action to recover damages for personal injuries and property damage allegedly resulting from automobile collision occurring on 20 October 1963.

The issues raised and the principles of law applicable thereto in the case of *Marie Moose Williams v. Carl Wayne Bray,* decided this day, are identical with the issues raised and the principles of law applicable and decisive of the case of *George Walton Williams v. Carl Wayne Bray.*

Max D. Ballinger for plaintiff.

Jordan, Wright, Henson & Nichols and William L. Stocks for defendant.

PER CURIAM. Upon authority of *Marie Moose Williams v. Carl Wayne Bray,* decided this day, and the cases therein cited, we hold that the trial court correctly disallowed defendant's motions to vacate and set aside the original summons.

Affirmed.

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

STATE v. JOSEPH ROGERS.

(Filed 6 March, 1968.)

1. **Constitutional Law § 28; Indictment and Warrant § 9—**

   Every defendant has the constitutional right to be informed of the accusation against him, and the warrant or indictment must set out the charge with such exactness that he can have a reasonable opportunity to prepare his defense and to avail himself of his conviction or acquittal as a bar to a subsequent prosecution for the same offense, and further, the charge must enable the court, on conviction, to pronounce sentence according to law. N. C. Constitution, Art. I, § 11.

2. **Robbery § 1—**

   G.S. 14-87 does not create a new offense but merely provides a more severe punishment when firearms or other dangerous weapons are used in the commission of common law robbery.

3. **Indictment and Warrant § 9—**

   Where time and place are not essential elements of the offense charged in the warrant or indictment, a defendant may obtain further information in respect thereto by motion for a bill of particulars.

4. **Robbery § 2; Indictment and Warrant § 7—**

   It is not essential in an indictment charging robbery with firearms that there be an allegation as to the place where the offense occurred, it being sufficient that the county of the offense be named in order to establish the jurisdiction of the court.

5. **Indictment and Warrant § 17—**

   The issue of variance between the indictment and the proof of the State is properly raised by a motion to dismiss.

6. **Robbery § 4—**

   A variance between the indictment and the proof as to the ownership of property taken is not fatal in a prosecution for robbery, it being sufficient that the property described be such as is the subject of larceny, and allegations in the indictment as to the ownership will be treated as surplusage.

7. **Same—**

   Evidence in this case *held* sufficient to be submitted to the jury on the question of defendant's guilt of robbery with firearms or other dangerous weapons.

8. **Robbery § 5—**

   There was no error in submitting to the jury the issue of defendant's guilt of the lesser offense of common law robbery even though there was sufficient evidence to show the use of a deadly weapon, since there was testimony by the prosecuting witness that he suffered a cut on the neck from some instrument used by defendant in the commission of the robbery but that he did not see the weapon.

9. Criminal Law § 115—

Error committed by the court in submitting the question of defendant's guilt of a lesser degree of the offense charged cannot be prejudicial to defendant.

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

This case is before the Court upon writ of *Certiorari*.

Defendant was charged with the offense of armed robbery under a bill of indictment as follows:

"INDICTMENT

STATE OF NORTH CAROLINA — SUPERIOR COURT
Mecklenburg County — May 8 Term, A. D. 1967.

THE GRAND JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Joseph Rogers, late of the County of Mecklenburg, on the 26th day of February, 1967, with force and arms, at and in the County aforesaid, unlawfully, willfully, and feloniously, having in his possession and with the use and threatened use of firearms, and other dangerous weapons, implements, and means, to wit: a razor whereby the life of Ronald W. Loftin was endangered and threatened, did then and there unlawfully, willfully, forcible, violently and feloniously take, rob, steal and carry away $415.00 in lawful money of the United States, the property of Ronald W. Loftin to wit: $415.00 of the value of more than $200.00 from the presence, person, place of business, and resident of Ronald W. Loftin, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State. . . ."

Before entering plea, defendant moved to quash the bill of indictment. The motion was denied and defendant entered a plea of not guilty.

The State's evidence in pertinent part tended to show the following:

Ronald Wayne Lofton testified that on 26 February 1967 he was employed as cashier at the Elder Supermarket located at 2608 West Boulevard. He observed defendant in the store at about 4:30 p.m. that day. After going to the back of the store, defendant came to the check-out line where Lofton operated a cash register. Lofton checked some beer out for defendant "and as soon as the register

opened, he grabbed me, and he told me to freeze. Then he told me to give him the green stuff, so I got the bills and he told me to put it in his right pocket. It was open a little bit, so I put the money in his pocket. He had something around my neck, but he put a nick on my neck right here. . . . the instrument nicked me when he first grabbed me and I was a little bit frightened. I was shaken up. He said 'You'd better get the money or I'm going to kill you.' And he then grabbed me and pressed down hard. It felt like a razor." Defendant pushed Lofton over to check the other cash register, then pushed him back to the first register and told him to bag the beer. Defendant then instructed him to walk to the car. After defendant got in the car, Lofton walked back into the store. He then called the police. When the police arrived, Lofton told them about the incident, including a description of the person who had confronted him and the car he was operating. The next day, T. N. Kiser of the City Police Department asked Lofton if he could identify Rogers, who was then sitting in Kiser's car. Lofton identified him as the person who had robbed him. Lofton did not see the instrument defendant put against his neck, but stated that after he came back into the store he looked in a mirror and saw some blood at a small cut under his left ear. In his opinion the cut could not have been made by a fingernail because defendant had not pressed that hard. About $415.00 was taken from the cash register.

The State offered other witnesses whose testimony was cumulative and corroborative.

Defendant's motion to dismiss at the conclusion of the State's evidence was overruled. Defendant offered no evidence and renewed all motions, which were overruled. The jury returned a verdict of "guilty of armed robbery as charged." Defendant's motion to set aside the verdict was overruled. Defendant appealed from judgment entered on the verdict.

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

T. O. Stennett for defendant.

BRANCH, J. Defendant in apt time made motion to quash the bill of indictment. He contends that this motion should have been allowed since the bill of indictment did not apprise defendant of the *place* where the crime was alleged to have occurred, so as to enable defendant to prepare his defense and protect him from a second prosecution for the same offense.

The only description in the indictment as to the place where the crime was committed is that it occurred in Mecklenburg County.

Every defendant has the constitutional right to be informed of the accusation against him and the warrant or indictment must set out the charge with such exactness that he can have a reasonable opportunity to prepare his defense, can avail himself of his conviction or acquittal as a bar to a subsequent prosecution for the same offense, and the charge must be such as to enable the court, on conviction, to pronounce sentence according to law. Article I, Sec. 11, North Carolina Constitution. *State v. Strickland,* 243 N.C. 100, 89 S.E. 2d 781.

Common law robbery is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will by violence or putting him in fear. *State v. Lawrence,* 262 N.C. 162, 136 S.E. 2d 595. G.S. 14-87, Robbery with Firearms, creates no new offense, but provides that when firearms or other dangerous weapons are used, more severe punishment may be imposed. *State v. Stewart,* 255 N.C. 571, 122 S.E. 2d 355. However, it is noted that the two crimes differ in that there must be an actual taking of property for there to be the crime of common law robbery, whereas under G.S. 14-87 the offense is complete if there is an *attempt* to take personal property by use of firearms or other dangerous weapon. *State v. Parker,* 262 N.C. 679, 138 S.E. 2d 496. Where time and place are not essential elements of the offense itself, a defendant may obtain further information in respect thereto by motion for a bill of particulars. *State v. Eason,* 242 N.C. 59, 86 S.E. 2d 774; G.S. 15-143.

The indictment alleges that defendant did in Mecklenburg County by the use or threatened use of a dangerous weapon rob one Ronald W. Lofton of personal property of value which was subject of robbery.

The time or place was not essential element of the offense in instant case. The jurisdiction of the court was established by the allegation that the crime occurred in Mecklenburg County, and after jurisdiction was established, the place of the crime became immaterial. The indictment charged the offense in a plain, intelligible and explicit manner, and contained averments sufficient to enable the court to proceed to judgment and thus bar a subsequent prosecution for the same offense. *State v. Anderson,* 259 N.C. 499, 130 S.E. 2d 857.

The instant case and *State v. Partlow,* 272 N.C. 60, 157 S.E. 2d 688, are distinguishable. In *Partlow,* defendant was charged with being an accessory before and after the fact to an armed robbery committed by named persons, without any averments in the indict-

ment as to the identity of the victim or the manner and method in which defendant counseled, incited, induced or encouraged the principals. Here, by indictment and proof defendant and victim are identified and the manner and method in which defendant was purported to have committed the crime are alleged in the indictment and evidence was offered to fit the essential allegations. The trial court correctly denied defendant's motion to quash.

Defendant further contends that the court erred in denying his motion for nonsuit at the close of the State's evidence and at the close of all the evidence, because of fatal variance between the indictment and the proof.

The indictment, in part, alleges that defendant "did then and there unlawfully, willfully, forcibly, violently and feloniously take, rob, steal and carry away $415.00 in lawful money of the United States, the property of Ronald W. Loftin, to wit: $415.00 of the value of more than $200.00 from the presence, person, place of business, and resident of Ronald W. Loftin, . . ."

All of the evidence shows that Ronald W. Lofton did not own the property taken, nor was it taken from his residence or place of business; however, all the evidence does show that the property alleged to have been taken was in the custody and care of Ronald W. Lofton and that it was of value.

Defendant's motions to dismiss the prosecution as of nonsuit properly raised the question of variance between the indictment and the proof. *State v. Law,* 227 N.C. 103, 40 S.E. 2d 699.

Defendant cites numerous cases for the proposition that a fatal variance results, *in larceny cases,* where title to property is laid in one person and proof shows it to be in another. *State v. Law, supra; State v. Weinstein,* 224 N.C. 645, 31 S.E. 2d 920; *State v. Nunley,* 224 N.C. 96, 29 S.E. 2d 17; *State v. Harris,* 195 N.C. 306, 141 S.E. 883; *State v. Bell,* 65 N.C. 313. This is a correct statement of the law as to larceny; however, it is not necessary that ownership of the property be laid in any particular person in order to allege and prove the crime of armed robbery.

> "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, § 8, p. 142. . . ." *State v. Guffey,* 265 N.C. 331, 144 S.E. 2d 14.

In the instant case there is allegation and proof that defendant accomplished the robbery by the use or threatened use of a dangerous weapon and that the property taken was so described by allegation and proof sufficient to show it to be of value and the subject of larceny.

In the case of *State v. Wynne,* 151 N.C. 644, 65 S.E. 459, the indictment charged defendant with unlawfully selling spirituous liquor by the small measure to Alex Weaver and Alonzo Wynne, and then alleged certain acts descriptive of the manner and means by which the offenses were committed. The trial court granted a motion to quash the indictment and the Supreme Court in its opinion stated:

"It was error to grant the motion to quash. The bill charges an 'unlawful sale of liquor by the small measure.' It is unnecessary to pass upon the effect of the evidential matters charged. The bill is complete without them. *Utile per inutile non vitiatur.* A verdict of guilty, or not guilty, is only as to the offense charged — not of surplus or evidential matters alleged. Revisal, sec. 3254, forbids a bill to be quashed 'if sufficient matters appear therein to enable the court to proceed to judgment. The use of superfluous words will be disregarded. . . .

"The charge of an unlawful sale of liquor is plainly made. If that is proved, the defendant is guilty. If it is not proved, he is not guilty. The additional facts charged are surplusage and ought not to have been charged. Their effect, if proven, is evidential only, and was a matter for instruction to the jury. . . ."

See also *State v. Abernathy,* 265 N.C. 724, 145 S.E. 2d 2.

Admittedly, there is variance between the allegations and the proof offered, but the variance is not material. The indictment charged the essential elements of the crime of armed robbery. Proof was offered to support the material allegations. The additional allegations as to ownership of the property were surplusage and must be disregarded.

The trial court correctly denied motions for nonsuit.

Defendant assigns as error the action of the court in submitting to the jury an included lesser crime on the ground there was no evidence establishing commission of the lesser crime.

In support of this contention defendant cites *State v. Bell,* 228 N.C. 659, 46 S.E. 2d 834, where defendant excepted to failure of the court to charge the jury that they might acquit the defendants of the crime of robbery with firearms as charged in the indictment under consideration, and convict them of a crime of less degree. Holding that the court did not err in failing to so instruct the jury, this Court stated:

> "It is true that in a prosecution for robbery with firearms, an accused may be acquitted of the major charge and convicted of an included or lesser offense, such as common law robbery, or assault, or larceny from the person, or simple larceny, if a verdict for the included or lesser offense is supported by allegations of the indictment and by evidence on the trial. 42 C.J.S., Indictments and Information, sections 275, 283, 293; *S. v. Jones, supra; S. v. Moore,* 211 N.C. 748, 191 S.E. 840; *S. v. Holt,* 192 N.C. 490, 135 S.E. 324; *S. v. Cody,* 60 N.C. 197. If the jury believed the testimony in the case under review, however, it was its duty to convict the defendants of robbery with firearms because all of the evidence tended to show that such offense was committed upon the prosecuting witness, Ernest Fox, as alleged in the indictment. There was no testimony tending to establish the commission of an included or lesser crime. . . ."

In instant case there was sufficient evidence for the jury to find that a deadly weapon was used in the perpetration of the robbery; however, since the witness did not actually see the weapon and defendant, by his cross-examination, strongly advanced the theory that no deadly weapon was used, enough doubt was created as to the use of a deadly weapon to warrant submission of the lesser offense to the jury. Instant case is readily distinguishable from the *Bell* case, since in *Bell* all the evidence showed the use of a dangerous weapon in the commission of the robbery.

Further, in the case of *State v. Chase,* 231 N.C. 589, 58 S.E. 2d 364, defendant was charged with armed robbery and kidnapping. The jury found the defendant not guilty of kidnapping and armed robbery, but returned a verdict of guilty of common law robbery. The defendant contended that the court erred in submitting the lesser charge of common law robbery. Holding that there was no error in submitting the lesser charge, this Court stated:

"We concede that upon the evidence adduced in the trial below it would have been proper to have limited the jury to one of two verdicts: Guilty of robbery with firearms or not guilty. *S. v. Bell,* 228 N.C. 659, 46 S.E. 2d 834; *S. v. Sawyer,* 224 N.C. 61, 29 S.E. 2d 34; *S. v. Manning,* 221 N.C. 70, 18 S.E. 2d 821; *S. v. Cox,* 201 N.C. 357, 160 S.E. 358. But his Honor elected to instruct the jury that if the State had failed to satisfy it beyond a reasonable doubt that the defendant was guilty of 'armed robbery,' it might return a verdict of guilty of common law robbery. Conceding this to be error, we have consistently held that such error is not harmful to the defendant. Brown, J., in speaking for the Court in *S. v. Quick,* 150 N.C. 820, 64 S.E. 163, said: 'Suppose the court erroneously submitted to the jury a view of the case not supported by evidence, whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder, what right has the defendant to complain? It is an error prejudicial to the State, and not to him.' To like effect is *S. v. Matthews,* 142 N.C. 621, 55 S.E. 342. 'An error on the side of mercy is not reversible,' *S. v. Fowler,* 151 N.C. 731, 66 S.E. 567. . . ."

The trial judge did not commit error in charging on the lesser included offense.

The entire charge, when read contextually, presents the law fairly and clearly to the jury, and we find no prejudicial error resulting to defendant.

We find no prejudicial error in the trial below.

No error.

STATE v. KELLY BUCK CANNON AND JERRY HOYLE.

(Filed 6 March, 1968.)

1. Criminal Law § 48—

Where a letter written by one defendant implicating another defendant was read by the sheriff while the second defendant was present, the silence of the second defendant is not competent as an implied admission of guilt where there is no showing that the second defendant was in a position to hear and understand what was read.

2. Criminal Law §§ 73, 77—

Testimony by officers as to statements made by one defendant implicating two codefendants is hearsay and therefore inadmissible against the codefendants.

3. Criminal Law § 177—

The admission of incompetent evidence does not entitle defendant to judgment of compulsory nonsuit since upon the subsequent trial the State may be able to offer sufficient competent evidence to carry the case to the jury.

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

APPEAL by defendants Cannon and Hoyle from *Campbell, J.*, May 1967 Session of CALDWELL. This case was docketed and argued as Case No. 336, Fall Term 1967, and docketed as Case No. 332, Spring Term 1968.

Four criminal prosecutions upon four separate indictments:

(1) Criminal prosecution on an indictment with two counts: The first count charges Kelly Buck Cannon on 1 March 1967 with feloniously breaking and entering a certain storehouse and building occupied by one Carl Wilson, trading as People's Grocery, with intent to commit larceny, and the second count charges Cannon with the felonious larceny from the store of Carl Wilson, trading as People's Grocery, of cigarettes, boloney meats, pocket knives, bread, and soft drinks of the value of more than $200.

(2) Criminal prosecution on an indictment charging Jerry Hoyle on 1 March 1967 with feloniously receiving and having cartons of cigarettes, boloney meat, pocket knives, and other merchandise of the value of more than $200, the property of Carl Wilson, trading as People's Grocery, knowing said articles of goods to have been theretofore feloniously stolen, taken and carried away.

(3) Criminal prosecution on an indictment charging Sonja Suddreth Williams on 1 March 1967 with the felonious breaking and entry into a warehouse and store building occupied by Carl Wilson, trading as People's Grocery, in the first count, and charging her in the second count with the larceny of goods from the store of Carl Wilson, trading as People's Grocery, of the value of more than $200.

(4) Criminal prosecution on an indictment charging Junior Willard Laws on 1 March 1967 with the felonious breaking and entry into a warehouse and store building occupied by Carl Wilson, trading as People's Grocery, in the first count, and charging him in the second count with the larceny of goods from the store of Carl Wilson, trading as People's Grocery, of the value of more than $200.

The record does not affirmatively show that the four cases were consolidated for trial, but the fair inference from the record and the charge of the court is that these four indictments were consolidated for trial. Each of the defendants pleaded not guilty. The record before us does not show the verdict of the jury in respect to Sonja Sudderth Williams and Junior Willard Laws. Defendants Williams and

Laws did not appeal. The record as first certified contained contradictory statements as to the verdicts of the jury in respect to Cannon and Hoyle. Upon remand under this Court's order, the record in the Superior Court was corrected under the supervision of Ervin, J., and as now certified by Judge Ervin the record shows the following verdicts: Verdict in the case of Kelly Buck Cannon as corrected: "Guilty of the charge of felonious breaking and entering and larceny of property of the amount of value of more $200.00." Verdict in the case of Jerry Hoyle as corrected: "Guilty of the charge of felonious receiving stolen property with a value in excess of $200.00."

From sentences of imprisonment as to each defendant, Cannon and Hoyle, each defendant appeals to the Supreme Court.

Attorney General T. W. Bruton, Deputy Attorney General Harrison Lewis, and Staff Attorney D. M. Jacobs for the State.

Ted S. Douglas for defendant appellants.

PARKER, C.J. The State's evidence taken in the light most favorable to it and giving it the benefit of every inference to be reasonably drawn therefrom shows the following facts: On the last day of February, 1967, Carl Wilson's place of business, which he was operating under the name of People's Super Market, located on the Connelly Springs and Prison Camp Road, was broken into at night. A window which had been locked inside was prized open. A fan over the window was taken off and laid down on the sink. There were stolen from his store that night cigarettes and pocket knives of the value of more than $200.

Dewey Haynes, a witness for the State, testified in substance: He was chief of police in the town of Hudson. After 1 March 1967 Sonja Suddreth Williams brought him a letter sealed in an envelope with writing on the front of it. He does not recall exactly what it was, but it was pertaining to "if anything happened to her or she came up missing and her mother reported her missing to me, to open this letter." He had this letter at his home. Later, Sonja Williams and her mother came to his house one morning before he was dressed. He testified, "Sonja Williams told me." At this point Cannon, Laws, and Hoyle objected. Their objections were overruled, and the witness testified, "She says, 'I want to turn myself in.'" Cannon, Laws, and Hoyle objected again and their objections were overruled. Haynes testified: "And Mr. Kelly Buck Cannon came in the yard at that time. She jumped inside my door. Her mother was standing at my stoop. She says, 'I want you to open that letter and read it right now.' And she wanted me to turn it over to Deputy Sheriff Glen

Robinson. I opened the letter. Sonja Williams was present at the time I opened it. I read the letter." At this point defendants Cannon, Laws, and Hoyle objected to the contents of the letter being read to the jury. Their objections were overruled. The court instructed the jury that the jury should not consider anything contained in the letter as to defendants Cannon, Laws, and Hoyle, but only as to defendant Sonja Suddreth Williams. Then officer Haynes read the letter to the jury, which in substance is as follows: Sonja Suddreth Williams is 20 years old and wants to tell the truth, but Buck Cannon said he would kill her or beat her to death. She would like to tell the truth but she was scared. If anything happens to her, she wants Dewey Haynes or Glen Robinson to have the letter. She knows all about things. Carl Bristol was one of the guys who broke into Gamewell Store. He knew where the cash box was in the trailer she was renting in Hudson Trailer Park. Bristol laughed because he said he knew where it was at one time in Buck Cannon's house on the mountain. Buck hid it one time. Buck Cannon also has made trips hauling pills. Cannon knew she knew too much. One night Buck Cannon, Junior Laws, and she were riding around. They told her they were going to break into a few stores. They made her drive the car. They wanted to be sure she would keep her mouth shut. They broke into the store at the end of the Prison Camp Road which goes into the Connelly Springs Road. They got cigarettes, knives, boloney, a loaf of bread, and four Pepsis. The next morning they went to Jerry Hoyle's house. Tony Laws took the stuff to a man named Fred — she does not know his last name. They gave her $15 for driving the car, Junior and Buck around $20 to $25 each, Tony around $20 for selling the stuff, and Jerry $10. She has never been in trouble with the law before except for writing some checks. This is the whole truth. If she should get killed or hurt in any way, she wants the law to have the letter.

The letter was offered in evidence by Solicitor Childs. Thereupon, the court instructed the jury that the letter was only to be considered in relation to the defendant Sonja Suddreth Williams, and not as to the defendants Cannon, Laws, and Hoyle.

After Officer Haynes testified as to this letter, defendants' counsel cross-examined him in respect to what he knew about the association and relationship of Sonja Suddreth Williams and the defendant Cannon and in respect to a conversation of Officer Haynes with Cannon about clothes Cannon had belonging to Sonja Suddreth Williams.

After Dewey Haynes had testified for the State, Glen Robinson,

a member of the Sheriff's Department of Caldwell County, testified for the State in reference to a statement given him by Sonja Suddreth Williams in the presence of Officers Dewey Haynes and Deputy Gaither Eckard. Defendants Cannon, Laws, and Hoyle objected to the reading of this statement, and it was read to the jury over their objections. This statement was in substantial accord with the statement that Officer Haynes read as set forth above, and this statement specifically said that Kelly Buck Cannon, Junior Willard Laws, and Junior Williams broke and entered the People's Grocery on the Prison Camp and Connelly Springs Road and stole therefrom 90 to 100 cartons of cigarettes, about 10 pounds of boloney, a loaf of bread, four Pepsis, and a box of knives of various sizes, and also implicated defendant Jerry Hoyle in receiving from them this stolen property. Robinson testified: "Sonja Suddreth Williams made a statement in the presence of Kelly Buck Cannon while I was present. . . . She made almost the same statement to Kelly Buck Cannon. I had all the things she had said in the letter, the statement and also in front of Hoyle and Laws. . . . Kelly Buck Cannon did not say anything at the time the statement was made by the Williams woman." After Robinson had testified, he was cross-examined by defendants' counsel in respect to threats Sonja Suddreth Williams said Cannon had made against her, in respect to her wanting to get out of the unlawful business of breaking and stealing that she was engaged in, and in respect to her alleged statement. At the end of the examination, the court changed its previous ruling and made this statement to the jury: "Members of the jury, you may consider anything that Sonja Suddreth Williams either stated or put in writing as it affects the defendants Cannon, Laws and Hoyle in so far as Mr. Douglas, their attorney, has inquired of it."

Defendants Williams, Cannon, Laws, and Hoyle were jointly tried for the felonies charged against them. Defendant Williams did not testify in the case. Statements that she had made were read to the jury over defendants' objections by officers Haynes and Robinson. That evidence was clearly hearsay evidence. The record shows that when Officer Haynes started to read the written statement of defendant Williams "Mr. Kelly Buck Cannon came in the yard." It cannot be determined from the record if defendant Cannon was standing close enough to Officer Haynes to hear him read the letter of defendant Williams and to understand what it said. The mere fact that the written statement of defendant Williams was read by Officer Haynes in defendant Cannon's presence, if he was present, is not enough. The record does not show that Cannon was in a position to hear and understand what Haynes read from the letter. Conse-

quently, any silence upon the part of Cannon cannot be construed at a judicial or *quasi-judicial* investigation as an admission of the truth of the statement that Officer Haynes read. Stansbury, N. C. Evidence, 2d Ed., § 179. The record does not show what Robinson read to Cannon, and consequently Cannon's silence cannot be construed against him.

Judge Campbell in his first ruling correctly instructed the jury that anything in defendant Williams' letter that Officer Haynes read or anything that Officer Robinson testified that defendant Williams told him should not be considered as evidence against defendants Cannon, Laws and Hoyle. Afterwards Judge Campbell reversed his ruling and instructed the jury as follows: "You may consider anything that Sonja Suddreth Williams either stated or put in writing as it affects the defendants Cannon, Laws and Hoyle in so far as Mr. Douglas, their attorney, has inquired of it."

When Judge Campbell changed his ruling and admitted into evidence "anything that Sonja Suddreth Williams either stated or put in writing as it affects the defendants Cannon, Laws and Hoyle in so far as Mr. Douglas, their attorney, has inquired of it," there was no more cross-examination of the State's witnesses except that Mr. West elicited on cross-examination that the State's witness Robinson stated he obtained a written statement from Broughton Hospital which he had requested by telephone. The substance of this written statement which was read by Mr. Robinson to the jury is as follows: Sonja Suddreth Williams was admitted to Broughton Hospital, Morganton, North Carolina, on 16 December 1966 by voluntary admission from Caldwell County, that she was discharged from that hospital on 20 December 1966, that she was considered to have recovered from a depressive illness, and that she was not considered to be an incompetent person. It seems manifest to us from Judge Campbell's general and vague statement to the jury as above quoted that the jury could not understand clearly what was admissible in evidence in respect to the defendants and what was not admissible, but it seems clear that the admission was disastrous to the rights of the appealing defendants Cannon and Hoyle. Certainly, the effect of Judge Campbell's ruling was to admit evidence when its probative force depended in part upon the competency and credibility of Sonja Suddreth Williams instead of the officers Haynes and Robinson by whom the State sought to produce the evidence. This is purely hearsay evidence. Stansbury, N. C. Evidence, 2d Ed., § 138. Defendants Cannon and Hoyle assign the admission of this evidence as error. The assignment of error is good.

Defendants assign as error the denial of their motions for judg-

ment of compulsory nonsuit. That assignment of error is overruled. Though the court below, in denying the motions for nonsuit, acted upon evidence which we now hold to be incompetent, yet if this evidence had not been admitted, the State might have followed a different course and introduced competent evidence sufficient to carry the case to the jury. *S. v. Stevens,* 264 N.C. 737, 142 S.E. 2d 588; *S. v. Hall,* 264 N.C. 559, 142 S.E. 2d 177; *S. v. McMilliam,* 243 N.C. 771, 92 S.E. 2d 202.

New trial as to both defendants.

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

DANIEL W. FULCHER v. NORWOOD NELSON.

(Filed 6 March, 1968.)

1. Contracts § 1—

Persons *sui generis* have a right to make any contract not contrary to law or public policy, and the court will not inquire into whether the parties acted wisely or foolishly.

2. Contracts § 18; Automobiles § 6—

A provision in a contract for the sale of an automobile which allows one party to rescind within a year if "not happy with car" is properly construed to mean if not satisfied with the car.

3. Contracts § 18—

An agreement in which the promise of one party is conditional upon the satisfaction of the promisee is generally enforceable, since such promise is generally considered as requiring a performance which shall be satisfactory to the promisee in the exercise of an honest judgment.

4. Same—

Where the language of a contract is uncertain as to whether one party in case of dissatisfaction shall have an unqualified option to terminate the contract or whether such right of termination is to be based upon some reasonable ground, the contract will be construed as not reposing in the party the arbitrary or unqualified option to terminate it.

5. Same; Automobiles § 6—

A provision in a contract allowing the purchaser of an automobile to "trade back" with the dealer if unhappy with the automobile will be construed to confer this right if plaintiff's election was made in good faith upon his dissatisfaction with the car.

6. Contracts § 26—

In the purchaser's action to rescind a contract of automobile sale under a provision allowing him to "trade back" if he is dissatisfied with the

car, plaintiff's testimony as to the physical condition of the automobile immediately after acquiring possession thereof is competent upon the question of plaintiff's good faith in electing to exercise his right of rescission.

7. Contracts § 27; Automobiles § 6; Sales § 13—

Evidence in this case is *held* sufficient to permit a jury finding that defendant automobile dealer breached a contractual obligation to "trade back" the automobile of a purchaser upon the latter's dissatisfaction with a car purchased from the dealer.

8. Contracts § 29—

In an action for damages resulting from an automobile dealer's breach of a contractual obligation to "trade back" at any time within a year if plaintiff is dissatisfied with the automobile purchased from the dealer, plaintiff is entitled to be placed, as near as this can be done in money, in the same position he would have occupied if the dealer's "trade back" obligation had been performed.

LAKE, J., dissenting.

HIGGINS, J., joins in dissenting opinion.

APPEAL by defendant from *Hobgood, J.*, August 1967 Civil Session of CARTERET.

Plaintiff instituted this action to recover damages for alleged breach of contract.

Admitted allegations establish that defendant on January 10, 1966, sold to plaintiff a 1961 Cadillac for $2,475.00; and that plaintiff paid $75.00 cash and traded in a 1961 Ford for which he was allowed $900.00.

Plaintiff alleged it was "agreed that if the plaintiff was not satisfied with the car, he, the defendant, would trade back with the plaintiff at any time within one (1) year"; that, shortly after taking possession thereof, he discovered the Cadillac was in "very bad condition"; that he demanded that defendant take the Cadillac back and return to plaintiff his 1961 Ford and the $75.00-down payment; that defendant, shortly after selling the Cadillac to plaintiff, sold the Ford he had received from plaintiff; that, notwithstanding plaintiff's repeated demands, defendant failed to trade back with plaintiff as he had agreed to do; that in June, 1966, after he had paid $51.21 for repairs to the "Cadillac in an attempt to keep it running and to protect the defendant's interest therein," plaintiff disposed of the Cadillac in a trade in which he was allowed $1,175.00 for it; and that plaintiff was entitled to recover, by reason of defendant's said breach of contract, the sum of $1,351.21, consisting of $1,300.00, to wit, the difference between what the Cadillac was reasonably worth and the

contract price at the time of the trade, plus the $51.21 plaintiff had expended for repairs.

Answering, defendant denied the allegations of plaintiff set forth in the preceding paragraph; and, by way of further answer and defense, alleged plaintiff had breached the contract (1) by refusing to deliver to defendant the title certificate to the 1961 Ford, and (2) by selling the Cadillac to a third party.

The only evidence was that offered by plaintiff, which consisted of plaintiff's testimony and exhibits.

The contract of January 10, 1966, is signed by plaintiff and defendant. Across the face thereof, immediately above defendant's (additional) signature, these handwritten words appear: "Will trade back with Daniel in 12 months if not happy with car. No lost *(sic)* to him."

The issues submitted by the court, and the jury's answers thereto, are as follows: "1. Did the defendant fail to perform his contract with the plaintiff? ANSWER: Yes. 2. Did the plaintiff breach the contract? ANSWER: No. 3. What amount is the plaintiff entitled to recover from the defendant? ANSWER: $250.00 plus the cost of court."

In accordance with said verdict, the court entered judgment that plaintiff have and recover of defendant the sum of $250.00 and that defendant be taxed with the costs. Defendant excepted and appealed.

Nelson W. Taylor for plaintiff appellee.
Wheatly & Bennett for defendant appellant.

BOBBITT, J. The gravamen of plaintiff's action is the alleged breach by defendant of his contractual obligation to "trade back" if plaintiff was "not happy with car." Although seeking to rescind, plaintiff does not base his alleged right to do so on fraud or breach of warranty. He bases it solely on the ground the contract gave him the right to "trade back," that is, to rescind.

Whether the court erred in overruling defendant's motion for nonsuit depends upon the validity of the special contract provision. Interpretation thereof is prerequisite to a determination of its validity.

"Persons *sui juris* have a right to make any contract not contrary to law or public policy." 2 Strong, North Carolina Index 2d, Contracts § 1. Whether defendant acted wisely or foolishly when he agreed to "trade back" if plaintiff was "not happy" with the Cadillac is not material. *Roberson v. Williams*, 240 N.C. 696, 700-701, 83 S.E. 2d 811, 814.

The trial judge interpreted the words, "if not happy with car,"

as used in the special provision of the contract of January 10, 1966, to mean *if not satisfied with the Cadillac.* We agree. In this connection, *satisfaction* is a synonym for *happiness.* 19 Words and Phrases, p. 59; Black's Law Dictionary, Fourth Edition, p. 846.

"It has been questioned whether an agreement in which the promise of one party is conditional on his own or the other party's satisfaction contains the elements of a contract — whether the agreement is not illusory in character because conditioned upon the whim or caprice of the party to be satisfied. Since, however, such a promise is generally considered as requiring a performance which shall be satisfactory to him in the exercise of an honest judgment, such contracts have been almost universally upheld." 5 Williston on Contracts, § 675A, pp. 189-190.

"Where, from the language of a contract, it is doubtful whether the parties intended that one party should have the unqualified option to terminate it in case of dissatisfaction or whether the intention was to give the right to terminate only in the event of dissatisfaction based upon some reasonable ground, the contract will be construed as not reposing in one of the parties the arbitrary or unqualified option to terminate it." 17 Am. Jur. 2d, Contracts § 496. This rule is applicable where the satisfaction or dissatisfaction of the purchaser relates to mechanical fitness. 5 Williston, *op cit.,* § 675B; Simpson on Contracts, Second Edition, § 149, p. 309; 1 Restatement, Contracts § 265, p. 380; *Olson v. Larson,* 48 N.D. 499, 184 N.W. 984.

Plaintiff's dissatisfaction *with the Cadillac,* as distinguished from general dissatisfaction with the terms of the trade, is the ground on which he asserts a contractual right to "trade back." We are of opinion, and so hold, the contract conferred this right to "trade back" if plaintiff's election was made in good faith on account of his dissatisfaction with the condition in which he found the Cadillac. The instructions of the trial judge were in substantial accord with this interpretation of the special contract provision.

Plaintiff's testimony tends to show that, on January 10, 1966, shortly after he obtained possession of the Cadillac, he discovered the muffler and other portions of the car were badly rusted, that the bottom of the car had been newly sprayed with an undercoating; and that he notified defendant that very day that he was "unhappy with *that* car," referring to the Cadillac. (Our italics.) Defendant objected to the admission of plaintiff's testimony as to the physical condition of the Cadillac, contending defendant made no representations or warranties as to its condition. However, this evidence was competent as bearing upon whether plaintiff's election to "trade

back" was made in good faith on account of the condition in which he found the Cadillac.

Plaintiff's testimony tends to show defendant, when advised that plaintiff was dissatisfied with the Cadillac, told plaintiff he had sold the 1961 Ford he had received as a trade-in from plaintiff, that defendant promised to bring to plaintiff another car in place of the 1961 Ford for use in making the "trade back"; and that, notwithstanding plaintiff's repeated demands that defendant "trade back" and defendant's repeated promises to do so, defendant failed to bring to plaintiff such other car or otherwise comply with his obligation to "trade back."

Defendant contends his motion for judgment of nonsuit should have been granted because it appears from plaintiff's evidence (1) that plaintiff did not deliver to defendant the title certificate for the 1961 Ford, and (2) that plaintiff disposed of the Cadillac in June, 1966, and could not *thereafter* return it to defendant. These contentions are untenable.

Plaintiff testified defendant did not call upon him for the title certificate for the 1961 Ford; and that, on January 10, 1966, defendant told plaintiff he had already sold the 1961 Ford and it was not available for return to plaintiff.

With reference to plaintiff's disposition of the Cadillac in June, 1966, plaintiff testified he did not dispose of the Cadillac until defendant had failed, notwithstanding plaintiff's repeated demands to "trade back," that is, return the money and car (or equivalent) he had received in exchange for the Cadillac. Under these circumstances, it would be of no benefit to defendant for plaintiff to store the Cadillac or, if subject to a lien, to permit the repossession and sale thereof by the holder of such lien. As indicated below, the reasonable market value of the Cadillac on January 10, 1966 (not the allowance therefor as a trade-in or its reasonable market value in June, 1966) is the significant factor in determining the amount of damages, if any, plaintiff is entitled to recover.

The evidence *in the record before us,* when considered in the light most favorable to plaintiff, was sufficient to permit a jury to find that defendant, on January 10, 1966, breached his contractual obligation to "trade back." The motion for nonsuit was properly overruled.

We emphasize the words, "in the record before us," because the evidence is silent as to matters that may be material in respect of nonsuit and are material in respect of the measure of damages.

There is no reference in the complaint or in the evidence as to how the balance of $1,500.00 (of the contract price of $2,475.00) was to be paid or as to whether it was paid. Defendant, in his further answer and defense, alleged plaintiff "financed the balance of One Thousand Five Hundred ($1,500.00) Dollars." If financed, as defendant alleged, when, by whom and under what circumstances was it financed? What amount, if any, did defendant receive as a result of such financing?

The trial judge properly instructed the jury to disregard the evidence bearing upon the cost of repairs made during the period between January 10, 1966, and June, 1966, when plaintiff had possession of and was using the Cadillac.

With reference to damages, the court instructed the jury in substance, in accordance with plaintiff's allegation and contention, that plaintiff, if entitled to recover, was entitled to recover the difference between the reasonable market value of this particular Cadillac on January 10, 1966, and the contract price of $2,475.00. Plaintiff alleged this difference was $1,300.00. (It is noteworthy that the contract price of $2,475.00 as of January 10, 1966, less the trade-in allowance of $1,175.00 in June, 1966, is $1,300.00.) The instruction as to the measure of damages was erroneous.

"(T)he general rule is that a party who is injured by breach of contract is entitled to compensation for the injury sustained and is entitled to be placed, as near as this can be done in money, in the same position he would have occupied if the contract had been performed." *Perkins v. Langdon,* 237 N.C. 159, 169, 74 S.E. 2d 634, 643; 2 Strong, North Carolina Index 2d, Contracts § 29. Where, as here, the action is to recover damages on account of defendant's breach of his contractual obligation to "trade back," that is, to rescind, plaintiff is entitled to be placed, as near as this can be done in money, in the same position he would have occupied if defendant's "trade back" obligation had been performed.

Under plaintiff's allegations and evidence, the breach by defendant of his contractual obligation to "trade back" occurred January 10, 1966. Compliance with this obligation by defendant required that he refund to plaintiff the $75.00, return to plaintiff the 1961 Ford, and return to plaintiff such additional sum, if any, as defendant may have received from plaintiff, in exchange for the Cadillac. In the event of a "trade back," the contract price is not material. A "trade back" or rescission contemplates that each party be restored as near as possible to his original status. 17 Am. Jur. 2d, Contracts § 512. Thus, if plaintiff is entitled to recover, the measure of damages would be as follows: (1) Determine what defendant received,

to wit, the cash he received plus the reasonable market value of the 1961 Ford as of January 10, 1966. (2) Determine what plaintiff received, to wit, the reasonable market value of the Cadillac as of January 10, 1966. (3) If what defendant received exceeds what plaintiff received, plaintiff is entitled to recover the amount of such difference. Plaintiff's recovery, if his damages were so determined, would carry out defendant's express agreement that plaintiff should suffer no loss.

Defendant duly excepted to the court's instructions relating to the measure of damages. Error therein, in the respect noted, entitles defendant to a new trial. On account of the incompleteness of the evidence in respect of material matters, the new trial will be *de novo* as to all issues arising on the pleadings.

New trial.

LAKE, J., dissenting: I dissent on the ground that the defendant's motion for judgment as of nonsuit should have been granted.

The alleged contract to "trade back with the plaintiff at any time within one (1) year" is so vague as to be meaningless and unenforceable. On what terms were the parties to "trade back"? Was it anticipated that the defendant, a dealer in automobiles, would retain the Ford for a year while waiting for the plaintiff to make up his mind whether he wanted to keep the Cadillac? Was it anticipated that the plaintiff might use the Cadillac for any time from a few minutes up to just short of twelve months and then return it to the defendant and get back the Ford plus the full amount paid by him to the defendant? If not, on what terms were the parties to "trade back"? The cause of action cannot be founded upon an alleged contract in which the defendant's undertaking is so uncertain that the court cannot possibly determine what would constitute full performance of it.

Furthermore, if a contract be construed as an undertaking by the defendant to restore to the plaintiff everything the plaintiff had turned over to the defendant upon the plaintiff's returning to the defendant the Cadillac, the plaintiff's evidence fails completely to show any damage sustained by the plaintiff as a result of the failure of the defendant to perform this undertaking. The record contains nothing whatever to show that the Cadillac was not worth more than the Ford plus all sums paid by the plaintiff to the defendant.

The plaintiff has not sued on the theory of breach of warranty or on the theory of fraud. His evidence does not establish a right of

action against the defendant, assuming that one is alleged in the complaint, and the motion for nonsuit should have been allowed. Such judgment would not bar the plaintiff from instituting another suit for breach of warranty or for fraud and deceit, if he be so advised.

HIGGINS, J., joins in dissenting opinion.

MAX S. MILLER v. WINCIE CLARICE MILLER.

(Filed 20 March 1968)

1. **Automobiles § 42.1—**

Statutes requiring installation of seat belts on new vehicles registered in this State are not absolute safety measures and do not expressly or impliedly impose upon the occupant of an automobile a duty to use them. G.S. 20-135.2, G.S. 20-135.3.

2. **Same; Automobiles § 94—**

The failure of a guest passenger to use an available seat belt does not constitute contributory negligence barring recovery by the passenger for personal injuries received in an automobile accident caused by defendant driver's negligence.

3. **Negligence §§ 11, 13—**

Plaintiff's negligence which concurs with that of defendant in producing the occurrence causing the original injury bars all recovery, even though plaintiff's negligence was comparatively small, the doctrine of comparative negligence being inapplicable in this State.

4. **Damages § 9—**

The doctrine of avoidable consequences requires an injured plaintiff to minimize his damages caused by defendant's wrong, and prevents recovery for those damages which plaintiff could have reasonably avoided.

5. **Same; Negligence § 11—**

Contributory negligence occurs either before or at the time of defendant's negligence, while the doctrine of avoidable consequences arises after defendant's wrongful act.

6. **Automobiles § 42.1; Damages § 9—**

The doctrine of avoidable consequences is not invoked by the failure of plaintiff guest passenger to use an available seat belt, since the failure to fasten the seat belt occurs before defendant's negligence and plaintiff's injury, and further, there being no duty upon the passenger to use a seat belt.

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

PARKER, C.J., concurs in result.

APPEAL by defendant from *Peel, J.*, 15 May 1967 Special Non-Jury Civil Session of MECKLENBURG, docketed and argued at the Fall Term 1967 as Case No. 278.

Action for personal injuries, heard on plaintiff's demurrer to the second and third defenses contained in defendant's answer.

Plaintiff alleges: On 6 February 1966, he was a passenger in his own 1960 Comet automobile, which defendant was driving northwardly on U. S. Highway No. 521 in Mecklenburg County. Near Pineville, defendant approached and entered a sharp curve at an excessive rate of speed. She lost control of the vehicle when she took her eyes off the road; it left the highway and overturned. In the upset plaintiff's automobile was damaged, and he suffered serious and permanent personal injuries. *Inter alia,* he sustained a compression fracture of the 11th dorsal vertebra. In consequence, he is entitled to recover $35,000.00.

Answering the complaint, defendant admitted that she lost control of the automobile on a curve and that plaintiff was injured when it turned over. She denied that the upset was caused by her negligence. As a first further answer and defense, she alleged that if she were guilty of negligence, as plaintiff avers, his own negligence contributed to his injury and damage in that he failed to protest or to take any steps for his own protection. Defendant's second and third defenses are set out verbatim as follows:

"AND FOR A SECOND FURTHER ANSWER AND DEFENSE, the defendant says that the automobile in which the plaintiff was riding was owned by him and was equipped with seat belts which were in good condition and were designed to hold a passenger in the automobile and on the seat in the event of an accident; that the plaintiff failed to use his seat belt or have the same fastened in any manner and that the plaintiff was injured when the automobile turned over on its top and the plaintiff fell out of the seat onto the top of the automobile; and that such injury to the plaintiff would not have occurred had he had his seat belt fastened in a proper manner; and the plaintiff, in failing to fasten his seat belt, knew or should have known that in the event of an accident, he would be likely to receive an injury by reason of not having his seat belt fastened, the injury which he did receive being of the kind and nature which he knew, or should have known, would occur as a consequence of not fastening his seat belt; and the plaintiff's failure to so fasten his

seat belt constituted negligence and was a proximate cause of the injury which he sustained; and

"The contributory negligence of the plaintiff in the foregoing particulars is pleaded in bar of any recovery by him in this action.

"AND FOR A THIRD FURTHER ANSWER AND DEFENSE, the defendant says that the failure of the plaintiff to fasten his seat belt was calculated to and did contribute to injuries which he received and in the event it should be determined that the plaintiff would have received some injury even though his seat belt had been fastened, the defendant says that the plaintiff failed to mitigate the damages to himself, failed to take reasonable steps to avoid said damages, and that to that extent the plaintiff is legally prevented from recovering said damages."

Plaintiff moved to strike the foregoing second and third defenses. Judge Peel treated the motion as a demurrer and sustained it. From his order that the second and third defenses be stricken, defendant appealed.

A. A. Bailey by Gary A. Davis for plaintiff appellee.
Jones, Hewson & Woolard for defendant appellant.

SHARP, J. In defendant's second further answer and defense, she pleads plaintiff's failure to fasten his seat belt as contributory negligence barring his right to recover any damages for personal injuries; in the third, she pleads that failure in mitigation of such damages. She alleges no unusual circumstance known to plaintiff prior to the accident, which created a special hazard over and above the ordinary risks incident to highway travel. The court sustained plaintiff's demurrer to both defenses. The question presented is: Does the occupant of an automobile have a duty to use an available seat belt *whenever* it is operated on a public highway?

Since 1 January 1964, the law of North Carolina has required that the front seat of every *new* motor vehicle of nine-passenger capacity or less (except motorcycles and one-passenger vehicles) shall, at the time the vehicle is registered in this State, be equipped with at least two sets of seat safety belts of a specified type. G.S. 20-135.2. Since 1 July 1966, the law has required that every such new vehicle "be equipped with sufficient anchorage units at the attachment points for attaching at least two sets of seat safety belts for the rear seat of the motor vehicle." G.S. 20-135.3. These statutes, however, contain no requirement that the occupant of an automobile use a seat belt.

Since 1960, thirty-three states and the District of Columbia have enacted seat-belt legislation. See Comment, *The Failure to Use Seat Belts as a Basis For Establishing Contributory Negligence, Barring Recovery on Personal Injuries,* 1 U. San Francisco L. Rev. 277 (1967) Appendix I, 290. Most of these statutes apply only to cars manufactured in 1962 or later. No state requires the belt to be used after installation except Rhode Island, which makes their use mandatory in certain government and public service vehicles only. Minnesota, Tennessee, and Virginia specify that a failure to use the seat belts shall not be deemed contributory negligence. 16 DePaul L. Rev. 521, 522 (1967); Roethe, *Seat Belt Negligence in Automobile Accidents,* 1967 Wis. L. Rev. 288, 289 [hereinafter cited as Roethe]. It appears, therefore, that the seat belt enactments are not absolute safety measures and that no statutory duty to use the belts can be implied from them. The North Carolina Legislature's failure to require the installation of belts in all licensed passenger vehicles and in buses, plus the limited requirement of only *two* sets of such belts in the front seat, supports this conclusion. Thus, if there be a duty to use an available seat belt, it is imposed by the common law.

When the occupant of an automobile is injured in a collision, upset, or deviation of the vehicle from the highway, it goes without saying that his failure to have his seat belt fastened did not contribute to the occurrence of the accident. *Brown v. Kendrick,* 192 So. 2d 49 (Fla. Dist. Ct. App. 1966); *Kavanagh v. Butorac,* ...... Ind. App. ......, 221 N.E. 2d 824 (1966). Obviously, however, in some accidents, an after-the-fact appraisal would reveal that his injuries would probably have been minimized had he been using a seat belt. But whether the occupant of an automobile was contributorily negligent in failing to fasten his seat belt must, of course, be determined in view of his knowledge of conditions prevailing prior to the accident, and not in the light of hindsight.

The conclusion that a motorist is negligent whenever he rides upon the highway with his seat belt unbuckled can be supported only by the premise that no reasonably prudent person would travel the highway without using an available seat belt. If this be true, every failure to use an available seat belt would be negligence *per se* — a proposition which defendant expressly disavows.

In spite of the well known hazards of highway travel and the daily toll which motor-vehicular accidents take in lives and property, most motorists do arrive safely at their destination. *Cierpisz v. Singleton,* 247 Md. 215, 230 A. 2d 629 (1967), and every person begins a trip upon that assumption. He believes that the chance of being involved in an injury-producing accident is relatively low. See

Note, 39 Colo. L. Rev. 605, 608 (1967). Conceding, however, that the reasonable man is aware of the general likelihood of accidents and knows subconsciously that one might happen to him, he drives or rides in the belief that he "need not truss himself up in every known safety apparatus before proceeding on the highway." (In addition to seat belts, shoulder harness, diagonal belts, and a combination of the two are now available equipment.) Kleist, *The Seat Belt Defense — An Exercise in Sophistry,* 18 Hastings L. J. 613, 615 (1967) [hereinafter cited as *Kleist*].

Seat belts are designed to prevent the serious injuries caused by ejection from the automobile and by buffeting about in it. Roethe points out that although statistics cannot be used to predict the extent of injuries resulting from automobile accidents involving persons using seat belts as compared to those who are not using them, statistics from safety studies do indicate that the seat belt is a valid safety device which significantly reduces injuries and fatalities in automobile accidents. Roethe at 292. See the discussion of some of these studies by Currie, C.J., in *Bentzler v. Braun,* 34 Wis. 2d 362, 149 N.W. 2d 626 (1967); National Safety Council, Accident Facts 53 (1967); 16 Am. Jur., Proof of Facts, Seat Belt Accidents § 5 (1965); Walker and Beck, *Seat Belts and the Second Accident,* 34 Insurance Counsel J. 349 (1967); 1 U. San Francisco L. Rev. 277 (1967). Notwithstanding, Roethe concludes:

"[T]he issue of the social utility of the use of seat belts is definitely not clarified in the minds of the public and the courts. Doubts remain as to whether seat belts cause injury, and the real usefulness of the seat belt in preventing injuries has not become public knowledge. . . .

"The social utility of wearing a seat belt must be established in the mind of the public before failure to use a seat belt can be held to be negligence. Otherwise the court would be imposing a standard of conduct rather than applying a standard accepted by society." Roethe at 296-97.

Figures collected by the National Safety Council indicate that in 1965, the average individual used his seat belt only 16% of the time he spent in an automobile. Note 39 Colo. L. Rev. 605, 608, n. 13 (1967); see also 16 Am. Jur., Proof of Facts, Seat Belt Accidents § 3 (1965). In 1967, the Council estimated that:

"Seat belts are now available to more than half of all passenger car occupants, but the belts are being used less than half of the time, on the average. As a consequence, the net usage figure — the per cent of all exposure hours during which passenger car occupants

are using seat belts — is estimated to be only 20 to 25 per cent." National Safety Council, Accident Facts 53 (1967).

If the foregoing statistics be correct, the average man does not customarily use his seat belt. Many people fail to use them because of the fear of entrapment in a burning or submerged car. See Annot., *Automobile Occupants' Failure to Use Seat Belt as Contributory Negligence,* 15 A.L.R. 3d 1428, 1430 (1967). There is also a belief that seat belts increase the frequency or severity of abdomen-pelvis and lumbar spine injuries. Roethe at 292. This belief, according to Kleist, has some foundation in fact:

". . . In the comprehensive study conducted by Motor Vehicle Research, Inc., hundreds of controlled crashes at various speeds with dummies simulating the human body placed in various positions with and without seat belts were observed by specially located cameras, and it was concluded that the standard waist type seat belts can cause more, rather than less, injuries in many crash conditions. Other researchers have reached the conclusion that the use of seat belts is limited in value. Therefore, whether or not the use of waist type seat belts is desirable remains at best speculative. Until more definitive answers are available the defense that the plaintiff is guilty of contributory negligence in not wearing a seat belt is subject to the objection that such a defense is pure conjecture.

". . . Assuming merely for the sake of argument that wearing seat belts would reduce injuries in 75 per cent of all collisions, the motorist, when he enters his car, cannot be assured that the collision he might have will not be one of the 25 per cent in which the seat belt might increase the degree of injury. In any given collision, no doctor can say exactly what injuries would have been suffered had the victim been wearing a seat belt as compared to those he suffered without it. There are too many unknown variables such as exact number, degree, direction, duration, and kinds of forces that might have been acting in any given accident to answer the question with any accuracy." Kleist at 614. See also 16 Am. Jur., Proof of Facts, Seat Belt Accidents § 43 (1965); *National Dairy Products Corporation v. Durham,* 115 Ga. App. 420, 154 S.E. 2d 752 (1967).

So far as our research discloses, no court has yet held an occupant's failure to buckle his seat belt to be negligence *per se. Lipscomb v. Diamiani,* 226 A. 2d 914 (Del. Super. Ct. 1967); *Brown v. Kendrick, supra; Kavanagh v. Butorac, supra; Cierpisz v. Singleton, supra.* If the failure to buckle a seat belt is not negligence *per se,* it could be contributory negligence only when a plaintiff's omission to use the belt amounted to a failure to exercise the ordinary care which a reasonably prudent person would have used *under the cir-*

cumstances preceding that particular accident. Since the facts and circumstances preceding any accident will vary, so must conduct constituting due care. Under what circumstances would a plaintiff's failure to buckle his seat belt constitute negligence? If a motorist begins his journey without buckling his belt, ordinarily he will not have time to fasten it when the danger of accident becomes apparent; so the duty to "buckle up" — if any — must have existed prior to the injury. Furthermore, it must be remembered that until one has, or should have, notice of another's negligence, he is not required to anticipate it. On the contrary, he is entitled to assume that others will use due care for his safety and their own. *Weavil v. Myers,* 243 N.C. 386, 90 S.E. 2d 733; 3 Strong, N. C. Index, Negligence § 7 (1960); *Lipscomb v. Diamiani, supra.*

If a plaintiff, a guest passenger injured in an automobile accident, knew the defendant to be an incompetent and dangerous driver or if he knew the defendant's automobile to be mechanically and dangerously defective, he would be guilty of contributory negligence in beginning the trip, and his failure to fasten his seat belt would add nothing to the defense. But suppose an unbelted plaintiff was the driver or a passenger in an automobile which collided with a tractor-trailer or other motor vehicle, the driver of which negligently caused the accident. Presumably, the driver of an automobile could require his guest passenger to fasten his belt or get out, but practically there seems no reason why the same rationale which applies to the unbelted guest-passenger who sues his driver should not also apply when he sues the driver of another vehicle. Conceivably a situation could arise in which a plaintiff's failure to have his seat belt buckled at the time he was injured would constitute negligence. It would, however, have to be a situation in which the plaintiff, with prior knowledge of a specific hazard — one not generally associated with highway travel and one from which a seat belt would have protected him — had failed or refused to fasten his seat belt. For instance, suppose a case in which the defendant driver tells the plaintiff-passenger to buckle his seat belt because the door on his side has a defective lock and might come open at any time. The passenger fails to buckle the belt and, in consequence, falls out of the automobile when the door comes open on a curve. Whether the plaintiff's conduct be called assumption of risk or contributory negligence, nothing else appearing, his failure to fasten the belt should bar his recovery for injuries thus received.

In the absence of a factual situation comparable to that indicated above — a situation in which the court would be justified in giving a peremptory instruction in favor of the defendant on the issue of

contributory negligence — there are no standards by which it can be said that the use of seat belts is required for one trip and not another. Without a meaningful standard for judgment, the triers of fact cannot find the failure to fasten a seat belt to be negligence. As Quillen, Judge, pointed out in *Lipscomb v. Diamiana, supra:*

"It is possible for reasonable men to analyze logically the variables presented by the issues of lookout and control, but it is extremely difficult to analyze the variables presented in failing to buckle a seat belt upon entering an automobile for normal, everyday driving. To ask the jury to do so is to invite verdicts on prejudice and sympathy contrary to the law. It is an open invitation to unnecessary conflicts in result and tends to degrade the law by reducing it to a game of chance.

". . . Everything does not have to be grey and a matter of balancing; some questions, such as stop signs and red lights, lend themselves to clear black and white determinations. . . . [T]he question of the use of seat belts is best resolved by a fixed standard. An occupant of a car involved in normal, everyday driving should either be required to wear a seat belt or he should not. That determination should be left to the distinguished members of our State Legislature." *Id.* at 917-18.

No reported case has come to our attention in which a plaintiff's failure to use an available seat belt has barred him from recovering damages for personal injuries sustained in an automobile accident caused by a defendant's negligence.

In *Bentzler v. Braun,* 34 Wis. 2d 362, 149 N.W. 2d 626 (1967), the plaintiff-passenger, who failed to use an available seat belt, was thrown forward when her driver collided with the rear of another car. She suffered facial and leg injuries; the driver, who also failed to use his seat belt, sustained minimal injuries. The Wisconsin court said that, while failure to use the seat belt does not alone prove causation, where the evidence indicates a causal relation between the injury sustained and the failure to use a seat belt, the jury should be instructed to apportion the damages. Although the court said that it is not negligence *per se* to fail to use an available seat belt, it said that there is a duty based on the common-law standard of ordinary care to use the belt. It held, however, that the evidence disclosed no causal relation between plaintiff's injuries and her failure to use the belt. This opinion brings to mind the law teacher's admonition that a student should look more closely at what the courts do than what they say.

In *Cierpisz v. Singleton,* 247 Md. 215, 230 A. 2d 629 (1967), the plaintiff, an unbelted guest-passenger in the defendant's automobile,

was injured when the defendant's vehicle collided with another vehicle, and she was thrown against the rear-view mirror. The driver, whose belt was also unfastened, was not injured. The trial judge refused to charge the jury that the plaintiff's failure to use her seat belt constituted contributory negligence barring her recovery, and the Court of Appeals found no error. It was persuaded, it said, "for the present at least," of the correctness of Roethe's statement that "[t]he social utility of wearing a seat belt must be established in the mind of the public before failing to use a seat belt can be held to be negligence." *Id.* at 226, 230 A. 2d at 635. The decision, however, was based upon the holding "that the failure to use the seat belt, standing alone, is not evidence sufficient to support a finding of contributory negligence." No expert testimony was produced at the trial, and the court said, "There was no showing that she would not have injured herself in the same manner if the seat belt had been fastened." *Id.* at 228, 230 A. 2d at 635.

In *Kavanagh v. Butorac,* ...... Ind. App. ......, 221 N.E. 2d 824 (1966), the plaintiff was an unbelted passenger in an automobile which collided with the defendant's vehicle. The plaintiff lost an eye and suffered other injuries by "forcible contact" with the rear-view mirror. The court declined to recognize "a new common-law doctrine" that the failure to use available seat belts is contributory negligence as a matter of law. It also declined to hold the doctrine of avoidable consequences applicable to the evidence in the case in spite of the testimony of a safety expert, that, in his opinion, the plaintiff would not have struck the rear-view mirror if his seat belt had been properly fastened. The court held that the trial judge, who heard the case without a jury, was at liberty to regard favorably or to disregard utterly this expert testimony. He disregarded the evidence, and the court said that the expert opinion was not conclusive proof that the eye injury would not have occurred. "Only by speculation can it be said that the injuries would not have occurred if the seat belt was fastened." *Id.* at 833. The import of this case is not altogether clear; the result is — the plaintiff recovered $100,000 for the loss of his left eye.

The question of seat-belt negligence has arisen upon the pleadings in three cases. In *Brown v. Kendrick,* 192 So. 2d 49 (Fla. Dist. Ct. App. 1966), the trial court struck the defense that the plaintiff, an unbelted guest-passenger, had not used an available safety belt. The District Court of Appeals said the court did not err in refusing to allow evidence of the plaintiff's failure to use the seat belt; that if such failure is to constitute negligence, the legislature should so declare.

In *Sams v. Sams,* 247 S.C. 467, 148 S.E. 2d 154 (1966), the de-

fendant pled the plaintiff's failure to use an available seat belt as contributory negligence, and the trial court struck the defense. The Supreme Court reversed, saying that the ultimate question should be decided in the light of all facts and circumstances adduced upon the trial rather than upon the pleadings.

In *Lipscomb v. Diamiani,* 226 A. 2d 914 (Del. Super. Ct. 1967), Quillen, Judge, after reviewing all the then reported seat-belt cases, concluded that *Brown v. Kendrick, supra,* stated the best rule for Delaware. He denied the defendant's motion to amend his answer to raise the affirmative defense of failure to use a seat belt. Of the three cases which arose upon the pleadings, only *Lipscomb v. Diamiani* discusses the fundamental problems involved in "seat belt negligence."

In *Mortensen v. Southern Pacific Company,* 245 Cal. App. 2d 241, 53 Cal. Rptr. 851 (1966), the California District Court of Appeals, in a Federal Employers Liability Act case, concluded that it was for the jury to decide whether the defendant's failure to provide seat belts amounted to negligence by the employer in failing to supply the driver of a pickup truck with a safe place to work.

In *Tom Brown Drilling Co. v. Nieman,* 418 S.W. 2d 337 (Tex. Civ. App. 1967), and in *Brown v. Bryan,* 419 S.W. 2d 62 (Mo. 1967), the courts declined to pass upon the question whether there was a common-law duty to use an available seat belt. In the former, it said there was no evidence that plaintiff's decedents would not have died as a result of the accident had they been using their seat belts. In the latter, evidence that defendant's automobile was equipped with seat belts which plaintiff-passenger was not using at the time of the accident was admitted without objection.

So far as our research has disclosed, the foregoing cases appear to be the reported judicial pronouncements to date on "seat belt negligence."

In North Carolina, and in those states which do not apply the doctrine of comparative negligence, a plaintiff's negligence which concurs with that of the defendant in producing the occurrence which caused the original injury will bar all recovery, even though the plaintiff's negligence was comparatively small. *Moore v. Boone,* 231 N.C. 494, 57 S.E. 2d 783; 3 Strong, N.C. Index, Negligence § 11 (1960); 22 Am. Jur. 2d *Damages* § 31 (1965).

It would be a harsh and unsound rule which would deny all recovery to the plaintiff, whose mere failure to buckle his belt in no way contributed to the accident, and exonerate the active tortfeasor but for whose negligence the plaintiff's omission would have been harmless. See Case Digest, 46 Neb. L. Rev. 176 (1967); 12

S. D. L. Rev. 130 (1967). Furthermore, it is doubtful that such a rule would increase the use of seat belts. In the case comment on *Brown v. Kendrick, supra,* 39 Colo. L. Rev. 605, 608, it is said, "[I]mposing an affirmative legal duty of wearing seat belts will have virtually no effect on the actual seat-belt wearing habits of automobile occupants. Its only effect would be to give an admitted wrongdoer a chance to dodge a substantial portion of his liability." It could never, of course, defeat a plaintiff's claim for property damage.

Needless to say, the seat-belt defense, which would bar an otherwise innocent victim, would not be popular with the jury or trier of facts. See *Kavanagh v. Butorac, supra, Bentzler v. Braun, supra;* Kleist at 616-19; see also Note, 39 Colo. L. Rev. 605, 608, n. 14 (1967).

Due care is measured by the customary conduct of the reasonably prudent man. The scant use which the average motorist makes of his seat belt, plus the fact that there is no standard for deciding when it is negligence not to use an available seat belt, indicates that the court should not impose a duty upon motorists to use them routinely whenever he travels upon the highway. If this is to be done, it should be done by the legislature. *Brown v. Kendrick, supra.* See Note, 12 S.D. L. Rev. 130.

Should the duty to use a seat belt be imposed — either by the legislature or by the court —, the issue of proximate cause would then loom. See Note, 39 Colo. L. Rev. 605. "The inability to prove a relationship between the injuries sustained and the failure to use a seat belt is a major problem which must be resolved before failure to use a seat belt can be held to be contributory negligence." Roethe at 298. Should the use of seat belts be required by law, there is little doubt that the testimony of professional safety experts would be made available to both plaintiff and defendant. Notwithstanding, it would probably remain a matter of conjecture to what extent a motorist's injuries are attributable to his failure to use a seat belt and whether, had it been used, other and different injuries would have resulted. Furthermore, it is safe to assume that, if an unbelted plaintiff sustained an injury in an automobile accident, he would also have suffered some injury — albeit minor — from buffeting even had he been wearing his seat belt. Therefore, since plaintiff would have suffered some injury as a result of the *occurrence* which resulted *solely* from the defendant's negligence, defendant's plea of contributory negligence could not be good as to those injuries. Proof of injury resulting from negligence entitles a plaintiff to nominal damages at least. *Potts v. Howser,* 267 N.C. 484, 148 S.E. 2d 836; *Mid-*

gett v. Highway Commission, 265 N.C. 373, 144 S.E. 2d 121; *Lieb v. Mayer*, 244 N.C. 613, 94 S.E. 2d 658.

If a plaintiff's failure to buckle his seat belt were held to affect an injured plaintiff's right to recover from an active tort-feasor, it could logically be done only by minimizing his damages, that is, excluding those which it could be shown a seat belt would have prevented.

The rule in North Carolina is that an injured plaintiff, whether his case be tort or contract, must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant's wrong. If he fails to do so, for any part of the loss incident to such failure, no recovery can be had. *Johnson v. R. R.*, 184 N.C. 101, 113 S.E. 606. This rule is known as the doctrine of avoidable consequences or the duty to minimize damages. Failure to minimize damages does not bar the remedy; it goes only to the amount of damages recoverable. 22 Am. Jur. 2d *Damages* §§ 30-32 (1965). It has its source in the same motives of conservation of human and economic resources as the doctrine of contributory negligence, but "comes into play at a later stage." McCormick, Damages § 33 (1935); Prosser, Torts § 64 at 433 (1964).

"The doctrine of avoidable consequences is to be distinguished from the doctrine of contributory negligence. Generally, they occur — if at all — at different times. Contributory negligence occurs either before or at the time of the wrongful act or omission of the defendant. On the other hand, the avoidable consequences generally arise after the wrongful act of the defendant. That is, damages may flow from the wrongful act or omission of the defendant, and if some of these damages could reasonably have been avoided by the plaintiff, then the doctrine of avoidable consequences prevents the avoidable damages from being added to the amount of damages recoverable." 22 Am. Jur. 2d *Damages* § 31 (1965).

The seat-belt situation does not fit the doctrine of avoidable consequences because the failure to fasten the seat belt occurred before the defendant's negligent act and before the plaintiff's injury. *Lipscomb v. Diamiani, supra.* See Kleist at 620. *Cf.* Note, 38 S. Cal. L. Rev. 733 (1966). Nevertheless, it is closely analogous. The same considerations, however, which reject the proposition that a motorist's failure to fasten a seat belt whenever he travels is negligence impel the rejection of the theorem that such a failure should reduce his damages. If there is no duty to fasten a seat belt, such a failure cannot be held to be a breach of the duty to minimize damages. Even were there a statutory requirement that a motorist fasten his seat belt every time he ventured upon the highway — a requirement which

would create the duty and provide the standard now lacking—, the complicated task of damage apportionment would "invite verdicts on prejudice and sympathy contrary to the law," create "unnecessary conflicts in result," and "degrade the law by reducing it to a game of chance." *Lipscomb v. Diamiani, supra* at 917.

The problem of conjectural damages cannot be dismissed lightly when the question is what would have been the extent of the injury had the seat belt been used and what happened because the seat belt was not used. It would involve "an extreme extension of judgment." *Id.* at 918. In discussing the difficult problem presented when the plaintiff's prior conduct is found to have played no part in bringing about an impact or accident, but to have aggravated the ensuing damages, Prosser makes this observation: "Cases will be infrequent, however, in which the extent of aggravation can be determined with any reasonable degree of certainty, and the court may properly refuse to divide the damages upon the basis of mere speculation." Prosser, Torts § 64 at 434 (1964).

We hold that defendant has alleged no facts which would constitute contributory negligence on the part of plaintiff or which invoke the doctrine of avoidable consequences.

Affirmed.

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

PARKER, C.J., concurs in result.

HENRY HOLLMAN, JR., EMPLOYEE, v. CITY OF RALEIGH, PUBLIC UTILITIES DEPARTMENT, EMPLOYER, SELF-INSURER, CARRIER.

(Filed 20 March 1968)

1. Master and Servant § 73—

Findings of fact of the Industrial Commission, except for jurisdictional findings, are conclusive on appeal when supported by competent evidence, even though there is evidence that would support a finding to the contrary.

2. Evidence § 21—

Evidential facts which cannot be established by direct evidence may be proved by reasonable and legitimate inferences drawn from the established facts.

3. Master and Servant § 93—
The Industrial Commission is vested with full authority to find essential facts, G.S. 97-86, and the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.

4. Master and Servant § 64; Evidence § 50— Expert testimony held sufficient to show that employee's loss of vision resulted from electric shock.
The evidence was to the effect that plaintiff, who had never worn glasses nor had trouble with his vision, came into contact with a high voltage wire during the course of his employment and sustained an electric shock. A medical expert in the field of eye diseases testified that his examination disclosed that claimant's vision was 20/200 in each eye and that it was his opinion the impaired vision was caused by the electric shock. On cross-examination the witness repeated his opinion but admitted that he had never known any myopia patients whose impairment was caused by shock nor had he read of such a case in any medical textbook. *Held:* The evidence was sufficient to support a finding by the Industrial Commission that the injury resulted from the accident.

5. Master and Servant § 67—
To obtain an award of compensation for an injury under the Workmen's Compensation Act, an employee must establish that his injury caused his disability, unless it is included in the schedule of injuries made compensable by G.S. 97-31 without regard to loss of wage-earning power.

6. Master and Servant § 71—
Compensation for partial loss of vision by a claimant should be awarded on the basis of the vision remaining without the use of corrective lenses. G.S. 97-31(19).

7. Master and Servant § 45—
The Workmen's Compensation Act should be liberally construed to effectuate its purpose of providing compensation for injured employees or their dependents, and its benefits should not be denied by a technical, narrow or strict construction.

8. Appeal and Error § 45—
Assignments of error in appellant's brief for which no reason or argument is stated or authority cited are deemed abandoned.

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

APPEAL by defendant from *Copeland, S.J.*, 13 June 1967 Civil Session of WAKE. Docketed and argued as Case No. 532, Fall Term 1967, and docketed as Case No. 528, Spring Term 1968.

This proceeding originated as a compensation claim before the North Carolina Industrial Commission.

This proceeding was originally heard before Honorable J. W. Bean, Chairman of the Industrial Commission, in Raleigh, North Carolina, on January 28 and 29, 1965, both parties being represented by counsel. At the inception of the hearing the following stipulations

were entered into by and between the parties: (1) That the parties are subject to and bound by the provisions of the North Carolina Workmen's Compensation Act; (2) that defendant-employer was a self-insurer at the time of the accidental injury herein involved; (3) that plaintiff was employed by defendant on 21 September 1962 at an average weekly wage of $46.35; (4) that plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant on 21 September 1962, when he came in contact with a high voltage wire and sustained an electric shock; and (5) that defendant-employer accepted liability, and the parties entered into an agreement on I. C. Form No. 21 for the payment of compensation to plaintiff for his temporary total disability, pursuant to which agreement defendant paid plaintiff compensation at the rate of $27.81 per week for a period of six weeks from 24 September 1962 to 4 November 1962.

The plaintiff offered evidence in substance as follows: Prior to 21 September 1962 he was a well, able-bodied man. On 21 September 1962 he was working for the city as its employee on Highway No. 1. He was removing some pipe from a ditch. There were others working with him, and they were taking the pipe out by a crane which was being operated by Mr. Otis Podner. Plaintiff was standing on one side of the ditch and another boy was standing on the other side of the ditch. This boy turned the pipe where plaintiff could take hold of it and told him to catch the pipe and place it in the road so that he could take it loose from the crane. When plaintiff took hold of the pipe, this boy "swung it," and that is all that he remembers. He was taken to the hospital that morning about 9:00 a.m. and stayed there until about 1:30 p.m., at which time he was released and sent home. On the following Monday he went to a doctor on Highway No. 1. He went to see this doctor twice. This doctor recommended that he go to Dr. Davis, which he did. He was treated by Dr. Davis, and Dr. Davis recommended that he see Dr. Leroy Allen, which he did. After that he went to the hospital and then went back home. He was later told to go see Dr. Thornhill for his eyes. He went to the city officials and explained this to them. Later they called and told him to go to Dr. Thornhill's office. Dr. Thornhill treated his eyes. Prior to going to Dr. Thornhill he did not wear glasses and had never had any trouble with his vision before the accident. He got glasses about a week after he saw Dr. Thornhill. Without his glasses he cannot see as well as he could before the accident. He is very near-sighted. He can see right well but when he takes his glasses off he cannot see well enough to identify a person. As a result of the injury by accident, plaintiff's feet and hands were

burned by the electric current, but there were no burns elsewhere on his body.

After the original hearing in Raleigh, Chairman Bean entered an order on 12 April 1965 to this effect: After carefully reviewing all the competent evidence, especially the medical evidence, it is the opinion of the Commission that plaintiff should be further examined to determine his present condition, and particularly as to whether coming in contact with 7200 volts of electric current would in any way affect a person's vision according to medical opinion. Chairman Bean, therefore, ordered that plaintiff be examined by an ophthalmologist at Duke Hospital, and that the Commission withhold any decision in the case until the report of the examination is received.

Defendant appealed from the order of Chairman Bean requiring further medical examination of plaintiff. This appeal came on to be heard before the Full Commission on 14 July 1965. Chairman Bean did not sit as a member of the Full Commission on this appeal. After hearing the appeal, the Full Commission entered an order striking Chairman Bean's order that plaintiff be given an ophthalmological examination at Duke Hospital and directed that the case be remanded to Chairman Bean "for the purpose of arriving at a decision in the matter based on the present record, or in the event Chairman Bean deems additional medical evidence of Raleigh doctors necessary for a proper determination in the case, the Full Commission directs that he reset the case for such additional evidence."

The case was reset for hearing in Raleigh before Chairman Bean on 10 February 1966, but was continued and reset for hearing in Raleigh before Chairman Bean on 31 May 1966. After the rehearing Chairman Bean entered an award in substance as follows: He found as true the facts stipulated by the parties and the following additional facts: (1) Plaintiff's injury by accident on 21 September 1962 was caused by his coming in contact with an electric wire carrying 7200 volts of electricity, burning his hands and feet. (2) As a result of the injury sustained on 21 September 1962 plaintiff was treated by Dr. James Robert Ballew, an admitted medical expert, specializing in ophthalmology, ear, nose, and throat diseases. (3) Dr. Ballew's opinion was that plaintiff was nearsighted, and he prescribed glasses to correct such condition. (4) Dr. Ballew was of the opinion that after he had fitted the claimant with glasses that he had a normal 20/20 vision. (5) Plaintiff was also treated for his eye condition by Dr. George T. Thornhill, an admitted medical expert, specializing in eye, ear, nose, and throat diseases. On 31 October 1962 Dr. Thornhill first saw the plaintiff who had a history of having come in contact with a high voltage wire which knocked him out.

(6) When Dr. Thornhill first saw plaintiff, his vision was 20/200 in each eye, without correction. He fitted plaintiff with glasses which brought his vision back to 20/20 in each eye which is considered normal vision. Dr. Thornhill saw plaintiff at subsequent times, to wit, 6 December 1962 and 12 December 1962, at which times his vision without glasses was 20/200 and with glasses, 20/20. (7) Dr. Thornhill was of the opinion that astigmatism or nearsightedness was caused by the electric shock that plaintiff received on 21 September 1962. (8) Plaintiff has a vision of 20/200 in each eye without glasses which is an 80% loss of vision. His vision is brought back to normal with the use of glasses.

Based upon his findings of fact, Chairman Bean made the following conclusions of law: Plaintiff sustained an injury by accident arising out of and in the course of his employment, and the defendant accepted liability and paid plaintiff for the time he was disabled. The determinative question is whether or not plaintiff sustained any permanent disability to his eyes as a result of the injury. To determine this question, the Commission has to rely upon expert medical testimony. The greater weight of the expert medical testimony is that plaintiff sustained an 80% permanent partial disability to both eyes, as per the Snellen Chart, as a result of his injury. The Commission concludes as a matter of law that plaintiff has 80% permanent partial disability to his eyes and is entitled to compensation "under the provisions of G.S. 97-31(16), *Schrum v. Catawba Upholstering Co.*, 214 N.C. 353, and *Watts v. Brewer,* 243 N.C. 422, for a period of 192 weeks at $27.80 per week."

Based upon his findings of fact and conclusions of law, the Commission made the following award: (1) Defendant shall pay plaintiff compensation at the rate of $27.80 per week for a period of 192 weeks for 80% permanent partial disability to his eyes. So much of said compensation as may have accrued shall be paid in a lump sum. (2) Defendant shall pay all medical, hospital, and other treatment bills after the same have been submitted to and approved by the North Carolina Industrial Commission. (3) Defendant shall pay the costs of the hearing, including an expert witness fee in the amount of $20 each for Dr. Ballew and Dr. Thornhill. (4) An attorney fee in the amount of $500 is approved for the plaintiff's attorneys, said amount to be deducted from the compensation due plaintiff and paid direct to said attorneys.

From said ruling defendant appealed. On review, the Full Commission adopted the findings of fact and conclusions of law of Chairman Bean and approved the award. Defendant appealed to the Superior Court. On appeal, Judge Copeland overruled all defendant's

assignments of error and affirmed the award. Defendant appealed to the Supreme Court.

Paul F. Smith and Donald L. Smith for defendant appellant.
F. J. Carnage and George E. Brown by F. J. Carnage for plaintiff appellee.

PARKER, C.J. Defendant assigns as error the Commissioner's finding of fact, which was affirmed by the Full Commission as well as the lower court judge, "that Dr. Thornhill was of the opinion that astigmatism or nearsightedness was caused by the electric shock that the plaintiff received on September 21, 1962." This assignment of error presents this question for decision: Were the stipulations and the evidence, viewed in the light most favorable to plaintiff, sufficient to support the challenged finding of fact? If so, this Court is bound by them, for it has long been settled that in a Workmen's Compensation case the findings of fact by the Industrial Commission, which are nonjurisdictional, are conclusive on appeal when supported by competent evidence, even though there is evidence that would have supported findings to the contrary. *Maurer v. Salem Co.,* 266 N.C. 381, 146 S.E. 2d 432; *Askew v. Tire Co.,* 264 N.C. 168, 141 S.E. 2d 280; *Huffman v. Aircraft Co.,* 260 N.C. 308, 132 S.E. 2d 614, cert. den. 379 U.S. 850, 13 L. Ed. 2d 53, reh. den. 379 U.S. 925, 13 L. Ed. 2d 338; *Tucker v. Lowdermilk,* 233 N.C. 185, 63 S.E. 2d 109.

At the beginning of the trial the parties stipulated as follows: "That the plaintiff sustained an injury by accident arising out of and in the course of his employment with the defendant, employer, on September 21, 1962, when he came in contact with a high voltage wire and sustained electric shock."

At the first hearing before Chairman Bean, there were three witnesses for claimant: Claimant himself, Roland Boyd, and Dr. James Robert Ballew. At the second hearing before Chairman Bean, Dr. George T. Thornhill, an admitted medical expert "specializing in eye, ear, nose and throat diseases," testified in substance, except when quoted, on direct examination as follows: He first saw claimant on 31 October 1962, and claimant told him that he had been in an accident in which he was struck by a high voltage wire and knocked out. He examined him with reference to his eyes, and his examination disclosed that his vision was 20/200 in each eye without correction; *i.e.,* without glasses. The examination was performed with a minus 275, which is a correction for nearsightedness, and this brought his vision to 20/20 for both eyes. This is considered average or normal vision. A further examination revealed that the

back of his iris, his retina, was normal. A slit lamp examination, which involves the shining of a light through the lens of the eye, revealed no signs of cataracts. Claimant was given a prescription and told to return in one month for another check. On 6 December 1962 claimant was given a prescription for glasses. Dr. Thornhill examined him again on 12 December 1962, and at that time his vision with glasses was 20/20. In his opinion, claimant will have to continue to wear glasses in order to have a vision of 20/20. Dr. Thornhill testified: "My opinion is that his condition was due to the shock or accident that he had. I have two reasons for believing this. I think that electric shock can alter the lens in the eye to cause some swelling which will cause nearsightedness. The other reason I think is from looking back, that a man with 20/200 vision would have sought help before this. I don't think he could have gotten around too well. In other words, if he had gone to a movie, I don't think he could have seen too much and had he gone to see sports, he couldn't have seen it, and to my understanding, he had not."

Dr. Thornhill's testimony on direct examination is set forth in one page of the record. His cross-examination by defendant is set forth in nine pages of the record, and the relevant part of it is in substance as follows, except when quoted: His reports of his examination refer to claimant's condition as being myopia in every instance; *i.e.*, nearsighted. After he was given a prescription for glasses on 6 December 1962, there were further examinations on 12 December 1962, 14 January 1963, 4 March 1963, 17 June 1963, 19 December 1963, 27 March 1964, and 9 February 1966. The purpose of the 9 February 1966 visit was to have his eyes rechecked. He found his condition the same as it had been on all previous occasions, still nearsighted. There are many causes of myopia. It can be due to heredity, which is the big cause. It can be caused by anything that would cause the swelling of the lens. Hardening of the lens can also cause it. Trauma can cause myopia if it will cause swelling of the lens. In this particular case, he used electric shock as trauma. Anything that will disturb the continuity of the lens or the metabolism of the lens in his opinion can cause nearsightedness. He testified: "I have seen many myopia patients but I have never in my experience seen any myopia patients whose myopia came as a result of electric shock. . . . There are a number of standard textbooks on ophthalmology, Duckelder is the Bible you might say. I have never examined Duckelder's text to see whether or not he had reported any cases of myopia as a result of electric shock." He was further asked: "So the only question is have you ever had personal experience or do you know of any textbooks which might have recorded any ex-

perience of electric shock producing myopia?" He replied: "I have not researched a book to find that." He testified further on cross-examination: "This man has stated that his vision was normal before the accident and, in my opinion, a high voltage current going through his body could cause swelling of the lens, resulting in myopia. The swelling of the lens would not be visible on examination. That is the reason I say in my opinion it could cause it. I did tell you over the telephone when I talked to you sometime ago that I gave this as my opinion because I couldn't exclude this as a possibility. I said in my opinion it could. This was based on a medical judgment, my opinion. It was my opinion that the condition might have been caused by this (electric shock). I will tell you why. When a lens is becoming cataractous, it will develop myopia first or nearsightedness and in my opinion, this could have been a possibility. The shock was not great enough to cause cataracts. It could have caused some swelling of the lens. This is my opinion. I couldn't verify that one way or another. I tell you that here as I told you on the telephone. I can't say whether this is a likelihood or not. This is a rare instance. In my opinion, I wouldn't say it would be a likelihood. I think it would have to be researched and tested on animals in some way before you could say. This is the first case of this kind that I have ever seen that didn't go on to cataracts. . . . In all these cases there was myopia before the cataracts. The time for a cararact to form will vary. It can take years to form. . . . This is the reason we prefer to wait to see if the cataracts would form. Notice I said return in one month. That was the very first visit. That has been three years ago. I expected the cataracts to form in that period of time. I have found no indication of a cataract now. I did examine him as late as January or February of 1966 and this accident occurred in 1962. In my opinion, I don't think he is going to develop cataracts. There again is an opinion. I base this opinion on the fact that the condition has remained stationary for this amount of time. . . ." Later on in the cross-examination Dr. Thornhill was asked this question: "Doctor, I will not ask you any more questions. I will summarize what I think your testimony has been and have you verify, if you will, please, sir — I understand that you are testifying that Henry's eye, myopic condition, could have been caused by the electric shock." He answered: "It was my opinion, yes sir." He was then asked: "And that is an expression of a reasonable medical opinion?" He replied: "Yes sir." He is basing his opinion on what claimant told him and on his own reasonability from what he found. He was of the opinion that he would have sought help before if he had had

myopia. He said in his reasoning that the electric shock could have caused some change in the lens. He testified: "There have been no opacities of the lens. Inflammation is due to traumatic shock or something that would cause a change in the metabolism of the lens, which is the way the lens lives, and that would cause a cataract or opacities. The terms that I used were high voltage current going through his body could cause swelling of the lens and eye, resulting in myopia. And the swelling of the lens in the eye is not a discernible thing that you could observe by examination. . . . Henry said he could see clearly before." They have not had another case that he knows of. He thinks after he talked to the person who was cross-examining him that he did look through Duckelder and did not see a similar case. Unfortunately, he cannot take another case and do the same thing and say this is absolutely identical. If he could try that, he could prove it maybe. He knows that electric shock can cause damage to the lens. There has not been enough work done on the subject to know that it would necessarily cause cataracts.

These facts are undisputed according to the evidence: Prior to 21 September 1962, and on that date, plaintiff was a well, able-bodied man, who had never worn glasses and had had no trouble with his vision. At the hearing before the Hearing Commissioner, the parties stipulated that claimant sustained an injury by accident arising out of and in the course of his employment with defendant on 21 September 1962 when he came in contact with a high voltage wire and sustained an electric shock. As a result of claimant's injury by accident, his hands and feet were burned by the electric shock, but there were no burns elsewhere on his body. On 31 October 1962 plaintiff was examined by Dr. George T. Thornhill, an admitted medical expert, "specializing in eye, ear, nose, and throat diseases," and his examination disclosed that claimant's vision was 20/200 in each eye. To establish a causal connection between the electric shock and the injuries to plaintiff's eyes, claimant offered the testimony of Dr. Thornhill, who testified that in his opinion the cause of plaintiff's impaired vision "was due to the shock or accident that he had." He further testified: "I have two reasons for believing this. I think that electric shock can alter the lens in the eye to cause some swelling which will cause nearsightedness. The other reason I think is from looking back, that a man with 20/200 vision would have sought help before this. I don't think he could have gotten around too well." During a lengthy grueling cross-examination Dr. Thornhill repeated his opinion that claimant's myopia was caused by the electric shock. It is true that Dr. Thornhill testified on cross-examination that he

had never in his experience seen any myopia patients whose myopia came as the result of electric shock and that he had never read in any standard textbook that myopia was caused by an electric shock. It is also true that Dr. Thornhill said he could not verify his opinion and to do so he thinks it would have to be researched and tested on animals in some way. "While 'possibility' is not enough to prove a claim, absolute certainty is not generally required. Reasonable certainty is sufficient." 12 Schneider, Workmen's Compensation § 2530(e) (3rd or perm. ed. 1959) [hereinafter cited as Schneider]. The Hearing Commissioner found as a fact, which was approved by the Full Commission and the judge, that plaintiff's injury by accident on 21 September 1962 was caused by his coming in contact with an electric wire carrying 7200 volts of electricity. The basis of this finding of fact lies most appropriately in the field of technical knowledge. Evidential facts which cannot be established by direct evidence may be proved by reasonable and legitimate inferences drawn from the established facts. *McGill v. Lumberton*, 215 N.C. 752, 3 S.E. 2d 324; 12 Schneider § 2531. The fact that Dr. Thornhill had never seen a case of myopia caused by an electric shock and any slight inconsistencies in his testimony were matters for the hearing tribunal to consider in passing upon the credibility and the weight of Dr. Thornhill's evidence in finding the facts. The parties admitted that Dr. George T. Thornhill was a medical expert specializing in eye, ear, nose, and throat diseases. Such an admission necessarily is to the effect that Dr. Thornhill must have acquired such special knowledge of the subject matter about which he testified as to give Chairman Bean and the Full Commission assistance and guidance in solving a problem to which the layman's equipment of good judgment and average knowledge is inadequate.

This is said in *Anderson v. Construction Co.*, 265 N.C. 431, 144 S.E. 2d 272: "The Workmen's Compensation Act, G.S. 97-86, vests the Industrial Commission with full authority to find essential facts. The Commission is the sole judge of the credibility of the witnesses *and the weight to be given their testimony*. . . . The court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." (Emphasis ours.)

It is our opinion and we so hold that Dr. Thornhill's testimony, viewed *in toto*, was sufficient to establish a causal relationship between the accident and the injury. Such testimony did not constitute pure speculation on Dr. Thornhill's part, and it amply supports

Chairman Bean's finding of fact, which was approved by the Full Commission and the judge, that Dr. Thornhill was of the opinion that plaintiff's astigmatism or nearsightedness was caused by the electric shock that he received on 21 September 1962. The assignment of error to this finding of fact is overruled.

Defendant assigns as error the awarding of any compensation in the present instance to claimant. Its contention is this: "The Industrial Commission follows the Snellen Chart in determining the compensation to be paid the plaintiff for his total *(sic)* partial disability. The Snellen Chart appears at Page 226 of the Rules and Regulations adopted by the Industrial Commission. At the bottom of the Chart, it is said that it should be applied without respect to the effect of corrective lenses." Defendant's argument in essence is this: "The plaintiff in this case has corrected vision, with glasses, which returns his eyes to normal which is far better vision than most people enjoy. He has returned to work at no loss of wages and will, according to Dr. Thornhill maintain his vision at 20/20 with the use of corrective glasses. There is no disability as defined by Statute." This assignment of error is overruled.

G.S. 97-2(9) reads: "The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." To obtain an award of compensation for an injury under the Workmen's Compensation Act, an employee must establish that his injury caused his disability, "unless it is included in the schedule of injuries made compensable by G.S. 97-31 without regard to loss of wage-earning power." *Anderson v. Motor Co.,* 233 N.C. 372, 64 S.E. 2d 265.

G.S. 97-31 reads:

> "In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the periods specified, and shall be in lieu of all other compensation, including disfigurement, to wit:
>
> * * *
>
> "(16) For the loss of an eye, sixty per centum of the average weekly wages during one hundred and twenty weeks.
>
> * * *
>
> "(19) Total loss of use of a member or loss of vision of an eye shall be considered as equivalent to the loss of such member or eye. The compensation for partial loss of or for partial loss

of use of a member or for partial loss of vision of an eye . . . shall be such proportion of the periods of payment above provided for total loss as such partial loss bears to total loss, except that in cases where there is eighty-five per centum, or more, loss of vision in any eye, this shall be deemed 'industrial blindness' and compensated as for total loss of vision of such eye."

Courts are in sharp conflict as to whether the correction of vision by lenses is a factor to be considered in determining compensation for eye injuries. 99 C.J.S. Workmen's Compensation § 316(b); 8 A.L.R. 1330; 24 A.L.R. 1469; 73 A.L.R. 716; 99 A.L.R. 1507; 142 A.L.R. 832; 11 Schneider § 2346(e). An examination of many of these conflicting cases shows that many are founded upon statutes based upon the theory that compensation was payable only when the accident led to loss of earning power. The North Carolina statute specifically provides for compensation for the loss of an eye or vision, total or partial, attributable to permanent injury arising out of and in the course of an employee's employment. Nothing in the North Carolina statute indicates an intention on the part of the General Assembly that glasses or corrective lenses should be considered in determining the loss of the whole or a fractional part of the vision of an eye. If the purpose of the statute is to compensate for a specific loss of partial vision, as is the case with our statute, naked vision, alone, should be considered, but if the purpose of the statute is to compensate only for loss of earning power, which is not the case with us, the corrected vision should be a factor. The conflict in the states' decisions is more apparent than real being due in many instances to differences in the controlling statutes.

This is said in *Schrum v. Upholstering Co.,* 214 N.C. 353, 199 S.E. 385:

"The compensation provided is for the 'loss of vision of an eye.' The sense of sight is just as precious to the person who is suffering from a defective vision due to astigmatism which may be, and is, corrected by the use of glasses, as it is to one whose sight is unimpaired. It is for this loss of vision the statute seeks to compensate.

"This employee, by the use of glasses, possessed vision which is considered normal or perfect, and there is nothing in this record which indicates that the accident would not have resulted in the destruction of his vision had the former condition not existed. This 'source and substance of vision' has been destroyed

> by the injury he sustained. For this loss he is entitled to the full compensation provided by statute."

This is said in 11 Schneider § 2346(e):

> "Should an injured eye or eyes be compensated on the basis of vision with or without corrective lenses? While there is a substantial conflict in the authorities on this question, as will be noted more fully later herein, the majority view is succinctly stated by the Florida Supreme Court [*Burdine's v. Green,* 150 Fla. 361, 7 So. 2d 460] as follows: 'The criterion for arriving at proper awards where there is injury to an eye is the percentage of that injury regardless of the use of artificial lenses.' The reason frequently given for following this view is the statute makes no reference to the effect of corrective devices. The courts that follow the opposite view hold that vision with corrective device is still vision and useful as such, though accomplished by artificial means."

The cases supporting the text are cited therein.

We are impressed with the language of the Court of Errors and Appeals of New Jersey in *Johannsen v. Union Iron Works,* 97 N.J.L. 569, 117 A. 639, which quotes with approval the language of the Supreme Court of that State, in the case they were dealing with on appeal as follows:

> "It seems to us, that, where one must depend upon some mechanism, braces or glasses, to enable a member of the body to function properly, and such necessity is the result of accident, that such member is permanently impaired. An eye dependent upon glasses for normal vision is not as good as an eye which requires no such aid for its vision."

For a comprehensive review of the authorities and their conflicts see *Lambert v. Indus. Com.,* 411 Ill. 593, 104 N.E. 2d 783 (1952). In the *Lambert* case the Supreme Court if Illinois held that an injury to an eye which was industrially blind without correction but normal with correction was compensable.

We have held in decision after decision that our Workmen's Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependants, and its benefits should not be denied by a technical, narrow, and strict construction. 3 Strong, N. C. Index, Master and Servant, § 45.

Construing our statute as above stated, it is our opinion, and we so hold, that under the facts of this case and the stipulations it is

the clear intent, purpose, meaning, and language of our compensation statute that claimant should be compensated for the injuries to his eyes on the basis of vision remaining without corrective lenses.

Defendant has other assignments of error for which no reason or argument is stated or authority cited, and consequently they are deemed to be abandoned. 1 Strong, N. C. Index 2d, Appeal and Error, § 45. Defendant has no argument or citation of authority to suggest that the amount of compensation to be paid to claimant or the length of time it is to be paid, by order of the court, is error. Defendant in his brief states two questions are involved, which are as follows: "I. Is there evidence to support the Commission's and the Court's finding that there is a causal relation between the plaintiff's injury by electric shock and his myopic condition which has impaired his vision? II. Should plaintiff's loss of vision be measured with or without the use of corrective lenses?"

The judgment of the court below is

Affirmed.

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

MELVIN HENDERSON AND WIFE, BEATRICE W. HENDERSON, v. SECURITY MORTGAGE AND FINANCE COMPANY, INC., AND JOSEPH H. WERNICK AND WIFE, PAULINE F. WERNICK.

(Filed 20 March 1968)

1. Corporations § 1—

The mere fact that one or two persons own all of the stock of a corporation does not make the acts of the corporation the acts of the stockholders so as to impose liability therefor upon them. G.S. 55-3.1.

2. Same—

Where a corporation is so operated that it is a mere instrumentality or *alter ego* of the sole or dominant shareholder and a shield for his unlawful activities, the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person.

3. Same—

Evidence of usurious transactions by the dominant shareholder of a finance company who made no pretense of keeping his activities separate from those of the corporation *is held* to justify trial court's action in disregarding the corporate entity.

4. **Mortgages and Deeds of Trust § 1—**

Where it appears from the evidence that the plaintiffs were indebted to defendants and that they executed a deed conveying to defendants a fee simple title to their house and lot, and contemporaneously therewith, defendants executed a "rent" agreement contracting to reconvey the house and lot to plaintiffs upon their payment of the indebtedness, the documents will be held to have the effect of a mortgage by the plaintiffs to the defendants.

5. **Mortgages and Deeds of Trust § 28—**

Where a deed and a contract constitute an equitable mortgage, and there is no showing of a default by the mortgagors in any provision of the contract, the mortgagee, having knowledge that there was no default, cannot by his purchase of the property at a foreclosure sale engineered by him under another deed of trust acquire a good title as against the demands of the mortgagors for reconveyance upon their payment of the indebtedness pursuant to the contract.

6. **Usury § 1—**

In order to constitute usury there must be a loan or forbearance of money, with an understanding between the parties that the money loaned shall be returned, and a payment or an agreement to pay a greater rate of interest than that allowed by law, with the corrupt intent to take more than the legal rate for the use of the money loaned.

7. **Same—**

A fee collected by the broker or agent of a borrower for procuring a loan is not usury; a commission charged by the lender in addition to the maximum rate of interest allowed by statute constitutes usury.

8. **Same—**

Plaintiff's evidence to the effect that they executed a note to defendant for $1800 at six per cent interest from date, but that they received only $1200, and that for their note for $280, payable in 28 weeks, they received only $140, *is held* sufficient to show a charge of interest in excess of the maximum rate allowed by statute. G.S. 24-1.

9. **Usury § 6—**

A right of action to recover the penalty for usury accrues upon each payment of usurious interest when that payment is made, each payment of usurious interest giving rise to a separate cause of action which is barred by the statute of limitations at the expiration of two years from such payment.

10. **Usury § 2—**

The renewal of a usurious agreement whereby the debtor makes a new promise to pay the obligation in full, including the usurious interest, does not constitute a settlement of plaintiffs' right to invoke the statutory remedy for usury so as to purge the renewal contract of the taint.

11. **Evidence § 19—**

In an action to recover the statutory penalty for usury paid, evidence that the mortgagee engaged in similar usurious transactions with other

borrowers at about the same time as those with the plaintiff is competent upon the question of the existence of a corrupt intent to exact usury.

12. Payment § 3; Mortgages and Deeds of Trust § 17—

Where the record fails to show how the mortgagee allocated the debtor's payments for obligations owing to him, the law will allocate those payments to the lawful and valid obligations of the debtors rather than to interest illegally charged.

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

APPEAL by defendants from *Crissman, J.*, at the 29 May 1967 Civil Session of GUILFORD (Greensboro Division). This case was docketed and argued as No. 699 at Fall Term 1967.

The plaintiffs brought suit to recover of the defendants, jointly and severally, $6,000, alleged to be double the amount of usury paid by them to the defendants, and for a judgment declaring the plaintiffs to be the owners of a certain house and lot, upon which there is a deed of trust, to be assumed by the plaintiffs, in favor of Home Federal Savings & Loan Association, hereinafter called Home Federal, and directing the individual defendants to make a deed therefor to the plaintiffs. From a judgment declaring the plaintiffs to be the owners of the land, directing the individual defendants to execute such deed, subject to such deed of trust, and providing for the recovery by the plaintiffs of $4,379 from the corporate defendant, hereinafter called Security, and Joseph Wernick, hereinafter called Wernick, all of the defendants appeal. They assign as error numerous rulings upon the admission of evidence, certain portions of the charge of the judge to the jury and the denial of their motions for judgment of nonsuit and for the addition of Home Federal as a party defendant.

The complaint alleges that the individual defendants and Security are, in fact, one and the same. The answer, filed by all the defendants jointly, denies this. The complaint also alleges the transactions referred to below, and that the plaintiffs have overpaid to the defendants all amounts owed them. The answer denies that any usurious interest was charged or collected, alleges that Security made no loan but acted only as a broker, pleads the two year statute of limitations with reference to any usury, counterclaims for $5,000 alleged to be still due and owing to the defendants from the plaintiffs, and alleges that Wernick ought to be declared the owner of the land, subject only to the deed of trust for the benefit of Home Federal.

Summons was issued 12 January 1966. The complaint was filed 19 April 1966, pursuant to a consent order.

The evidence introduced by the plaintiffs, including that admitted over objection, if true, is sufficient to show:

1. On 30 April 1962 the plaintiffs owned the house and lot, subject to a deed of trust securing their note for $10,500 to American Federal Savings & Loan Association, hereinafter called American. They were also indebted in varying amounts to other creditors.

2. On 25 April 1962 the plaintiffs went to the office of Security and conferred with Wernick. The male plaintiff, hereinafter called Henderson, made application for "a loan" of $3,300, using Security's loan application form. At the bottom of the printed form, immediately above his signature, appeared the following:

> "I hereby retain Security * * * as my agent to secure for me a second mortgage loan in the amount of $3,300 * * *. I further agree to pay Security * * * a fee of .... dollars for their services in obtaining this loan, plus appraisal fees and closing costs."

3. Subsequently, Wernick, without authority from the plaintiffs, inserted the figure $400 in the blank space so left upon the application form.

4. The above quoted provision upon the application form was not called to the attention of the plaintiffs, and nothing was said to them with reference to Security's or Wernick's acting as an agent or broker to procure a loan from some other person. Henderson did not know of any other person's being involved in the making of the loan and never agreed to pay Security a fee for obtaining a loan from any other person.

5. When the plaintiffs returned to the office of Security on 30 April 1962, Wernick said that "he" could not let Henderson have more than $1,200. The plaintiffs thereupon signed and delivered to Wernick a note payable to bearer for $1,800 plus interest at 6% and a deed of trust upon the house and lot. The note provided for 36 monthly payments of $59 each, a total of $2,124. Wernick then told Henderson that the difference between the $1,200 which "he" was letting Henderson have and the $1,800 specified in the note was for interest, "he" not having "carrying charges." In return for the $1,800 note, $200 was paid to Henderson by a check drawn by Security, $878 to one of his creditors and approximately $117 to another of his creditors. Nothing else was received by the plaintiffs. They were given no statement showing a breakdown of the disbursement of the $1,800.

6. In all of their numerous visits to the office of Security the plaintiffs saw no one other than Wernick or Mrs. Wernick. All payments made by them were made to Security and were received from them by Wernick. When the loan was made, Henderson was given a card on which payments by him were to be and were entered by Wernick. The card does not show the name of the lender but states that payments were to be made at the office of Security.

7. On 18 December 1962 the plaintiffs again went to the office of Security and asked Wernick to make another loan to them, which he agreed to do. On this occasion they signed and delivered to Wernick a note payable to bearer for $280, payable $10 per week for 28 weeks, and another deed of trust on the same house and lot. In return they received $140. They were given another card, on which payments on this loan were to be and were entered by Wernick. The card stated the amount of the loan as $290. It shows payments totaling $70 through 22 March 1963, all credited to principal.

8. The card so given to the plaintiffs with reference to the $1,800 transaction shows 11 payments of $59, one per month, through 22 March 1963, $50 of each such payment being credited to the principal of the note, $9.00 to interest.

9. On 29 March 1963 the plaintiffs executed and delivered to Security their warranty deed conveying the above land to Security in fee simple, subject to the $10,500 deed of trust securing their indebtedness to American.

10. Contemporaneously with the above deed, the plaintiffs and Security entered into a written agreement reciting that, as a result of their default in payments to American, the plaintiffs had conveyed their land to Security in consideration of the following: Security agreed to "rent" the property to the plaintiffs for $159.60 per month, which "rent" the plaintiffs undertook to pay until they had paid in full their above two notes ($1,800 and $280) plus $712.14, with interest at 6%, which amount Security had paid American to stop foreclosure of the deed of trust securing it, plus $18.50 "for legal and filing fees." This agreement provided that the plaintiffs would also pay taxes, insurance and repairs upon the property, and that, upon the completion of such payments, Security would convey the land back to the plaintiffs. Though the "rental" agreement did not so state, it was understood by the parties that from the "rent" payments Security would first make the payments thereafter coming due from the plaintiffs to American, and this was done, the total

amount so paid by Security to American being $1,341.90 from 7 May 1963 to 9 June 1964.

11. A card similar to those above mentioned, entitled "Rental Account," was given to Henderson and upon it payments totaling $2,385.06 are entered and initialed by Wernick. These payments, 19 in number, were made from 30 March 1963 to 30 June 1964. Thereafter, the plaintiffs continued to make such payments as they came due, though not so shown on this card.

12. Total payments by Henderson to Security and Wernick, these not being broken down as to the item to which they were to be applied, were as follows:

From 4 June 1962 to 31 December 1962	$ 479.00
From 13 January 1963 to 31 December 1963	1,781.96*
From 15 January 1964 to 31 December 1964	1,780.20
From 1 February 1965 to 3 December 1965	1,360.00
From 3 January 1966 to 31 January 1966	250.00
Grand Total	$5,651.16

* $346 of the total paid in 1963 preceded the "rent" agreement.

13. On 20 June 1964 the trustee in the deed of trust securing the above mentioned note made by the plaintiffs for $280 (sometimes referred to as $290) executed a deed conveying the above mentioned land to Wernick, reciting the said trustee's foreclosure sale under such deed of trust.

14. The said trustee's report to the clerk of the superior court, dated 30 June 1964, shows that the purchase price of the house and lot at the foreclosure sale was $290 and, after paying expenses of the sale, there was "credited to note and deed of trust" $258.79.

15. On 2 July 1964 Wernick and wife executed a deed of trust upon the house and lot to secure their note of that date to Home Federal for $10,500. Of the proceeds of this note, $9,245.20 was paid to American and the above deed of trust securing the note of the plaintiffs to American was cancelled; $1,176.30 was paid by Home Federal to Wernick and the balance was applied to sundry closing costs of that loan other than an attorney's fee. The disposition made by Wernick of the portion of the proceeds so received by him does not appear.

16. Eighteen payments of $75.25 each, totaling $1,354.50, were made by Security to Home Federal from 3 August 1964 to 12 January 1966 for application upon the principal and interest of Wer-

nick's note to Home Federal. All payments due Home Federal since that date, on which this suit was instituted, have been paid by the plaintiffs direct to Home Federal.

Evidence introduced by the defendants was to the following effect:

1. Wernick is president of Security, which was incorporated in February 1962. He and his wife are its only stockholders and do everything in connection with its operations. When the plaintiffs first applied to him, he informed them that he was a real estate broker and would endeavor to obtain a loan for them for which services his fee would be $400.

2. He submitted the application to Jerry B. Hyman, who was willing to make a loan in the amount of $1,800 only. This Wernick reported to Henderson, reducing his "broker's" fee to $300, and the loan was so made. From the $1,800 Wernick paid $300 to Security for a "brokerage fee," $62.25 for miscellaneous closing expenses, and the remainder to Henderson or his creditors.

3. The loan of $280 on 18 December 1962 was made by Security. From its proceeds $201.17 was paid to Henderson, $59 was applied to a payment due on the first transaction, and $12.25 was paid out for the preparation of the deed of trust and recording fees. (The disposition of the remainder of $7.58 was not shown.)

4. On 22 March 1963 Wernick learned that American was in process of foreclosing the deed of trust securing the plaintiffs' note to it. To prevent such foreclosure Wernick agreed to pay to American $737.14, which he did, and the plaintiffs agreed to convey the house and lot to Security, which they did. Thereupon, Security and the plaintiffs entered into the above mention "rent" agreement. The "rent" payments were "kept current."

5. The loan from Home Federal, refinancing the plaintiffs' obligation to American, was obtained with the plaintiffs' approval.

6. The foreclosure of the deed of trust securing the $280 note, resulting in the trustee's deed to Wernick, was to remove from the property a subsequent deed of trust placed upon it by the plaintiffs and was with Henderson's approval.

7. With the $1,176.30 received by Wernick from the Home Federal loan, he paid Hyman the balance of $940.36 then due on the plaintiffs' $1,800 note. Prior to that time Wernick had remitted to Hyman payments received from the plaintiffs on that note.

8. There is now due Wernick, or Security, on account of the advancement to American, including interest and insurance advanced, $1,058.37.

Jerry Hyman, called as a witness for the defendant, testified to the following effect:

He had no direct dealings with the plaintiffs. He issued his check in the amount of $1,800 to Security upon the note and deed of trust of the plaintiffs in that amount. Payments were made to Hyman by Security. On 2 July 1964 the then balance of the loan, $940.36, was paid by Security and Hyman delivered the note and deed of trust to Wernick. Prior thereto payments on the note were in arrears and Hyman demanded payment in full from Wernick as endorser. Hyman had "bought" other loans from Wernick.

Alston, Alexander, Pell & Pell for defendant appellants.

Hoyle, Boone, Dees & Johnson and Harry Rockwell for plaintiff appellees.

LAKE, J. It is alleged in the complaint and admitted in the answer that Security is a corporation. Nevertheless, it is apparent from the record, including the testimony of Wernick, himself, that throughout the entire series of transactions with and concerning the plaintiffs, Wernick made no effort to keep, or pretense of keeping, his interest and activities separate and apart from those of the corporation. Wernick and his wife were its only stockholders. There is nothing to show her interest was other than nominal. The corporation was a mere device or puppet in Wernick's hands.

The mere fact that one person (two in the present case) owns all of the stock of a corporation does not make its acts the acts of the stockholder so as to impose liability therefor upon him. G.S. 55-3.1; *Wall v. Colvard, Inc.,* 268 N.C. 43, 149 S.E. 2d 559; *Acceptance Corp. v. Spencer,* 268 N.C. 1, 149 S.E. 2d 570; *Whitehurst v. FCX Fruit and Vegetable Service,* 224 N.C. 628, 32 S.E. 2d 34. However, when, as here, the corporation is so operated that it is a mere instrumentality or *alter ego* of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person, it being immaterial whether the sole or dominant shareholder is an individual or another corporation. 18 Am. Jur. 2d, Corporations, §§ 14-17; 18 C.J.S., Corporations, § 7b; Fletcher, Cyclopedia Corporations, §§ 41, 41.1 and 45. As Sanborn, J., said in *United States v. Milwaukee Refrigerator Transit Co.,* 142 F. 247, 255, "[W]hen the

notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons." The present record fully justifies the action of the trial court in treating Security and Wernick as one and the same so as to impose upon it and him, alike, liability for the payment of the statutory penalty for the exaction of usury in the transactions with the plaintiffs.

It is undisputed that on 29 March 1963 the plaintiffs were the owners in fee simple of the house and lot, subject to three deeds of trust, the first securing an indebtedness to American, the second and third securing notes given to Security, there being no contention that the note secured by the third deed of trust was ever held or owned by anyone other than Security. At that time, the plaintiffs executed a deed conveying the fee simple title to Security, and, contemporaneously therewith, Security entered into the so called "rent" agreement with the plaintiffs. By it Security contracted to reconvey the house and lot to the plaintiffs upon their payment of the above two notes and the advances made by Security to American for the benefit of the plaintiffs. These two documents must be construed together. Their effect is that of a mortgage by the plaintiffs to Security. *Hardy v. Neville*, 261 N.C. 454, 135 S.E. 2d 48; *O'Briant v. Lee*, 214 N.C. 723, 200 S.E. 865. "If there is an indebtedness or liability between the parties, either a debt existing prior to the conveyance, or a debt arising from a loan made at the time of the conveyance, or from any other cause, and this debt is left subsisting, not being discharged or satisfied by the conveyance, but the grantor is regarded as still owing and bound to pay it at some future time, so that the payment stipulated for in the agreement to reconvey is in reality the payment of this existing debt, then the whole transaction amounts to a mortgage, whatever language the parties may have used, and whatever stipulations they may have inserted in the instruments." 3 Pomeroy, Equity Jurisprudence, 4th ed., § 1195, quoted with approval in *O'Briant v. Lee, supra.*

One of the debts secured by this combination of deed and "rent" agreement was the note for $280 held by Security and also secured by the third deed of trust. There is no showing of a default in any provision of the "rent" agreement, which had the effect of extending the time for paying the note. On the contrary, the testimony of Wernick, himself, is that the "rent" payments were kept current. Thus, at the time of the purported foreclosure of the third deed of trust, and the resulting conveyance of the house and lot to Wernick by the trustee therein, all payments upon this obligation had been made by the plaintiffs according to the agreement of the parties. Wernick,

having engineered the purported foreclosure with knowledge that there was no default in the payment of the indebtedness secured by the deed of trust, could not, by purchasing at the foreclosure sale, acquire a good title as against the demand of the plaintiffs for reconveyance upon the payment of their indebtedness pursuant to the "rent" agreement. Furthermore, he thereafter continued to collect from the plaintiffs the "rent" payments and apply them pursuant to the "rent" agreement. He also refinanced the indebtedness to American for the benefit of the plaintiffs, according to his testimony. He thus continued to recognize the rights of the plaintiffs in the property under the "rent" agreement after the purported foreclosure sale.

The verdict of the jury establishes that nothing is owing by the plaintiffs to the defendants upon their counterclaim; that is, upon any of the obligations secured by the combination of absolute deed and "rent" agreement, which, as above shown, was a mortgage in effect. Therefore, there was no error in the judgment declaring the plaintiffs to be the owners of the land and requiring Wernick and his wife to execute a deed to them, unless there was error otherwise in the proceeding below. In *Oliver v. Piner,* 224 N.C. 215, 29 S.E. 2d 690, this Court, speaking through Schenck, J., said:

> "There being no evidence of a breach by the parties of the first part in the performance of the conditions in the deed of trust authorizing a foreclosure thereof, the deed from the party of the second part, the trustee, joined in by the party of the third part, the *cestui que trust,* who was likewise the assignor of the last and highest bid at the foreclosure sale, to the plaintiffs is rendered void * * *."

There was no error in the refusal of the trial court to order Home Federal to be made a party to this action. Neither the plaintiffs nor the defendants attack the validity of the note held by Home Federal or the deed of trust securing it. The plaintiffs, in their complaint, recognize the validity of this obligation, and of the deed of trust securing it, and state that they are to assume the obligation upon the conveyance of the house and lot to them by the defendants. Home Federal asserts no right other than its rights under this note and deed of trust. It has no interest in the controversy between the parties to this action and its presence in the action is not necessary to the adjudication of that controversy. The judgment below must be, and is hereby, modified, however, so as to provide, in accordance with the prayer of the complaint, that the deed to be made by the defendants shall provide for the assumption by the plaintiffs of the obligation

to Home Federal as distinguished from the present provision in the judgment that the land is to be conveyed to the plaintiffs, subject only to the deed of trust securing that obligation.

This Court has frequently stated that the elements of usury are these: (1) A loan or forbearance of money; (2) an understanding that the money loaned shall be returned; (3) payment or an agreement to pay a greater rate of interest than that allowed by law; and (4) a corrupt intent to take more than the legal rate for the use of the money loaned. *Preyer v. Parker,* 257 N.C. 440, 125 S.E. 2d 916; *Bank v. Wysong & Miles Co.,* 177 N.C. 380, 99 S.E. 199; *Doster v. English,* 152 N.C. 339, 67 S.E. 754.

By hypothesis, one who makes no loan but, as broker or agent of the borrower, finds a lender and procures the making of a loan by him, has not received usury when he collects a fee for his services. If, however, the lender, himself, charges a commission in addition to the maximum rate of interest permitted by the statute, such charge is usury. *Arrington et al., v. Goodrich et al.,* 95 N.C. 462. "A profit, greater than the lawful rate of interest, intentionally exacted as a bonus for the loan of money, * * * is a violation of the usury laws, it matters not what form or disguise it may assume." *Doster v. English, supra.*

The court below correctly instructed the jury as to the elements of usury and as to the nature of a broker's services. In its charge it stated the contention of the defendants that, as to the $1,800 note, the difference between the face of the note and the amount received therefor by the plaintiffs or paid out for their benefit was a commission charged by Security as a broker and not a bonus exacted by it as lender. We find no merit in any of the exceptions to the charge, either as to its contents or as to the alleged omissions therefrom. As to whether the defendants acted as a broker in the $1,800 matter, there was a conflict between the testimony of the plaintiffs and that of the defendants. The jury accepted the plaintiffs' version.

The plaintiffs' evidence was to the effect that in return for their note of $1,800 they received only $1,200, the note providing for interest on $1,800 at 6% from date. The plaintiffs' evidence is that for their note for $280, payable in 28 weeks, they received only $140. The defendants do not contend that in this second transaction they acted as broker. Taking the plaintiffs' evidence to be true, as must be done upon a motion for judgment of nonsuit, it is clearly sufficient to show a charge of interest in excess of the maximum rate allowed by the statute. G.S. 24-1.

G.S. 24-2 provides that the charging of usury results in "a forfeiture of the entire interest which the note or other evidence of debt

carries with it, or which has been agreed to be paid thereon." It further provides that in event a greater rate of interest than that allowed by law has been paid, the person so paying usury may recover twice the amount of interest paid. G.S. 1-53 provides that an action to recover the penalty for usury paid must be brought within two years, and an action for "the forfeiture of all interest for usury" must also be brought within two years.

The right of action to recover the penalty for usury paid accrues upon each payment of usurious interest when that payment is made, each payment of usurious interest giving rise to a separate cause of action to recover the penalty therefor, which action is barred by the statute of limitations at the expiration of two years from such payment. *Ghormley v. Hyatt,* 208 N.C. 478, 181 S.E. 242; *Trust Co. v. Redwine,* 204 N.C. 125, 167 S.E. 687; *Sloan v. Insurance Co.,* 189 N.C. 690, 128 S.E. 2; See also Annot., 108 A.L.R. 622, 623, 633.

The plaintiffs' evidence shows that 11 payments of $59 each were made on the $1,800 note more than two years prior to the commencement of this action, and that of each such payment $9.00 was allocated by the defendants to interest, the plaintiffs apparently assenting to such allocation. The right of action to recover the penalty for these payments, aggregating $99, was, therefore, barred by the statute of limitations at the time this suit was instituted. As to the note for $280, however, all of the evidence indicates that the only payments made more than two years prior to the institution of this action were allocated by the defendants to the principal and were, in the aggregate, less than the principal actually advanced to the plaintiffs on that loan. Consequently, no right of action on account of interest paid upon the $280 note was barred by the statute of limitations when this suit was instituted.

The deed and "rent" agreement of 29 March 1963 were, in effect, a renewal of the $1,800 note and the $280 note. In the "rent" agreement the plaintiffs made a new promise to pay these notes "in full," including the usurious interest therein provided. At that time the controversy concerning usury had not developed. Such a renewal of the original obligations does not constitute a settlement of the plaintiffs' right to invoke the statutory remedy for usury so as to purge the renewal contract of the taint. *Mortgage Co. v. Zion Church,* 219 N.C. 395, 14 S.E. 2d 37; *Hill v. Lindsay,* 210 N.C. 694, 188 S.E. 406.

It is undisputed that the plaintiffs made the monthly payments provided for in the "rent" agreement from its date to the commencement of this action. Nine such payments appear to have been made more than two years prior to the commencement of this action. It is clear from the record that after a substantial portion of these pay-

ments by the plaintiffs to Security was paid over by Security to American for the account of the plaintiffs, the remainder was retained by Security for application to the plaintiffs' obligations to it. However, the record does not show that Security made any allocation of such remainder between principal and interest or between the $1,800 note, the $280 note and the money previously advanced by Security to American. That being true, the law will allocate those payments to the lawful and valid obligations of the plaintiffs rather than to interest illegally charged. The aggregate of such payments made more than two years prior to the institution of this suit, after subtracting the amounts paid over to American, was less than the total of such lawful obligations. Consequently, the record does not show any payments of interest more than two years before the institution of this action, except the $99 above mentioned. There is, therefore, ample evidence of usury paid within two years prior to the institution of this action and, consequently, the motion for judgment of nonsuit upon the action for the recovery of the penalty for such usury was properly overruled.

There was no error in admitting the testimony of Wernick, on cross examination, as to other similar transactions with other borrowers at about the same time as those with the plaintiffs. This evidence was competent on the question of the existence of a corrupt intent to exact usury, which is an element of the plaintiffs' right of action. See Stansbury, North Carolina Evidence, 2d ed., § 92.

The jury found that the amount of usurious interest paid by the plaintiffs to Security was $2,189.50. In his charge to the jury, the trial judge stated three times that the plaintiffs contended the total amount of usury paid by them to the defendants was $2,189.50, and that the plaintiffs contended the jury should answer the issue in that amount. He instructed the jury that, on the other hand, the defendants contended that no usury had been charged or paid. The record does not show that any error in the statement of the parties' contentions was called to the attention of the court by either party.

The above figure does not appear, as such, at any other point in the record. Apparently, it is a figure used by counsel for the plaintiffs in their argument of the case to the jury. We have not been favored by either party with a statement analyzing and summarizing the statistical data contained in the numerous exhibits and oral testimony relative to the several transactions involved and the numerous payments made on account of each of them. No error in the jury's computation has been called to our attention by the defendants. However, it is apparent that the jury, in determining the

amount of usury paid, included those payments aggregating $99 which, as above shown, were made more than two years before this action was instituted and, as to which, the plaintiffs' right to recover the statutory penalty was barred. The judgment should, therefore, be modified by deducting from the amount of recovery adjudged the sum of $198, this being double the amount of the interest payments as to which the statute of limitations had run. The amount which the plaintiffs are entitled to recover of the defendants is, therefore, hereby reduced from $4,379 (the amount of the judgment below) to $4,181.

In summary, the judgment below must be, and is hereby, modified by reducing the amount of recovery for usury paid to $4,181, and by modifying that part requiring the execution of a deed to the plaintiffs by Wernick and wife so as to direct that such deed shall provide for the assumption by the plaintiffs of the indebtedness to Home Federal secured by the deed of trust executed to it by Wernick and wife, above mentioned. As so modified, the judgment is affirmed.

Modified and affirmed.

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

MRS. ANNIE R. SCHLOSS v. SIMEON A. SCHLOSS.

(Filed 20 March 1968)

1. Divorce and Alimony § 16—

If the husband abandons the wife within the purview of G.S. 50-7(1), she is entitled to alimony without divorce under former G.S. 50-16, notwithstanding that he may continue to provide adequate support for her.

2. Same—

In an action for alimony without divorce, a complaint alleging abandonment is not demurrable for failure to allege the amount of support supplied to the wife by the husband since his withdrawal from the home.

3. Divorce and Alimony § 2—

In an action for alimony without divorce, the issues raised by the pleadings must be determined by a jury before permanent alimony may be awarded.

4. Divorce and Alimony § 18—

An award *pendente lite* does not affect the final rights of the parties and may be entered by the judge without a jury.

5. Same—

In granting or denying alimony *pendente lite* the court is not required to make findings of fact unless adultery of the wife is pleaded in bar, although the better practice is to do so.

6. Same—

The amount of alimony *pendente lite* for the support of the wife rests in the sound discretion of the trial court, but such discretion is not absolute, and while the financial ability of the husband to pay is a major factor in the amount arrived at, the court must also consider the earnings and means of the wife. G.S. 50-16.

7. Same—

The amount awarded as subsistence *pendente lite* will not be disturbed on appeal in the absence of a clear abuse of discretion.

8. Same—

An award of $1500 per month as alimony *pendente lite* for the support of the wife, although exceedingly liberal under the circumstances of this case, *is held* not to constitute a clear abuse of discretion.

9. Same—

The purpose of the allowance of counsel fees *pendente lite* is to enable the wife to meet the husband on substantially even terms during the litigation by allowing her to employ adequate counsel.

10. Same—

Where plaintiff alleges that she has over $13,000 in bank accounts and investments and owns a new automobile and a $48,000 residence free of encumbrances, and where she has been awarded subsistence *pendente lite* of $1500 per month, an award of $2500 for counsel fees *pendente lite is held* to be error in the absence of findings by the court that she is financially unable to employ counsel.

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

APPEAL by defendant from *Riddle, S.J.*, at the 12 June 1967 Special Non-Jury Session of MECKLENBURG. This case was docketed and argued as No. 287 at Fall Term 1967.

This is an action for permanent alimony without divorce, for alimony *pendente lite* and for counsel fees.

The defendant appeals from an order directing him to pay $1,500 per month as alimony *pendente lite* and $2,500 as a fee for services rendered by the plaintiff's attorney *to the date of the order*. The order contains no finding of fact, stating merely that it appeared to the court "from the complaint filed by the plaintiff and the affidavits offered by the respective parties, that the plaintiff is entitled to the relief sought for alimony *pendente lite* and counsel fees."

The verified complaint alleges the plaintiff, then 54 years of age,

and the defendant, then 63, were married on 7 November 1965; the plaintiff owns a home in Charlotte worth $48,000, a 1967 Chevrolet automobile and stocks and bank accounts totalling $13,600, from which she derives an annual income of $417.95; the defendant owns corporate stocks and partnership interests worth more than $1,200,000 and has a gross annual income in excess of $100,000; without any provocation or fault on the part of the plaintiff, the defendant left the home on 17 April 1967 and, since that time, has lived separate and apart from the plaintiff; and the following is "an estimated list of the plaintiff's living expenses on a yearly basis":

"EXHIBIT 'A'

	Per Year
Taxes on home	$ 616.70
Repairs and paint, etc. (home and garage)	500.00
Replacement of appliances, draperies and rugs	1,000.00
Maid and yardman, seed and fertilizer	3,240.00
Lights	387.26
Heat	275.00
Water	68.75
Telephone (including long distance)	170.00
Fire wood	45.00
Insurance on home	368.00
Insurance on cars	242.00
Life Insurance	80.42
Hospital Insurance	219.80
Extra travel insurance	20.10
Car (new one every three years)	3,800.00
Upkeep — license, oil and gas	700.00
Shrubbery and tree care	100.00
Newspapers	26.00
Magazines	20.00
Books	20.00
Doctor	200.00
Dentist	150.00
Eye care	150.00
Food and miscellaneous for home	6,500.00
Clothing	2,700.00
Dry cleaning	175.00
Drugs	214.00
Beauty parlor	300.00
Drapery and rug cleaning	50.00
Trips	2,000.00

Entertainment and clubs	1,300.00
Church pledge and circle and Sunday School	600.00
Charity	100.00
Christmas	1,000.00
Gifts, weddings, birthdays	500.00
TOTAL	$27,838.03"

The only other evidence offered by the plaintiff consisted of her affidavit as to the effect of an award of alimony, as prayed for, upon the defendant's income tax liability.

The evidence for the defendant consisted of his own affidavit and affidavits of three other persons, the latter relating respectively to: (1) Alleged unreasonable financial demands made by the plaintiff upon her former husband during their marriage; (2) criticism of defendant and derogatory remarks concerning him and his family made by the plaintiff to his employee; and (3) similar remarks by the plaintiff to the maid, employed in the home until her discharge by the plaintiff.

The affidavit of the defendant was to the following effect with respect to the matters here material:

Their marriage was the second for each of the parties. Prior to the marriage, the plaintiff was a registered nurse and had an income from her profession plus an income from investments and from the business of her deceased former husband. From the marriage to the separation (approximately 17 months), the defendant lived with the plaintiff in her home and paid all household and living expenses, including joint income tax liabilities. The total of such household bills and expenses, including the support of the plaintiff's son and daughter by her former marriage, averaged $543.00 per month. In addition, the defendant, during the marriage, made substantial gifts to the plaintiff, took her at his expense on numerous pleasure trips, contributed to the college education of her daughter and purchased furniture and appliances for the home. Since the separation the defendant "has paid all of the plaintiff's expenses of every kind and has given her $100.00 per week in cash," has provided her and her daughter (the son being now grown and no longer residing in the home) with medical and hospital insurance and has informed her, through her attorney, that he would continue to pay her "expenses" and, in addition, pay to her $100.00 per week in cash throughout their separation. The defendant is "in comfortable financial circumstances" as the result of his own 43 years in business, the plaintiff having contributed nothing to his financial success. The defendant's primary business consists of a partnership with his sister. This necessitates

frequent conferences with the sister, toward whom the plaintiff has been antagonistic and insulting. The plaintiff is obsessed with a desire for money and with animosity toward the defendant's friends, family and religion, her denunciations of these compelling the defendant to leave the home.

Hunter M. Jones and James O. Cobb for defendant appellant.
Warren C. Stack and James L. Cole for plaintiff appellee.

LAKE, J. Our sole concern upon this appeal is with an order awarding subsistence and counsel fees to the plaintiff *pendente lite* in her action for alimony without divorce. The rights of the parties are governed by G.S. 50-16, since this litigation began prior to the repeal of that statute by the Session Laws of 1967, chapter 1152. The 1967 Act provides expressly that it shall not apply to pending litigation.

The pertinent provisions of G.S. 50-16 are:

> "If any husband shall separate himself from his wife *and* fail to provide her * * * with the necessary subsistence according to his means and condition in life * * * *or* if he be guilty of any * * * acts that would be * * * cause for divorce * * * from bed and board, the wife may institute an action * * * to have a reasonable subsistence and counsel fees allotted and paid * * *. Pending the trial and final determination of the issues * * * such wife may make application * * * for an allowance for such subsistence and counsel fees, and it shall be lawful for such judge to cause the husband * * * to pay so much of his earnings * * * as may be proper, according to his condition and circumstances, for the benefit of his said wife * * * having regard also to the separate estate of the wife. * * *" (Emphasis added.)

G.S. 50-7 provides:

> "The superior court may grant divorces from bed and board:
> "(1) If either party abandons his or her family. * * *
> "(4) Offers such indignities to the person of the other as to render his or her condition intolerable and life burdensome."

It is undisputed that since the separation of the plaintiff and the defendant he has paid all of the plaintiff's household bills and, in addition, has paid the plaintiff $100.00 per week. We have held, however, that a husband may be deemed to have abandoned his wife

within the meaning of G.S. 50-7(1), and so be liable for alimony under G.S. 50-16, notwithstanding the fact that, after cohabitation is brought to an end, he voluntarily provides her with adequate support. *Richardson v. Richardson,* 268 N.C. 538, 151 S.E. 2d 12; *Thurston v. Thurston,* 256 N.C. 663, 124 S.E. 2d 852; *Pruett v. Pruett,* 247 N.C. 13, 100 S.E. 2d 296. Whether his withdrawal from the home, followed by such support, constitutes an abandonment which is ground for suit by the wife for divorce from bed and board, and therefore ground for suit by her for alimony without divorce under G.S. 50-16, depends upon whether his withdrawal from the home was justified by the conduct of the wife. See: *Deal v. Deal,* 259 N.C. 489, 131 S.E. 2d 24; *Pruett v. Pruett, supra; Ollis v. Ollis,* 241 N.C. 709, 86 S.E. 2d 420; *Caddell v. Caddell,* 236 N.C. 686, 73 S.E. 2d 923. This being true, the complaint in this action, which alleges such withdrawal without justification, is not demurrable for the failure of the wife to allege therein the amount of support supplied to her by the husband since his withdrawal from the home. Therefore, the demurrer *ore tenus* filed by the defendant in this Court on that ground is overruled.

If, upon the trial of the action on the merits, it is determined that the husband's withdrawal from the home was without justification, notwithstanding his voluntary payments for the wife's subsistence thereafter, the court may award permanent alimony to the wife pursuant to G.S. 50-16. *Thurston v. Thurston, supra; Butler v. Butler,* 226 N.C. 594, 39 S.E. 2d 745.

We are not here concerned with the right of the plaintiff to permanent alimony. Before permanent alimony may be awarded, the issues raised by the pleadings must be passed upon by a jury. *Davis v. Davis,* 269 N.C. 120, 152 S.E. 2d 306. An award *pendente lite* may, however, be made by the judge, and he is not required to set forth in his order any findings of fact where, as here, there is no allegation of adultery by the wife, though it is better practice for such findings of fact to be made and set forth in the order. *Myers v. Myers,* 270 N.C. 263, 154 S.E. 2d 84; *Deal v. Deal, supra; Creech v. Creech,* 256 N.C. 356, 123 S.E. 2d 793; *Holloway v. Holloway,* 214 N.C. 662, 200 S.E. 436. The order granting or denying an award of subsistence *pendente lite,* with or without counsel fees, whether or not containing findings of fact, is not a final determination of and does not affect the final rights of the parties. *Davis v. Davis, supra; Deal v. Deal, supra; Fogartie v. Fogartie,* 236 N.C. 188, 72 S.E. 2d 226.

When a man marries he assumes, and the law imposes upon him, the obligation to provide his wife reasonable support. *Wilson v. Wil-*

son, 261 N.C. 40, 134 S.E. 2d 240. This duty rests upon the husband irrespective of the wife's ownership of property and of her having a separate income of her own. It continues to rest upon him after he withdraws from the home and separates himself from his wife without justification. So long as the parties live together and the husband provides for the wife a reasonable support, consistent with her comfort, welfare and safety, the law leaves to his discretion the selection of the home and the standard of living to be maintained therein. See *Sprinkle v. Ponder,* 233 N.C. 312, 64 S.E. 2d 171. Under those circumstances, the law leaves it to the discretion of even a wealthy husband to make provision for a future rainy day, even though it may appear to his wife that he is making provision for a flood in an arid climate. When, however, he separates himself from his wife without justification, the normal influences toward generosity are no longer present. In that event, if the parties, themselves, are unable to agree upon the subsistence to be supplied, the wife is entitled to a court order directing the husband to perform this duty and the court must determine the amount to be paid by the husband.

The amount so to be awarded is in the discretion of the court, but this is not an absolute discretion and unreviewable. *Martin v. Martin,* 263 N.C. 86, 138 S.E. 2d 801; *Ipock v. Ipock,* 233 N.C. 387, 64 S.E. 2d 283; *Butler v. Butler, supra; Kiser v. Kiser,* 203 N.C. 428, 166 S.E. 304. The statute provides that the amount shall be "a reasonable subsistence" and shall be determined "according to his condition and circumstances." The financial ability of the husband to pay is a major factor in the determination of the amount of subsistence to be awarded. *Sayland v. Sayland,* 267 N.C. 378, 148 S.E. 2d 218. The wife of a wealthy man, who has abandoned her without justification, should be awarded an amount somewhat commensurate with the normal standard of living of a wife of a man of like financial resources.

The fact that the wife has property of her own does not relieve the husband of the duty to support her following his unjustified abandonment of her. *Sayland v. Sayland, supra.* Nevertheless, the statute expressly provides that the earnings and means of the wife are matters to be considered by the judge in determining the amount of alimony to be awarded. "It is a question of fairness and justice to both." *Sayland v. Sayland, supra.* The purpose of the award is to provide for the reasonable support of the wife, not to punish the husband or to divide his estate.

This is especially true of an allowance for subsistence *pendente*

lite. In *Sguros v. Sguros,* 252 N.C. 408, 114 S.E. 2d 79, Higgins, J., speaking for the Court, said:

> "A *pendente lite* order is intended to go no further than provide subsistence and counsel fees pending the litigation. It cannot set up a savings account in favor of the plaintiff. Such is not the purpose and cannot be made the effect of an order."

The purpose of the award of support *pendente lite* is to provide for the reasonable and proper support of the wife in an emergency situation, pending the final determination of her rights. It has not yet been determined that the defendant was not justified in separating himself from the plaintiff. It is apparent from an examination of "Exhibit A," attached to the complaint, that it includes numerous items unrelated to her needs during the pendency of the litigation, such as the purchase of a new automobile every three years, replacement of draperies and rugs, trips, painting the home, and other items. Her estimates of other expenses appear to be rather liberal. However, it is well settled that the amount to be awarded for support *pendente lite* rests in the sound discretion of the hearing judge, and his determination will not be disturbed in the absence of a clear abuse of that discretion. *Miller v. Miller,* 270 N.C. 140, 153 S.E. 2d 854; *Sayland v. Sayland, supra; Griffith v. Griffith,* 265 N.C. 521, 144 S.E. 2d 589; *Harris v. Harris,* 258 N.C. 121, 128 S.E. 2d 123; *Mercer v. Mercer,* 253 N.C. 164, 116 S.E. 2d 443.

The allowance of $1,500 per month for the support of the plaintiff alone is exceedingly liberal in view of her ownership of the home, free and clear of encumbrances, and other resources. There were no children born of this marriage. The plaintiff's children by her first marriage are grown and only one of them continues to reside with her. The defendant's wealth was accumulated prior to his marriage to the plaintiff, a circumstance which somewhat distinguishes this case from *Mercer v. Mercer, supra.* Nevertheless, in view of the defendant's own affidavit as to the standard of living established by his generosity in providing for the plaintiff and her children prior to the separation, and in view of his acknowledged ability to maintain the plaintiff in somewhat luxurious manner, we do not find such an abuse of discretion by the hearing judge as would justify setting aside his determination of the subsistence to be paid her *pendente lite.*

The award of counsel fees rests upon a different basis. Apart from statute, there is no duty upon the husband, before or after separation, to furnish his wife with legal counsel, whether he or another

be the adverse party to her controversy. The award of counsel fees accompanying an award of permanent alimony, pursuant to G.S. 50-16, is to be made only after the merits of the controversy have been determined by a jury. *Davis v. Davis, supra.* The purpose of the allowance of counsel fees *pendente lite* is to enable the wife, as litigant, to meet the husband, as litigant, on substantially even terms by making it possible for her to employ adequate counsel. See: *Stanback v. Stanback,* 270 N.C. 497, 155 S.E. 2d 221 (counsel fees awarded on final judgment); *Myers v. Myers, supra; Deal v. Deal, supra; Harrell v. Harrell,* 253 N.C. 758, 117 S.E. 2d 728; *Mercer v. Mercer, supra; Fogartie v. Fogartie, supra; Oliver v. Oliver,* 219 N.C. 299, 13 S.E. 2d 549.

The award of counsel fees is not a necessary consequence of the award of subsistence. 27 Am. Jur., Husband and Wife, § 414. In the usual case, the wife is indigent or without substantial income of her own and the support allowance made to her is barely enough to provide her with the necessities of life. In such case, the requirement that the husband also pay her counsel fees is necessary to assure her a fair trial of their controversy. This is the purpose of the allowance of counsel fees, not punishment of the husband. The wealth of the husband has a direct and substantial bearing upon what is a reasonable amount to be awarded for the subsistence of the wife, since it is a factor in determining the standard of living which she may reasonably expect him to maintain for her. The wealth of the husband, however, has less bearing upon the value of the services rendered to the wife by her attorney. It does, of course, have a bearing upon the maximum fee which he is able to pay.

In the present case, less than two months elapsed between the separation and the entry of the order. The order directed the husband to pay $2,500 to the wife's counsel "as a fee for services rendered *to date.*" (Emphasis added.) There is nothing to indicate that the wife consulted her counsel prior to the husband's departure from the home. No evidence was introduced at the hearing by the plaintiff except her verified complaint, a short affidavit by her with reference to the effect of the full allowance prayed for upon the husband's income tax liability, and a copy of the joint income tax return. The entire evidence for the defendant consisted of his counter affidavit and three very short affidavits of other persons. Nothing in the record indicates that extensive preparation for the hearing was necessary or was made. The only documents in the record which would appear to have been prepared by the wife's counsel were the complaint, an order to show cause, an order for continuance, the

above affidavit with reference to the income tax liability, and the final order.

There is an obvious inconsistency in an order which allows a wife subsistence payments designed to enable her to live in a manner suitable for the wife of a wealthy man and which allows her counsel fees on the theory that she is indigent and unable to employ counsel. The plaintiff alleges in her complaint that she is the owner of a $48,000 residence which is free of encumbrances, she owns a new automobile and has over $13,000 in bank accounts and other investments. When to these resources there is added by the court's order an income from her husband at the rate of $18,000 per year, it cannot be said, in the absence of any findings of fact, that she is financially unable to pay a reasonable fee to her attorney and so is unable to employ counsel to represent her in her litigation with her husband.

In the absence of any findings of fact by the hearing judge, and without prejudice to the rights of either party upon the final hearing of this litigation, we conclude that the order from which the defendant appeals should be, and it is hereby, modified by striking therefrom the allowance of counsel fees and, as so modified, should remain in effect subject to the further orders of the superior court. This does not mean that the plaintiff's attorney is not entitled to a reasonable fee for his services. The question is simply, Who is to pay it? It is not necessary that we, at this time, determine what is a reasonable fee for the services rendered by the plaintiff's counsel prior to the order of 14 June 1967, and we make no such determination. That is a matter to be determined by negotiation between attorney and client.

Modified and affirmed.

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

STATE v. EBENEZER COLA WESTON (Nos. 33 AND 34).

(Filed 20 March 1968)

1. Automobiles § 110; Negligence § 31—

The wilful, wanton or intentional violation of a safety statute, or the inadvertent or unintentional violation of such statute when accompanied by recklessness amounting to a thoughtless disregard of consequences or a

heedless indifference to the safety of others, constitutes culpable negligence, but the inadvertent or unintentional violation of a safety statute, standing alone, does not constitute culpable negligence.

2. **Automobiles §§ 113, 132— Evidence held sufficient to go to jury on defendant's guilt of manslaughter and passing stopped school bus.**

The State's evidence was to the effect that a school bus stopped on the side of a highway to pick up passengers standing on the other side, that the arm stop signal and the blinking light on the bus were put into operation some 300 feet before the bus stopped, and that defendant driver, who was approaching the bus from the front, passed the stopped bus at a speed of about 25 miles per hour and struck a child who had run into the road to get on the bus. There was further evidence that defendant's view of the highway was unobstructed and that the highway was straight for a mile or more in either direction from the stopped bus. *Held:* The evidence is sufficient to go to the jury on the issues of defendant's guilt of manslaughter and of unlawfully passing a stopped school bus in violation of G.S. 20-217.

3. **Automobiles § 114—**

In a prosecution for involuntary manslaughter arising out of the operation of an automobile, an instruction that defendant would be guilty if at the time of the accident he was operating his car while failing to keep a reasonable lookout *is held* erroneous, since it applies the test of civil liability rather than that of criminal liability.

4. **Criminal Law § 168—**

Conflicting instructions upon a material point, one correct and one incorrect, must be held for reversible error, since the jury is not supposed to know which is the correct instruction, and it must be assumed on appeal that the jury's verdict was influenced by that portion of the charge which is incorrect.

5. **Same—**

Conflicting instructions on a material point in this manslaughter prosecution, although resulting from a *lapsus linguæ* by the trial court, *is held* to warrant a new trial.

6. **Criminal Law § 106—**

If there is substantial evidence of each essential element of the offense charged, defendant's motion for nonsuit is correctly denied.

7. **Constitutional Law § 36—**

Sentence of imprisonment within the statutory limit is not cruel and unusual punishment as forbidden by the North Carolina Constitution, Art. I, § 14.

APPEAL by defendant from *Cohoon, J.*, September 4, 1967 Session of CURRITUCK Superior Court.

Defendant was charged in separate bills of indictment with manslaughter and with unlawfully passing a stopped school bus in violation of G.S. 20-217.

The State offered evidence tending to show substantially the following:

David Lee Heath, III, about twelve years old, testified that on 19 October 1966 he and his brother, Michael Dean Heath, and their cousin, William Sanderlin, had been playing in and about their yard while waiting for the school bus. Their house was located on the south side of highway 158, and a Shell service station was located on the north side of the road. As the bus approached in the north lane, traveling in a westerly direction, the boys were standing about one step off the pavement on the south side of the highway. The bus put out its stop sign, and there was a large blinking red light above the windshield of the bus. The bus stopped on the north side of the highway, across from where the boys were standing. About five seconds after the bus stopped, Michael Dean Heath ran into the road toward the bus, and a car coming from the direction of Elizabeth City hit him. There was a sharp rise from the yard where the boys had been playing, to the highway. There was a board fence three and a half feet high around the pasture west of William Sanderlin's home which was west of the Heath home, and a fence covered with vines which, with the vines, was about five feet high next to and west of the Heath home. Dean was six years old, and was about three and a half to four feet tall.

The testimony of William Sanderlin, Jr. in substance corroborated David Heath. He stated, *inter alia:*

> ". . . The school bus put the stop sign out. That stop sign is located on the side of the bus near the road where it stopped. That would be on the driver's side of the bus. I did not notice any other signal about the bus this morning. When Dean started out on the pavement of the highway, the bus was stopped."

Mrs. Frances Sawyer: She was employed as a school bus driver on 19 October 1966. On that date she arrived at the David Heath home about 8:00 o'clock a.m. It was a clear, sunny morning. The road was straight for about one and a half miles in a westerly direction and was straight about two miles from this point in an easterly direction. She was proceeding westerly on highway 158 toward Elizabeth City. She put out the stop sign when she was in front of the Shell station. She explained that when the stop sign is put out the stop light on the front of the bus is turned on. The stop sign functioned properly. She saw two boys standing on a culvert about four or five feet from the edge of the pavement. At that time she saw another boy running up. She first saw them when she was near the Shell station approximately 300 to 350 feet away from them. She

observed a red car approaching her from the Camden-Currituck line. It was traveling at a normal speed and she saw nothing unusual about the manner in which it was being operated. She saw nothing which would have prevented the operator of the car from seeing the bus. She stated:

> "As I stopped my bus, I looked away from the highway and looked through the rear-view mirror, and looked down to put the bus out of gear, and to open the door of the bus, and when I looked back up, the front of the red car had come past the left front fender of the bus, and I heard a slight sound, . . . as I came around behind the bus I observed Dean lying in the highway, and the red car off to one side of the highway.
>
> . . . . .
>
> "As to where was the red car I saw approaching the school bus, when I came to a full stop, it was in front of William Sanderlin's home. I would estimate around 450 feet from where the school bus was stopped."

The witness identified defendant as the operator of the red car and stated that the vehicles were not moved before the patrolman arrived.

Patrolman R. I. Weathersbee: He arrived at the scene of the accident about 8:35 a.m., and found a school bus sitting just east of the David Heath home, facing in a westerly direction, and a 1964 Pontiac automobile on the south shoulder about 115 feet east of the front bumper of the school bus. He found a blood spot in the south lane of highway 158, 95 feet 3 inches east of the front bumper of the bus, and 14 feet 9 inches west of the front bumper of the Pontiac automobile. He found a small indentation about 3 inches in diameter and about one-half inches deep in the front center of the hood of the Pontiac. The distance between the Sanderlin home and the Heath home was about 500 feet. There was a fence around the pasture between the two houses which was about 20 to 25 feet south of the pavement. The shoulder of the road was about ten feet wide. Defendant told Weathersbee that he was going to Kitty Hawk fishing pier and was traveling at a speed of about 58 to 60 miles per hour, and that when he was in the vicinity of a bridge at the Camden-Currituck line, he observed a school bus coming toward him, and the bus at that time was approximately in front of a service station, and he began to slow down. When he got to a fence west of the David Heath home, he saw the school bus at about a 28.9¢ gasoline advertisement sign located west of the service station, and the school

bus at that time put out the stop sign. He started applying his brakes and watching the school bus, and he did not think the bus had quite stopped when he passed the front of it. He estimated that he was traveling about 25 miles per hour when he passed the bus. He heard a bump and at that time he put on all the brakes he had, and that he saw a boy "way up there where that blood spot was." He never saw the boy, for he was watching the school bus because he knew he wasn't supposed to pass it when it was giving the signal. He though that after he passed it he would go back and apologize for passing the bus. He had good brakes, and although he had a wooden right foot, this did not prevent him from using his foot to accelerate or brake the car in a proper manner.

The officer stated it was approximately 300 feet from the bus to the 28.9¢ sign at the service station. He described a red light located on the school bus as being situated in the centermost part of the top of the cab and being about 8 to 10 inches in diameter. There was an arm on the left side of the bus which extended outward with the letters STOP written on it. The arm was about 18 inches long and about 5 or 6 inches wide. It was white, with black letters.

David Heath, Jr.: He was the father of Michael Dean Heath. The fence surrounding the pasture between his house and the Sanderlin house was about 35 or 40 feet from the edge of the pavement on 19 October 1966. The pine trees in his front yard would be approximately 45 to 50 feet from the edge of the pavement.

It was stipulated that about 45 minutes after the accident occurred the battery in the bus was in a run down condition. The ignition switch was on and the motor was not running. When a jumper cable was applied to the battery, the red light over the windshield began to blink. This was a flashing light. The lever which operated the stop arm was in an "on" position, but at that time the stop arm was not out. However, upon starting the motor and charging the vacuum chamber, the stop arm operated properly. It was further stipulated that Michael Dean Heath died on 21 October 1966 as a result of the injuries received when he was struck by the car driven by defendant.

At the close of the State's evidence defendant made motions for judgment as of nonsuit in both cases. The motions were denied.

Defendant testified that he was 75 years old and that on 19 October 1966 he was driving his Pontiac automobile on highway 158, and as he approached the area where the accident took place he saw the school bus. He was going east on highway 158 and was meeting the bus. He saw the stop sign on the bus when it was put out, and at that time the bus was near the drive of the Shell station. When

he saw the stop sign, he hit his brakes and came down to 25 or 30 miles per hour. The bus was still moving when the child was struck. He never saw a child anywhere.

On cross-examination he stated that the road was straight, but that he did not see anybody in the highway as he approached the bus. He stated there was nothing to obstruct his vision on the highway.

Defendant offered several witnesses who testified as to his good character.

At the close of defendant's evidence he again moved for judgments as of nonsuit in both cases. The motions were denied.

The jury returned a verdict of guilty as to both charges. Defendant appealed from judgment entered on the verdict.

Attorney General Bruton and Staff Attorney Vanore for the State.
Aydlett & White and Frank B. Aycock, Jr., for defendant.

BRANCH, J. Defendant assigns as error the trial court's denial of his motions for judgment as of nonsuit.

The often-quoted landmark case of *State v. Cope,* 204 N.C. 28, 167 S.E. 456, defines culpable negligence and distinguishes culpable negligence and the resulting criminal responsibility from ordinary actionable negligence which imports only civil liability. We quote portions of this opinion:

> "5. Culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. *S. v. Whaley,* 191 N.C. 387, 132 S.E. 6; *S. v. Rountree, supra* (181 N.C. 535, 106 S.E. 669).
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> . . . . .
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> "6. An intentional, wilful or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence. *S. v. Palmer,* 197 N.C. 135, 147 S.E. 817; *S. v. Leonard,* 195 N.C. 242, 141 S.E. 736; *S. v. Trott,* 190 N.C. 674, 130 S.E. 627; *S. v. Crutchfield,* 187 N.C. 607, 122 S.E. 391; *S. v. Sudderth,* 184 N.C. 753, 114 S.E. 828; *S. v. Jessup,* 183 N.C. 771, 111 S.E. 523; *S. v. Gray,* 180 N.C. 697, 104 S.E. 647; *S. v. Gash,* 177 N.C. 595, 99 S.E. 337; 2 R.C.L. 1212.
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> . . . . .
>
> "7. . . . an intentional violation of a prohibitory statute

or ordinance, unaccompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, is not such negligence as imports criminal responsibility. *S. v. Stansell, supra; S. v. Agnew,* 202 N.C. 755, 164 S.E. 578; *S. v. Satterfield,* 198 N.C. 682, 153 S.E. 155; *S. v. Tankersley,* 172 N.C. 955, 90 S.E. 781; *S. v. Horton,* 139 N.C. 588, 51 S.E. 945.

"8. However, if the inadvertent violation of a prohibitory statute or ordinance be accompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others, then such negligence, if injury or death proximately ensue, would be culpable and the actor guilty of an assault or manslaughter, and under some circumstances of murder. *S. v. Trott, supra; S. v. Sudderth, supra; S. v. Trollinger,* 162 N.C. 618, 77 S.E. 957; *S. v. Limerick,* 146 N.C. 649, 61 S.E. 567; *S. v. Stitt,* 146 N.C. 643, 61 S.E. 566; *S. v. Turnage,* 138 N.C. 566, 49 S.E. 913."

The rule as to the intentional or unintentional violations of a speed statute as related to culpable negligence is concisely stated by Denny, J. (later C.J.), in the case of *State v. Hancock,* 248 N.C. 432, 103 S.E. 2d 491, as follows:

". . . The violation of a safety statute which results in injury or death will constitute culpable negligence if the violation is wilful, wanton, or intentional. But, where there is an unintentional or inadvertent violation of the statute, such violation standing alone does not constitute culpable negligence. The inadvertent or unintentional violation of the statute must be accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision. amounting altogether to a thoughtless disregard of consequences or of a heedless indifference to the safety of others. *S. v. Miller,* 220 N.C. 660, 18 S.E. 2d 143."

See 1 N. C. Index, 2d, Automobiles, § 110, footnotes 71, 72 and 73, beginning on page 597, for an exhaustive citation of applicable case law.

The evidence, in the light most favorable to the State, tends to show that defendant was operating his automobile in an easterly direction on Highway 158 at a speed of 58 to 60 miles per hour, on a clear, sunny day, at about 8:00 o'clock a.m. There was nothing to

obstruct his view of the highway, and from the point where the school bus stopped the highway was straight in a westerly direction for one to one and a half miles and in an easterly direction for two miles. The school bus came to a stop when defendant was approaching at a distance of about 500 feet. The arm stop signal and the blinking light on the bus were put into operation 300 feet east of the place where the bus stopped. Defendant passed the stopped school bus at a speed of about 25 miles per hour. At least two of the three children had been standing within one foot of the southern edge of the pavement across from where the bus stopped. Defendant did not see any of the children. Michael Dean Heath died as a result of the injuries received when he was struck by defendant's automobile.

It is a violation of the law to pass a school bus while such bus is stopped and engaged in receiving or discharging passengers therefrom upon the roads or highways of the state. G.S. 20-217. It is also a violation of the law to drive upon the highways of the state carelessly and heedlessly, in wilful or wanton disregard of the rights or safety of others, or to operate a motor vehicle without caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property. G.S. 20-140. These statutes are safety statutes, designed for the protection of life, limb and property.

Applying these recognized rules of law, we hold that the trial judge correctly overruled defendant's motions for nonsuit.

Defendant assigns as error, *inter alia,* the following portion of the trial judge's charge:

> "So I charge you, gentlemen, with reference to the charge of involuntary manslaughter, that if you find from the evidence and beyond a reasonable doubt that, at the time the deceased, Michael Dean Heath, was struck and killed by the defendant's automobile, that is, the defendant Ebenezer Weston, and that the defendant Ebenezer Weston was guilty of culpable or criminal negligence, as heretofore explained to you by the Court, that is, that he was driving his car at the time and place in question, carelessly and heedlessly, in willful and wanton disregard of the rights or safety of others, or without due caution and circumspection, and at a speed or in a manner so as to endanger or be likely to endanger any person or property then upon said highway, or failed to stop for a stopped school bus with its Stop signal out in receiving or discharging passengers, *or in failing to keep a reasonable lookout;* or, if you find from the evidence and beyond a reasonable doubt that at the time

and place in question the defendant was inadvertently driving his car in violation of the statutes and common law rule, about which I have previously instructed you, in such case made and provided, that such acts and conduct of the defendant were accompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting to a thoughtless disregard of consequences, or a heedless indifference to the safety and rights of others, then I charge you that the defendant would be guilty of culpable or criminal negligence; and if you find from the evidence, and beyond a reasonable doubt, that such culpable or criminal negligence was the proximate cause of the injury and death of Michael Dean Heath, the defendant would be guilty of involuntary manslaughter, and if you so find beyond a reasonable doubt, it would be your duty to render a verdict of guilty of involuntary manslaughter, against the defendant." (Emphasis ours.)

Here, the trial judge instructed the jury as to several alternatives under which they could find defendant guilty of involuntary manslaughter. One of the alternatives was that the jury should find defendant guilty if it found beyond a reasonable doubt that at the time his automobile struck and killed Michael Dean Heath defendant was operating his car while failing to keep a reasonable lookout. This instruction was erroneous in that it applied the test of civil liability rather than the test of criminal liability. *State v. Cope, supra; State v. Spencer,* 209 N.C. 827, 184 S.E. 835.

It is apparent from the exemplary manner in which the learned trial judge charged the jury in other respects and the able manner in which he presided at this trial that this erroneous portion of the charge was a *lapsus linguæ.* However, this Court has held many times that when there are conflicting instructions upon a material point, one correct and one incorrect, a new trial must be granted. Since the jury is not supposed to know which is the correct instruction, we must assume that the jury's verdict was influenced by that portion of the charge which is incorrect. *State v. Starnes,* 220 N.C. 384, 17 S.E. 2d 346.

It is obvious that this portion of the charge is a material point and, even though apparently inadvertent, is error.

Defendant contends that the trial judge erred in denying his motions for nonsuit as to the charge of passing a school bus while it was stopped on a road or highway and engaged in receiving or discharging passengers therefrom.

We do not deem it necessary to again review the evidence upon

consideration of defendant's motions for nonsuit as to this charge. Suffice it to say that, taking the evidence in the light most favorable to the State and resolving the conflicts therein in favor of the State, as we must do, there is substantial evidence of each essential element of the offense charged. *State v. Thompson,* 256 N.C. 593, 124 S.E. 2d 728; *State v. Bass,* 255 N.C. 42, 120 S.E. 2d 580. The trial court correctly denied defendant's motions for nonsuit.

Nor is there merit in defendant's contention that the judgment entered was excessive. The sentences were within the statutory limit for the offense of which defendant was convicted, and did not constitute cruel and unusual punishment as forbidden by Article I, Section 14 of the Constitution of North Carolina. *State v. LePard,* 270 N.C. 157, 153 S.E. 2d 875.

We have carefully examined defendant's remaining assignments of error and find no prejudicial error affecting the charge of passing a school bus while it was stopped on the road or highway and engaged in receiving or discharging persons therefrom.

As to the charge of involuntary manslaughter:

New trial.

As to the charge of passing a school bus while it was stopped:

No error.

STATE v. KELLY CLYBURN, BOBBY McVAY AND HENRY FRYER.

(Filed 20 March 1968)

1. Criminal Law § 75—

The test of admissibility of a defendant's confession is whether the statement was in fact voluntarily made.

2. Criminal Law § 76—

Whether an alleged confession was made voluntarily so as to be admissible in evidence is a question to be determined by the trial court in the absence of the jury.

3. Same—

Whether the defendant made a purported confession is a question of fact to be determined by the jury from evidence admitted in its presence.

4. Same—

Where the trial court finds upon the *voir dire* from conflicting evidence that the confession was voluntarily and freely made after defendant had been advised of his rights, the findings, being supported by conclusive evidence, are binding on appeal.

5. Criminal Law § 106—

The extra-judicial confession of guilt by a defendant must be supported by evidence *aliunde* which establishes the *corpus delecti,* and such evidence may be direct or circumstantial.

6. Burglary and Unlawful Breakings § 5; Larceny § 7—

Testimony of a store manager that a quantity of guns and other merchandise was stolen from the locked premises after business hours is sufficient to establish the *corpus delecti,* and such evidence, together with defendant's confession that he participated in the breaking and the larceny, *is held* sufficient to be submitted to the jury.

7. Criminal Law § 103—

It is for the court to determine the competency, admissibility and sufficiency of the evidence, and it is for the jury to determine the weight, effect and credibility of the evidence.

8. Criminal Law §§ 66, 106—

The evidence of the State sufficiently established the *corpus delecti,* but the sole evidence as to the identity of the defendant was testimony by a witness who could not "honestly say" that defendant was an accomplice. *Held:* The evidence raises no more than a suspicion or conjecture as to defendant's identity, and the offense charged was incorrectly submitted to the jury.

APPEAL by defendants Henry Fryer and Bobby McVay from *Clarkson, J.,* 26 June 1967 Regular Criminal Session of MECKLENBURG.

Defendants were charged in one bill of indictment with felonious breaking and entering and felonious larceny. Defendants filed separate cases on appeal. Both cases are before the Court on *certiorari.*

The State's evidence in substance tends to show:

O. K. Tesh testified: He was branch manager for Brown-Rogers-Dixson Company, a corporation, on 14 March 1967. The company building was located at 209 E. Seventh Street, Charlotte. He locked the building about 5:30 p.m. on 13 March 1967, and when he returned to work on the morning of 14 March he saw that the cash drawer had been pried open and the cash register drawer was open. After police arrived, he accompanied them to the second floor and found that the gun "cage" had been broken into and 42 guns and a quantity of electric razors and watches had been removed. A window on the second floor which he had checked on the previous night was open. Further investigation revealed that four televisions, three radios and four phonographs were missing. He estimated the fair market value of the property taken to be about $5,000.00. He had not given defendants permission to enter the building or to take anything therefrom. No other company official had authority to grant such permission. None of the property had been recovered by the company.

After conducting a *voir dire* hearing at which Officers H. M. White and Thomas R. Smith and defendant Clyburn testified, the court found that statements made by Clyburn to Officers White and Smith were freely and voluntarily made and were competent against Clyburn.

The trial judge heard Officer White and defendant Henry Fryer in the absence of the jury as to statement Fryer reportedly made to Officer White. The court ruled the alleged statement to be incompetent as to all defendants.

Continuing the *voir dire* hearing in the absence of the jury, Officer White testified that he talked to Bobby McVay on 21 April 1967. Before questioning McVay he advised him "that he had the right to remain silent and not answer any questions; that anything he told me could be used for him or against him in a court of law; that he had the right to have a lawyer present while I talked to him; and that if he could not afford a lawyer, the court would appoint one for him. McVay's constitutional rights were explained to him, but he did not sign a waiver. . . . After advising Clyburn of his constitutional rights, he said nothing about wanting a lawyer. There were no physical threats made against the defendant nor any promises made to him. . . . Our discussion took place on April 21 at about 4:30 a.m. McVay said he didn't want to sign a waiver but he would talk to me. . . . I told McVay that he was charged with storebreaking and larceny at Brown-Rogers-Dixson Co. on East 7th Street. After that I read the warrant to him. . . . I asked McVay what part he took in this break-in and he told me that he climbed up on the roof; that he did not enter into the building and that Truesdale and Clyburn handed the merchandise out the window to him. . . ."

Bobby McVay on the same *voir dire* stated:

> "I was taken to the police department on Thursday night the 18th. Mr. White was the first officer to talk with me early the next morning. He advised me of my constitutional rights which I understood, then I told him that I didn't have anything to talk to him about. Officer White then raised a number of questions with me. Throughout all the questioning I indicated that I did not desire to discuss the matter with him, and it was only at his insistent questioning that I ever said anything at all.
>
> "Detective White told me that Kelly Clyburn and Henry Fryer had already signed a statement against James Truesdale and myself. He asked me why I didn't sign a statement. Said he thought that if I would sign a statement that maybe they

would revoke my probation, or wouldn't put me on such high bond.

CROSS EXAMINATION:

"At the time Mr. White talked to me he advised me of my constitutional rights; and I understood what he was talking about.

I told him I didn't want to talk to him about the case; but he asked me question after question. However, I did not tell him anything. I answered the questions he asked me and the next morning he came to me and asked me did I want him to write a statement or did I have anything to tell him. I told him no.

At that time I did not ask him for a lawyer. Officer White did not harm me in any way. He never promised me anything except that he would have my bond lowered."

"THE COURT: Court finds as a fact that the defendant McVay was warned of his constitutional rights after he had been arrested and the warrant was read to him; finds as a fact that he fully understood what his constitutional rights were; that he did not request a lawyer; that he freely and voluntarily without any inducement or promise or threats of physical violence of any kind, made a statement to the police officers as set forth in the record; that while he refused to sign a waiver or sign a written statement, the court holds that the oral statement made to the officers is competent as against the defendant McVay but not as to his co-defendants and it can be admitted into evidence before the jury as to the defendant McVay."

The jury returned to the courtroom and Officer White testified as to statement made by defendant Kelly Clyburn. Before he testified, the court instructed the jury that the statement was admitted only as against Clyburn. The statement implicated James Truesdale, Bobby McVay, Henry Fryer and Kelly Clyburn in the breaking, entering and larceny.

H. M. White testified in presence of jury, over objection, that Bobby McVay on 21 April 1967 stated to him that he (McVay) climbed up on the roof of the Brown-Rogers-Dixson building and took merchandise out of the window from Truesdale and Clyburn. He had been drinking and had some pills and he remembered going to Clyburn's house later, but did not remember all that happened.

At this point the court instructed the jury not to consider the testimony relative to McVay's statement as to defendants Fryer and Clyburn.

John Cureton then testified that at about 9:00 a.m. on or about 14 March 1967 he had a conversation with Kelly Clyburn concerning the disposition of a lot of guns which had come from a hardware company on 7th Street. He told Clyburn that he could not handle the guns, but he knew someone who might be interested. He saw Clyburn about noon of the same day with "two other gentlemen in the courtroom now that look like the men that were with Kelly on the morning of the 14th. . . . I believe these fellows in the courtroom were the ones with Clyburn on the morning of the 14th (pointing to these men). But there is some doubt in my mind at this point, because these men now look different in their appearance. . . . I see in the courtroom two men who were in the car with me at the time we were riding over to where the guns were. . . . When we got to this place on Myers Street, we got out of the car. We were Clyburn, Buck, myself and the other three fellows that were in the car. We went upstairs in this building and into a room. In the middle of the floor was a pile of guns in boxes stacked up. . . . The other three fellows were left standing outside the door on the steps, but the door was open. . . . Kelly Clyburn in my presence and in the presence of the other two defendants said nothing about the participation of the other two defendants in this case with him in this breaking and entering. . . . As far as I remember Fryer and McVay are the two men, I believe. . . . One of the men was short and the other one was tall and I remember that part. One walked — he had a sort of drag to him when he walked. I noticed that, but as far as looking at these two men here and remember the way the other two looked, it just can't be clarified in my mind to that point. . . . It is just hard to say just for sure this is what I saw three months ago. I can't honestly say that they are the two men, but I believe they were. There is some doubt in my mind about it, but I believe they are the two men."

Defendants offered no evidence and moved for judgments of nonsuit. The motions were denied.

The jury returned verdicts of guilty as charged in the bill of indictments against all defendants. From judgment entered on the verdicts, defendants Bobby McVay and Henry Fryer appealed.

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

William J. Richards, Jr., for defendant McVay.

T. O. Stennett for defendant Fryer.

BRANCH, J.

APPEAL OF DEFENDANT MCVAY.

Defendant McVay assigns as error the admission into evidence of his confession.

The test of admissibility of a defendant's confession is whether the statement was in fact made voluntarily. *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; *State v. Gosnell,* 208 N.C. 401, 181 S.E. 323. Whether the statement was made voluntarily so as to be admissible before the jury is a question to be determined by the trial judge upon evidence presented to him in absence of the jury. *State v. Outing,* 255 N.C. 468, 121 S.E. 2d 847. It is a question of fact, to be determined by the jury from evidence admitted in its presence, whether such statement was made by the defendant. *State v. Guffey,* 261 N.C. 322, 134 S.E. 2d 619. However, 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.

The procedure to be followed when objection is interposed as to the voluntariness of a confession is set forth in the case of *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1, where Lake, J., speaking for the Court, stated:

> "When the State proposes to offer in evidence the defendant's confession or admission, and the defendant objects, the proper procedure is for the trial judge to excuse the jury and, in its absence, hear the evidence, both that of the State and that of the defendant, upon the question of the voluntariness of the statement. In the light of such evidence and of his observation of the demeanor of the witnesses, the judge must resolve the question of whether the defendant, if he made the statement, made it voluntarily and with understanding. *State v. Barnes, supra; State v. Outing, supra; State v. Rogers, supra.* The trial judge should make findings of fact with reference to this question and incorporate those findings in the record. Such findings of fact, so made by the trial judge, are conclusive if they are supported by competent evidence in the record. No reviewing court may properly set aside or modify those findings if so supported by competent evidence in the record. *State v. Barnes, supra; State v. Chamberlain, supra; State v. Outing, supra; State v. Rogers, supra.*"

Defendant contends that if he made a statement, it was involuntary since he was insistently questioned after he indicated to the officers that he did not desire to talk about the case. To support this contention, defendant relies on that part of the opinion in *Miranda v. Arizona,* 384 U.S. 436, 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 conduct 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."

The record is in sharp conflict as to this contention. Defendant offers evidence that he was questioned insistently after indicating that he did not wish to talk. The State offered evidence that defendant freely talked upon first being questioned, and only indicated that he did not wish to sign a waiver.

In the case of *State v. Logner,* 266 N.C. 238, 145 S.E. 2d 867, it is stated:

> ". . . Much of the evidence which the trial judge heard was conflicting, but 'where the evidence is merely in conflict on the question as to whether or not a confession was voluntary, the ruling of the court is conclusive on appeal.' *State v. Hammond,* 229 N.C. 108, 47 S.E. 2d 704. The evidence fully supports Judge Bickett's findings. Defendant had and was accorded the right to a preliminary hearing on the competency of his alleged confession. The judge, however, was not required either to believe or to accept his testimony as if it were true."

See also *State v. Outing, supra.*

Here the trial court properly excused the jury, and in the absence of the jury heard evidence from the State and defendant upon the question of the voluntariness of defendant's confession. The court thereupon made findings of fact which were incorporated into the record. The record contains substantial competent evidence to support the trial court's finding that defendant's confession was voluntarily made.

The jury by its verdict found that defendant made the statement. This finding is binding on appeal.

Defendant McVay's assignment of error that the trial court erred in overruling his motion for judgment of nonsuit cannot be sustained.

> "The naked extra-judicial confession of guilt by 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." *State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511.

In the instant case the felonious breaking and entering of the building belonging to Brown-Rogers-Dixson Company and the felonious larceny of personal property therefrom were established *aliunde* the confession of defendant McVay by the testimony of the witness O. K. Tesh. This evidence, when taken in connection with defendant McVay's confession, was sufficient to carry the case to the jury against defendant McVay.

No prejudicial error is made to appear as against defendant McVay.

APPEAL OF HENRY FRYER.

Henry Fryer's sole assignment of error is that the trial court erred in overruling his motion for judgment as of nonsuit.

The State's case is entirely dependent on the testimony of the witness John Cureton to connect defendant Fryer with the offense with which he is charged.

It is stated in *State v. Lawrence,* 196 N.C. 562, 146 S.E. 395:

> "The competency, admissibility and sufficiency of evidence is for the court to determine, the weight, effect and credibility is for the jury. *S. v. Utley, supra* (126 N.C. 997); *S. v. Blackwelder,* 182 N.C. 899."

Here the Court is not concerned with whether the evidence is *competent,* but the question is whether it is *sufficient* to carry the case to the jury. We further recognize that "It is not the function of the court to pass on the credibility of witnesses or to weigh the testimony." *State v. Hanes,* 268 N.C. 335, 150 S.E. 2d 489.

In the case of *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679, certain well recognized principles of law pertinent to this assignment of error are clearly and concisely stated for the Court by Lake, J., as follows:

> "Upon a motion for judgment as of nonsuit in a criminal action, the evidence must be considered by the court in the light most favorable to the State, all contradictions and discrepancies therein must be resolved in its favor and it must be given the benefit of every reasonable inference to be drawn from the evidence. *State v. Bruton,* 264 N.C. 488, 142 S.E. 2d 169;

State v. Thompson, 256 N.C. 593, 124 S.E. 2d 728; *State v. Bass,* 255 N.C. 42, 120 S.E. 2d 580. All of the evidence actually admitted, whether competent or incompetent, including that offered by the defendant, if any, which is favorable to the State, must be taken into account and so considered by the court in ruling upon the motion. *State v. Walker,* 266 N.C. 269, 145 S.E. 2d 833; *State v. Virgil,* 263 N.C. 73, 138 S.E. 2d 777.

"The question for the Court is whether, when all of the evidence is so considered, there is substantial evidence to support a finding both that an offense charged in the bill of indictment, or warrant if it be a case tried upon a warrant, has been committed and that the defendant committed it. *State v. Bass,* 253 N.C. 318, 116 S.E. 2d 772. If, when the evidence is so considered, it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion for nonsuit should be allowed. *State v. Guffey,* 252 N.C. 60, 112 S.E. 2d 734. This is true even though the suspicion so aroused by the evidence is strong. *State v. Chavis,* 270 N.C. 306, 154 S.E. 2d 340."

Two propositions are involved in the proof of a criminal charge: (1) Proof that a crime has been committed, *i.e.,* proof of the *corpus delecti,* and (2) proof that it was done by the person charged, *i.e.,* proof of the identity of the defendant. *State v. Edwards,* 224 N.C. 577, 31 S.E. 2d 762; *State v. Bass, supra.*

It would be incongruous to submit the question of identity of the defendant to the jury for their determination beyond a reasonable doubt upon the sole testimony of a witness who could not "honestly say that they were the two men."

Considered in the light most favorable to the State and resolving all contradictions and discrepancies in its favor, the testimony of the State's witness was, at best, so equivocal and uncertain as to raise only a suspicion or conjecture as to the identity of the defendant as the perpetrator of the crime.

The trial court erred in overruling defendant Fryer's motion for judgment as of nonsuit.

As to defendant McVay:

No error.

As to defendant Fryer:

Reversed.

JEAN P. CHEEK AND GILBERT A. CHEEK, T/A PAJA'S BEAUTY AND HEALTH CENTER, AND VIOLET M. McDANIEL, PLAINTIFFS, v. THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, DEFENDANT.

(Filed 20 March 1968)

1. Constitutional Law § 12—
A statute or ordinance which curtails the right of a person to engage in an occupation can be sustained as a valid exercise of the police power only if it is reasonably necessary to promote the public health, morals, order, safety or general welfare.

2. Same—
When the legislature undertakes to regulate a business, trade or profession, the courts will assume it acted within its powers until the contrary clearly appears.

3. Municipal Corporations §§ 24, 27—
If the manner in which a trade or occupation is conducted will probably result in injury to the public health, safety or morals, the police power of a municipality may lawfully be used to eliminate the hazard. G.S. 160-200(6).

4. Municipal Corporations § 27; Constitutional Law §§ 12, 14—
The occupation of a massagist and the business of massage parlors and similar establishments are proper subjects for regulation under the police power of a municipality, provided, however, that such regulation be uniform, fair and impartial in its operation.

5. Constitutional Law § 20—
Statutes and ordinances are void as class legislation whenever persons engaged in the same business are subject to different restrictions or are given different privileges under the same conditions.

6. Same—
Inequalities and classifications do not, *per se*, render a legislative enactment unconstitutional.

7. Same; Municipal Corporations § 27—
A municipal ordinance which prohibits a person of one sex from giving a massage to a patron of the opposite sex in a massage parlor, health salon or physical culture studio, but which permits such conduct in a barber shop, beauty parlor, or YMCA or YWCA health club, is unconstitutional, since it arbitrarily discriminates between businesses of the same class.

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

APPEAL by plaintiffs from *Hasty, J.*, 8 May 1967 Schedule "C" Non-Jury Session of MECKLENBURG, docketed and argued as Case No. 282 at the Fall Term 1967.

Action by plaintiffs to restrain the enforcement of an ordinance of the City of Charlotte (City).

On 12 December 1966, for the stated purpose of protecting the general health, safety, welfare, and morals of the area, City enacted

"An Ordinance Licensing and Regulating Massage Parlors, Health Salons and Similar Establishments." In brief summary, the ordinance provides: Any person desiring to engage in business as a masseur or masseuse, or to operate an establishment wherein physical treatment or manipulation of the human body is carried on, must first obtain a license from the city council. For the purposes of the ordinance, any person who applies either mechanical or manual massage to the body is deemed to be a masseur or a masseuse. Every applicant for a license must show good health and good moral character and produce either a diploma from a school of physical culture or proof that he or she has had at least two years of practical experience in a duly licensed massage or physical-culture studio. If the applicant is a corporation, its employees must meet the foregoing requirements. Licensees must file with the police department the names and addresses of all their employees and must keep, available for police inspection, accurate records of the names and addresses of all their patrons. No masseur, masseuse, or establishment licensed under the ordinance may engage in business except between the hours of 8:00 a.m. and 10:00 p.m. It shall be unlawful for any masseur, masseuse, or other licensee to treat an individual of the opposite sex except upon the signed order of a licensed physician, osteopath, or registered physical therapist. Such order must specify the number of treatments prescribed, the date and hour of each, and the name of the operator who will give each treatment. It is unlawful for a person under the age of 21 to receive treatment at any massage parlor or similar establishment.

By express provision, the ordinance does "not apply to a regularly established and licensed hospital, sanitarium, nursing home or medical clinic, nor to the office or clinic operated by a duly qualified and licensed medical practitioner in connection with his practice of medicine, provided, however, that such office or clinic is regularly used by such medical practitioner as his principal location for his practice of medicine; nor shall the provisions of this article apply to health club activities of the Young Men's Christian Association or the Young Women's Christian Association; nor shall the provisions of this article apply to duly licensed barber shops and beauty shops."

Plaintiffs allege that the occupation of masseur and masseuse is an ordinary lawful and innocuous business which has no effect upon the public health, safety, welfare, or morals; that the ordinance is an unreasonable and invalid exercise of the police powers of the City of Charlotte in that (1) the ordinance prohibits plaintiffs from engaging in their respective businesses and deprives them of a live-

lihood because — in the main — their patrons are men; and (2) the exemptions arbitrarily discriminate between plaintiffs and others of the same class. Plaintiffs seek a permanent injunction restraining City from enforcing the ordinance.

On 13 March 1967, Judge Froneberger issued a temporary restraining order, which was continued until the final hearing before Judge Hasty on 31 May 1967. The parties waived a jury trial and stipulated that Judge Hasty might hear the evidence, make findings of fact, and render final judgment on the merits of the cause. Both plaintiffs and defendant offered evidence.

Plaintiffs' evidence tended to show the following facts: Plaintiff Violet M. McDaniel is manager and masseuse at the BMG Health Company. On 12 December 1966, she worked in a similar capacity at Marie's Health Salon. All of the customers of Marie's in early December 1966 were men and all the employees were women (masseuses). Immediately prior to the enactment of the ordinance, Marie's employed four trained masseuses, whose weekly income was $70.00-$80.00. The average weekly income of the Health Salon varied from $500.00-$700.00. After the passage of the ordinance, Marie's closed until the latter part of February 1967, when a male massager (masseur) was obtained. The income of Marie's during a three-weeks' period with the male operator was only $60.00. After the temporary restraining order was obtained, the income of the salon returned to its pre-ordinance level.

Defendant's evidence tended to show: At the time the ordinance was passed, approximately 17 massage parlors, or health salons, were operating in the City of Charlotte. The city council enacted the ordinance at the request of the police department, which had received numerous complaints that certain lewd and unlawful conduct was routine in these establishments. Several plain-clothes police officers of the City, in the course of an official investigation, had visited the massage parlors, requested and received lewd massages. Their inquiries revealed that some of the massage parlors were likewise places of prostitution.

Judge Hasty found facts in accordance with all the evidence and concluded that (1) immoral acts are likely to result, and do result, from the massage of a person of one sex by a person of another sex in massage parlors and health salons; (2) that the challenged ordinance seeks to protect the health and morals of the Charlotte community; and (3) that the ordinance does not prohibit, but merely regulates, the conduct of massage parlors and health salons. He ruled that the ordinance was a constitutional exercise of City's police

powers and dissolved the restraining order, which had been issued on March 13th. Plaintiffs excepted to the judgment and appealed.

Craighill, Rendleman & Clarkson by Francis O. Clarkson, Jr., and Hugh B. Campbell, Jr., for plaintiff appellants.

Paul L. Whitfield for defendant appellee.

SHARP, J. Plaintiffs first attack the ordinance with the assertion that it unreasonably obstructs their right to earn a livelihood by giving massage treatments, which — they say — is an ordinary and harmless occupation which defendant has no authority to regulate.

The rule is that a statute or ordinance which curtails the right of any person to engage in any occupation can be sustained as a valid exercise of the police power only if it is reasonably necessary to promote the public health, morals, order, safety, or general welfare. *State v. Ballance,* 229 N.C. 764, 51 S.E. 2d 731. "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." *Lawton v. Stell,* 152 U.S. 133, 137, 38 L. ed. 385, 388-89, 14 S. Ct. 499, 501. When, however, the legislative body undertakes to regulate a business, trade, or profession, courts assume it acted within its powers until the contrary clearly appears. *Roller v. Allen,* 245 N.C. 516, 96 S.E. 2d 851. See 2 Strong, N. C. Index 2d, Constitutional Law § 12 (1967).

North Carolina has not considered the validity of an ordinance or statute regulating massage parlors, masseurs, masseuses, or similar operations. In *State v. Biggs,* 133 N.C. 729, 46 S.E. 401, by a special verdict, the jury found that defendant administered massage, baths, and physical culture, manipulated the muscles, bones, spine, and solar plexus, and kneaded the muscles with the fingers of the hand. He advised "his patients" what to eat, but he prescribed no drugs and performed no surgery. In reversing defendant's conviction for practicing medicine without a license, this Court stated: "There is nothing in this treatment that calls for an exercise of the police power by way of an examination by a learned board in obstetrics, therapeutics, *materia medica,* and the other things, a knowledge of which is so properly required for one who would serve the public faithfully and honorably as a doctor of medicine." The decision was: "The police power does not extend to such cases." *Id.* at 738, 46 S.E. at 404.

To hold that a massage treatment does not, by itself, constitute the practice of medicine is not to hold that massage parlors, health salons, and the activities of professional massagists cannot be regu-

lated. If the probable result of the manner in which they are conducted is injury to the public health, safety, or morals, City's police power may lawfully be used to eliminate the hazard. G.S. 160-200(6), (7); *State v. Harris,* 216 N.C. 746, 6 S.E. 2d 854; Chapter 713, § 6.41, N. C. Session Laws 1965. "From their nature," it appears that massage parlors are a business "where abuses of morality and violations of law may readily exist." *Hora v. City and County of San Francisco,* 43 Cal. Rptr. 527, 530 (Dist. Ct. App.).

The general right to regulate massagists on the grounds of public health, safety, and morality has been recognized in several cases. See Annot., Regulation of Masseurs, 17 A.L.R. 2d 1183, 1190 (1951).

Ex Parte Maki, 56 Cal. App. 2d 635, 133 P. 2d 64 (1943) (the leading case on this subject) involved the constitutionality of an ordinance of the City of Los Angeles which, *inter alia,* forbade any person, for hire or reward, to administer a massage to a person of the opposite sex unless the massage be given under the supervision of a licensed physician. The appellant there, as here, contended that the ordinance deprived him of a property right without due process of law and denied him the equal protection of the laws. In declaring the ordinance constitutional, the court said:

"The ordinance applies alike to both men and women. . . . The barrier erected by the ordinance against immoral acts likely to result from too intimate familiarity of the sexes is no more than a reasonable regulation imposed by the city council in the fair exercise of police powers." *Id.* at 635, 133 P. 2d at 67.

". . . The reasonable exercise of the police power in regulating any occupation in order to maintain the moral welfare does not arbitrarily deprive a person so engaged of his property. . . . Enactments that curb the vicious or restrain the wicked necessarily restrict the emoluments of his enterprise. However, such results are not to be considered in determining the validity of a law.

"* * *

"There is nothing in the ordinance that denies the equal protection guaranteed by the Fourteenth Amendment. It applies to all alike who give massages for hire and who are not licensed to practice one of the arts of healing." *Id.* at 643-44, 133 P. 2d at 68-69.

Patterson v. City of Dallas, 355 S.W. 2d 838 (Tex. Civ. App. 1962) was a suit to enjoin the enforcement of a comprehensive ordinance regulating massage establishments. *Inter alia,* it prohibited any person from administering a massage to a member of the opposite sex. Chiropractors, registered physical therapists, and registered nurses operating under the direction of a physician were excluded from the operation of the ordinance. In upholding the ordinance in

its entirety, the Texas court said that the case of *Ex Parte Maki* was so well decided that it was decisive of the appeal. The court encountered no difficulty in finding reasonable grounds for the discrimination in favor of the persons exempted. To sustain a criminal prosecution for a violation of the same ordinance, in *Connell v. State,* 371 S.W. 2d 45 (Tex. Crim. App. 1963), the court relied upon *Patterson v. City of Dallas. Accord, City of Houston v. Shober,* 362 S.W. 2d 886 (Tex. Civ. App. 1962); *Gregg v. State,* 376 S.W. 2d 763 (Tex. Crim. App. 1964).

People v. City of Chicago, 312 Ill. App. 187, 37 N.E. 2d 929 (1941) was a mandamus proceeding to compel Chicago to issue plaintiff a license to operate a massage parlor. His license had been revoked the preceding year when police investigation revealed that in plaintiff's business female attendants customarily massaged male patrons. This admitted fact, the court held, proved the mayor's refusal to issue the license to be neither unreasonable, arbitrary, nor capricious, but the exercise of a sound discretion.

We hold that the occupation of a massagist and the business of massage parlors and similar establishments are proper subjects for regulation under the police power of the City of Charlotte. Such regulation, however, must be uniform, fair, and impartial in its operation. "Even though statutes are passed in the interest of the public health, safety, or morals, they are void as class legislation wherever they are made to apply arbitrarily only to certain persons or classes of persons or to make an unreasonable discrimination between persons or classes. . . ." 16A C.J.S. *Constitutional Law* § 493 (1956).

Plaintiffs' second contention is that the ordinance is unconstitutional because it discriminates among persons and establishments of the same kind. Statutes and ordinances "are void as class legislation . . . whenever persons engaged in the same business are subject to different restrictions or are given different privileges under *the same conditions.*" 16A C.J.S. *Constitutional Law* § 496 (1956). (Emphasis added); *Clinton v. Oil Co.,* 193 N.C. 432, 137 S.E. 183; *State v. Glidden Co.,* 228 N.C. 664, 46 S.E. 2d 860. Inequalities and classifications, however, do not, *per se,* render a legislative enactment unconstitutional. *Ramsey v. Veterans Commission,* 261 N.C. 645, 135 S.E. 2d 659; *State v. Trantham,* 230 N.C. 641, 55 S.E. 2d 198; 2 Strong, N. C. Index 2d, Constitutional Law § 20 (1967).

" 'Class legislation' is not offensive to the Constitution when the classification is based on a reasonable distinction and the law is made to apply uniformly to all the members of the class affected.

Or, as the principle is more often expressed, when the law applies uniformly to all persons in like situation, — which of itself implies that the classification must have a reasonable basis, without arbitrary discrimination between those in like situation." *State v. Glidden Co., supra* at 666, 46 S.E. 2d at 862. *Accord, Motley v. Board of Barber Examiners,* 228 N.C. 337, 45 S.E. 2d 550.

Applying the fundamental rules of constitutional law set out above, it is clear that the ordinance in suit cannot withstand plaintiffs' second attack. There is no reasonable ground for putting barber shops, beauty parlors, Y. M. C. A. and Y. W. C. A. health clubs in a separate classification from massage parlors, health salons, or physical culture studios. Therefore, an ordinance which prohibits a person of one sex from giving a massage to a patron of the opposite sex in the latter, and permits it in the former, makes a purely arbitrary selection. It "has no reasonable relation to the purpose of the law, only serving to mechanically split into two groups persons in like situations with regard to the subject matter dealt with but in sharply contrasting positions as to the incidence and effect of the law." *State v. Glidden Co., supra* at 668, 46 S.E. 2d at 862.

Obviously, the city council felt that the activities which the ordinance seeks to eliminate were not then being carried on in the exempted establishments. Notwithstanding, as presently written, the ordinance prohibits the proprietors and employees of a massage parlor from doing acts which can be done with impunity under similar circumstances in a barber shop or any of the other exempted places of business. Such favoritism cannot be sustained. *Clinton v. Oil Co., supra.*

The judgment of the court below is
Reversed.

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

HAZEL MARIE ROBBINS BRADY v. WILLIAM GLENN BRADY.

(Filed 20 March 1968)

1. Divorce and Alimony § 18—

Chapter 1152, 1967 Session Laws, repealing G.S. 50-16 and establishing G.S. 50-16.1, *et seq.*, as the authority in actions for alimony and alimony *pendente lite,* does not apply to an action instituted prior to the 1967 enactment.

2. Same—

The remedy of subsistence and counsel fees *pendente lite* enables the wife to maintain herself according to her station in life and to employ counsel in order to meet her husband at the trial upon substantially equal terms.

3. Same—

The amount of subsistence and counsel fees *pendente lite* is within the discretion of the court, and such discretion is not absolute but is confined to a consideration of the necessities of the wife and the means of the husband.

4. Same—

Allegations and proof by the wife that the defendant had offered such indignities to her as to render her condition intolerable and her life burdensome, and that she consequently left the home, *are held* sufficient to support a finding that the husband abandoned the wife.

5. Same—

In the wife's action for alimony without divorce pursuant to G.S. 50-16, the court, in a hearing to determine subsistence and counsel fees *pendente lite*, is not bound by findings in a similar hearing in the wife's previous action where the wife took a voluntary nonsuit before defendant asserted any claim or demanded affirmative relief.

6. Same—

A finding by the court that it was not within the means of the defendant husband to maintain two separate living establishments is an improper predicate for denying the wife's claim for subsistence and counsel fees *pendente lite.*

7. Same—

Where the court's finding with respect to the wife's unfitness to have custody of the children is contrary to the medical testimony, and where the court's finding with respect to the wife's ability to support herself is not supported by any evidence, it appears that the court did not exercise its discretion in the light of controlling factual conditions, and the cause is remanded for further hearing.

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

APPEAL by plaintiff from *Bailey, J.*, 27 March 1967 Civil Session of RANDOLPH. Docketed and argued as Case No. 603, Fall Term 1967, and docketed as Case No. 601, Spring Term 1968.

This is an action for alimony without divorce under the provisions of G.S. 50-16. Plaintiff and defendant were married on 3 September 1951, and three children were born of the marriage. They were ages 7, 8 and 11 years at the time of institution of this action by summons issued 3 March 1967.

Plaintiff alleged that defendant is a habitual drunkard, that he has falsely accused her of sexual promiscuity, that he has been "con-

ducting an affair" with a named third party, that he has on many occasions brutally slapped her, that he refuses to eat or sleep with her, that he has cursed her, that on 14 February 1967 she was forced to take the three children and leave the home for that defendant failed to provide necessary food for them, that since 14 February 1967 the defendant has wilfully failed and refused to support plaintiff and their three children, that such acts were without any provocation whatsoever on the part of the plaintiff and that they have made her condition intolerable and her life burdensome. She further alleged that she and the defendant are owners in fee simple of a home in Randolph County, that defendant will not leave the home, and that she has had to take the children and move into an apartment in the town of Randleman. She also alleged that she is without sufficient funds to support herself and their children and to bear the cost of litigation; that she is physically able to care for the children and is a fit and proper person to have custody. She asked the court to grant her subsistence, custody and support of the children, counsel fees, and a writ of possession for the homeplace.

Except for the facts of marriage, and birth of the children, defendant denied plaintiff's allegations. By way of further answer, he alleged that he has worked hard to support his family, that he recently completed a home which was built according to plaintiff's plans, that plaintiff has continually stated that she hates the home and does not want to stay there any more, that he has never been intoxicated and does not now drink "except on occasions," that for a period of several months prior to institution of this action plaintiff had been through a severe stress due in part to her physical condition, that she "swore out a peace warrant against" him and later withdrew the complaint, that she withdrew the sum of $945 from their joint savings and loan account, deposited it in the children's names and her name and refused to let him have any of the money to pay household bills, that plaintiff professes love for him and expresses the desire to continue the marriage one day and on the next day curses him and tells him to leave and never come back, and that she has persisted in leaving him without just cause. Defendant further alleged that on 26 January 1967 plaintiff instituted an action against him which was substantially the same as the present action, that a hearing was held in the former action on 2 February 1967 before Olive, E.J., and that following the hearing the court found that the defendant had not offered indignities to the person of plaintiff so as to make life burdensome and intolerable, and denied plaintiff's request for relief.

This cause was heard on motion of plaintiff for subsistence and

counsel fees *pendente lite,* custody and support of the children, and possession of the home. Plaintiff introduced evidence by affidavit and her own testimony in support of the allegations of her complaint. She testified that all of the affidavits introduced in evidence were furnished after the hearing on 2 February 1967, and that no affidavits had been used at that hearing. It was the consensus of affiants that plaintiff is a fit and proper person to have custody of the children. There was evidence aside from plaintiff's complaint treated as an affidavit to support the indignities alleged by her.

After the hearing the court found facts, including the following to which plaintiff excepted:

> "That the plaintiff brought an action against the defendant containing substantially similar allegations as this action on 26 January 1967, and being S. D. Number 3186.
>
> "That thereafter the plaintiff took a voluntary nonsuit in said action and on 3 March 1967 instituted the instant action seeking substantially the same relief upon substantially the same grounds.
>
> "That the plaintiff has suffered from vertigo at least since December 1960.
>
> "That in early 1962 she was treated foı acute depressive reaction which has continued until at least January 1967.
>
> "That on two occasions since 12 February 1967 the plaintiff has sought to have the defendant placed under a peace bond, and in one instance the relief sought was denied and in the other the plaintiff withdrew the matter before it could be heard.
>
> "That since 25 January 1967 the plaintiff has instituted four actions against the defendant causing the defendant to incur substantial expense in defending said actions.
>
> "That the defendant earns a net income after taxes of approximately $4,000.00 per year, and pays $64.00 per month plus $4.13 per month for insurance upon the indebtedness on the home owned by the plaintiff and the defendant.
>
> "That it is not possible to maintain two places of abode and two separate living establishments within the means of the defendant.
>
> "That the defendant is a fit and proper person to have custody of the minor children of the marriage.

"That the plaintiff *except for her health problems* is a fit and proper person to have custody of said children. (Plaintiff excepts to the underlined portion only.)

"That said interests can best be served by placing the care, custody, control and tuition of said children with their father with reasonable visitation rights granted to their mother.

"That the plaintiff has worked in the past and when relieved of the necessity of caring for said children will probably be able to support herself.

"That the plaintiff has not made out a case upon which the relief sought can be granted."

The court then entered judgment awarding custody of the children to the defendant with visitation rights for plaintiff, denying plaintiff's application for a writ of possession of the home, and restraining plaintiff from bringing any further action against the defendant for any matter or thing arising between them prior to 14 February 1967. The court found that plaintiff's counsel had already received reasonable compensation, *pendente lite,* paid from joint funds of plaintiff and defendant, and ordered no further amount for attorney fees. Plaintiff objected and excepted to the signing of the order and assigned as error the findings of fact itemized above, the court's conclusions, and the signing of the order.

Walker, Bell & Ogburn by John N. Ogburn, Jr., for defendant appellee.

Ottway Burton for plaintiff appellant.

PARKER, C.J. G.S. 50-16, under which this action was brought, was repealed by Chapter 1152 of the 1967 Session Laws, effective 1 October 1967. The Act established G.S. 50-16.1 through G.S. 50-16.10 as the authority and procedure in actions for alimony and alimony *pendente lite.* Section 9 of the Act provides that it shall not apply to pending litigation. Decision in this case must rest upon our interpretation of G.S. 50-16 as it existed prior to the 1967 enactment. *Schloss v. Schloss,* 273 N.C. 266, 160 S.E. 2d 5.

The wife may institute action under G.S. 50-16 if the husband separates himself from her and fails to provide her and the children of the marriage with necessary subsistence, or if he shall be a drunkard or spendthrift, or if "he be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or

from bed and board." G.S. 50-16; *Richardson v. Richardson,* 268 N.C. 538, 151 S.E. 2d 12; *Thurston v. Thurston,* 256 N.C. 663, 124 S.E. 2d 852. G.S. 50-7 authorizes divorce from bed and board where either party (1) abandons his or her family, or "(4) Offers such indignities to the person of the other as to render his or her condition intolerable and life burdensome."

G.S. 50-16 "provides two remedies, one for alimony without divorce, and another for subsistence and counsel fees pending trial and final disposition of the issues involved." The remedy of subsistence and counsel fees *pendente lite* is intended to enable the wife to maintain herself according to her station in life and to employ counsel to meet her husband at the trial upon substantially equal terms. *Myers v. Myers,* 270 N.C. 263, 154 S.E. 2d 84; *Richardson v. Richardson, supra; Fogartie v. Fogartie,* 236 N.C. 188, 72 S.E. 2d 226.

The amount of subsistence and counsel fees *pendente lite* to be allowed is within the discretion of the court, and the court's decision is not reviewable except for abuse of discretion or error of law. *Sayland v. Sayland,* 267 N.C. 378, 148 S.E. 2d 218; *Griffith v. Griffith,* 265 N.C. 521, 144 S.E. 2d 589. However, the discretion of the court in making allowances *pendente lite* is not an absolute discretion to be exercised at the pleasure of the court. "It is to be exercised within certain limits and with respect to factual conditions which are controlling . . . Generally speaking (and excluding statutory grounds for denial), allowance of support to an indigent wife while prosecuting a meritorious suit against her husband under G.S. 50-16, for alimony without divorce . . . is so strongly entrenched in practice as to be considered an established legal right. . . . In such case discretion is confined to consideration of the necessities of the wife on the one hand, and the means of the husband on the other." *Butler v. Butler,* 226 N.C. 594, 39 S.E. 2d 745. These principles were quoted and applied in the case of *Garner v. Garner,* 270 N.C. 293, 154 S.E. 2d 46. The court, of course, must look into the merits of the action and would not be justified in making an allowance where the plaintiff, in law, has no case. The only defense limiting the power of the trial court to award subsistence is adultery of the wife, as set forth in the statute. Even when this defense is successfully interposed the court may allow reasonable counsel fees. *Oldham v. Oldham,* 225 N.C. 476, 35 S.E. 2d 332. "The granting of alimony *pendente lite* is given by statute for the very purpose that the wife have immediate support and be able to maintain her action. It is a matter of urgency." *Williams v. Williams,* 261 N.C. 48, 134 S.E. 2d 227.

The court below concluded "that the plaintiff has not made out

a case upon which the relief sought can be granted." The basis of this finding is not made clear in the record before us. Plaintiff's theory as set forth in the pleadings and evidence was that the defendant had abandoned her and had offered such indignities to her as to render her condition intolerable and life burdensome. This Court held in *McDowell v. McDowell,* 243 N.C. 286, 90 S.E. 2d 544, that allegations that plaintiff was compelled to leave her husband because of his willful failure and refusal to provide her with support and that his failure was without provocation on her part were sufficient to state a cause of action for alimony without divorce on the ground of abandonment. There was evidence from which the court below could have found an abandonment by defendant or an offer of such indignities as to render plaintiff's condition intolerable and life burdensome.

The trial court indicated that it had some question about its authority to find in favor of the plaintiff because of the previous similar action brought by her and the adverse ruling made at the hearing in that action. The finding made in the previous action was not binding in the present action. Where the defendant asserts no claim and demands no affirmative relief, plaintiff, in an action for alimony without divorce, may take a voluntary nonsuit. *Griffith v. Griffith, supra.* In the previous action between these parties, the plaintiff took a voluntary nonsuit as she was entitled to do. The pleadings filed in the earlier action do not appear in the record before us. Conceding that they were similar, there is at least one new allegation. In the present action the plaintiff alleged that she was forced to take her children and leave the home on 14 February 1967. This allegation obviously could not have been included in an action instituted 26 January 1967 and heard on 2 February 1967. Further, the evidence presented at the hearing in the present action was much more extensive than that presented at the hearing before Judge Olive. Affidavits of 14 persons were introduced at the hearing in the present action, whereas none were introduced at the previous hearing.

The court found as a fact "that it is not possible to maintain two places of abode and two separate living establishments within the means of the defendant." This finding may have had some bearing on the court's conclusion that the plaintiff had not made out a case upon which relief could be granted. It is not a proper ground upon which the court could base its conclusion. This Court said in *Harrell v. Harrell,* 253 N.C. 758, 117 S.E. 2d 728: "The granting of an allowance and the amount thereof does not necessarily depend upon the earnings of the husband. One who has no income, but is able-bodied and capable of earning, may be ordered to pay subsistence."

In *Reavis v. Reavis*, 271 N.C. 707, 157 S.E. 2d 374, this Court affirmed an order for support payments where the husband's weekly take-home pay was conceded to be only $60.36 per week.

The trial court implied that plaintiff's health rendered her an unfit and improper person to have custody of the children. All the medical testimony on this question was contrary to the court's finding. Three doctors submitted affidavits that they had seen the plaintiff professionally during the latter part of March, 1967, and expressed the opinion that plaintiff's health had improved to the extent that it would not in any way interfere with her care and custody of the children.

The trial court found "that the plaintiff has worked in the past and when relieved of the necessity of caring for said children will probably be able to support herself." If there was evidence to support this finding, it does not appear in the record.

From the record, it appears that the learned judge's discretion with respect to custody of the children and allowances to the wife was not exercised with respect to factual conditions which are controlling. *Garner v. Garner, supra; Butler v. Butler, supra;* and that his conclusion probably was based upon a mistaken view of the law. *Myers v. Myers, supra; Sayland v. Sayland, supra.* There is sufficient evidence to support the court's finding that reasonable compensation *pendente lite* had already been paid to plaintiff's counsel, and its order as to this is affirmed. For error in the court's order with respect to the remaining issues, the cause is remanded for further proceedings in accordance with this opinion. The question of entitlement to an allowance of fees to plaintiff's counsel for services rendered following the conclusion of the hearing below will be for determination by the judge presiding at the next hearing.

Error and remanded.

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

STATE OF NORTH CAROLINA v. GEORGE KIRBY.

(Filed 20 March 1968.)

1. Criminal Law §§ 41, 99—

While the Court may not ask questions reasonably calculated to impeach or discredit a witness or his testimony, the court may propound competent questions to a witness in order to clarify the witness' testi-

mony or to develop some fact overlooked, and the fact that such a question requires a response that is circumstantial evidence does not render it incompetent.

2. Homicide § 19; Criminal Law § 33—

Testimony describing a deceased's wounds is competent to show the violence of the transaction, particularly where the question of the use of excessive force is raised by defendant's plea of self-defense, and such testimony will not be excluded merely because it may excite prejudice against the defendant.

3. Criminal Law § 99—

A question propounded by the court as to how wounds found on the deceased compared with each other *is held* a question to develop a relevant fact which had been overlooked and is not an expression of opinion by the court on the evidence.

4. Homicide § 9—

One may kill in self-defense if it is necessary or if he reasonably believes it is necessary to protect himself from death or great bodily harm, it being for the jury to determine the reasonableness of the belief upon the facts and circumstances as they appeared to the defendant at the time of the killing.

5. Homicide § 27—

The court's charge relating to the actual or apparent necessity for defendant to act in self-defense, and as to whether defendant used only such force as was necessary, or reasonably appeared to him to be necessary, to save himself from death or great bodily harm *is held* to be proper in this case.

APPEAL by defendant from *Cohoon, J.*, August 1967 Mixed Session of SAMPSON.

Defendant was charged in a bill of indictment with murder in the first degree. At the beginning of the trial the solicitor announced that he would not put the defendant on trial as charged in the bill, but would seek a verdict of guilty of murder in the second degree or manslaughter, as the jury might determine. Defendant entered a plea of not guilty.

The evidence presented by the State was, in substance, as follows:

King Boykin testified that he operated "a piccolo place" where he sold food and drinks. On the night of 3 July 1967 he was in his place of business. He became aware of a disturbance while he was behind the counter where he served food through a window. He had heard no conversation between defendant and Harvey McPhail, the deceased. He heard a noise and saw people "jumping up" and running and saw defendant advancing on McPhail with a knife. McPhail backed up and defendant stabbed him twice. Defendant ran between

two tables and McPhail fell face down on the floor after defendant had stabbed him again. Defendant then backed out the door and Boykin did not see him again that night. Boykin stated that he saw nothing in McPhail's hand.

Daniel F. Culbreth testified that he was in King Boykin's place at the time the stabbing occurred. He heard defendant and McPhail arguing about buying a girl a drink. He saw defendant stab McPhail two times as McPhail was backing up and then stab him a third time in the back as McPhail bent forward. He saw a knife in defendant's hand but did not see anything in McPhail's hands. Defendant hesitated over McPhail a little while then ran out. McPhail was carried out to a car and taken to a hospital.

By stipulation, a letter written by Dr. J. Cooper Howard was read into evidence. In the letter the doctor stated, in part, that in his opinion death was due to massive hemorrhage, secondary to the stab wound to the heart. It was also stipulated that Harvey McPhail was dead upon arrival at Sampson County Memorial Hospital that night.

At the close of the State's evidence defendant's motion for nonsuit was overruled.

Defendant testified in his own behalf and stated that he went to King Boykin's place on the night of 3 July 1967 with Emma Melvin and two other persons. While there he danced with Emma and then another girl. After dancing, and as he approached Emma to tell her he was ready to leave, Joe McLamb stepped on defendant's foot with his crutch. McLamb apologized to defendant. McPhail, who was standing near Emma, made a statement to the effect that McLamb did not have to apologize to defendant. Defendant stated that he (defendant) smiled, turned, and started walking out when he heard someone shout "watch it." He turned to his left and saw a hawkbill knife come down over his head. Defendant grabbed McPhail's arm and resisted the latter's efforts to cut him. During this time defendant reached in his pocket for his knife, stabbed McPhail, and ran outside. Defendant stated that he took his knife out of his pocket because he was scared McPhail was "going to kill me and cut me up." He could not recall stabbing McPhail more than once. He asked Larry Simmons to drive him to a doctor because he thought he had been cut. When he discovered that he was not cut defendant told Simmons to let him out near County-wide Sewing Company, where he stayed until 4:00 a.m. He went to the jailhouse around 8:00 a.m. where he told the sheriff what had happened.

The State was allowed to introduce out of order the testimony of Woodrow W. Carr, who testified that he was part-owner and a

co-partner in Robinson and Carr Funeral Home in Clinton. He saw Harvey McPhail on 4 July 1967 and observed his wounds. Carr further stated:

> "He had approximately a two-inch stab wound in the heart, a gapping wound which was at least two inches in the left shoulder blade and another gapping wound in his back. This was about in the middle of the back. That was a stab wound."

At this point defendant presented further evidence.

Emma Melvin stated that she was with defendant the night the stabbing occurred. Her testimony tended to corroborate the testimony of defendant, as did the testimony of other witnesses offered by defendant.

Sheriff J. W. Norton testified that he had investigated the incident and had talked with Emma Melvin and defendant. Norton's testimony as to what they had said to him tended to corroborate their testimony. Norton's statement as to what King Boykin told him that night also tended to corroborate Boykin's testimony.

At the conclusion of the evidence defendant renewed his motion for nonsuit, which was overruled.

The jury found defendant guilty of second degree murder. Defendant moved to set aside the verdict and for a new trial, which motion was denied. Judgment was entered on the verdict.

Defendant appealed.

Attorney General Bruton and Assistant Attorney General Bernard A. Harrell for the State.

Joseph B. Chambliss for defendant.

BRANCH, J. Defendant assigns as error the court's question to witness Woodrow Carr: "Speaking of the three wounds, how did they compare with each other?"

The presiding judge is entirely justified in propounding competent questions to a witness in order to clarify what a witness has said or to develop some relevant fact which has been overlooked. However, care must be exercised to avoid indirect expression of opinion on the facts, and it is improper for the trial judge to ask questions which are reasonably calculated to impeach or discredit the witness or his testimony. *State v. Kimrey,* 236 N.C. 313, 72 S.E. 2d 677.

Testimony describing wounds found on a deceased is competent as showing the violence of the transaction. *State v. Artis,* 227 N.C. 371, 42 S.E. 2d 409. This rule is particularly applicable here, since defendant by his plea of self-defense raises the question of whether

excessive force was used. Further, since the evidence is relevant, it will not be excluded because it might excite prejudice against defendant. *State v. Green,* 251 N.C. 40, 110 S.E. 2d 609.

Defendant argues in his brief that the answer to the question propounded by the court is circumstantial evidence and thus erroneous.

Conceding, *arguendo,* that the evidence is circumstantial, the mere fact that it is circumstantial does not render it inadmissible.

"Circumstantial evidence, which is evidence of facts from which other matters may be fairly and sensibly deduced, is competent and is highly satisfactory in matters of gravest moment." 2 Strong, N. C. Index 2d, Criminal Law, § 41, p. 546. The single question asked by the trial judge concerned a relevant fact which had apparently been overlooked. He did not cross-examine the witness, nor did the question tend to express an opinion as to the facts of the case.

Defendant's plea of self-defense, coupled with the compelling evidence that defendant inflicted the wound causing deceased's death, further dissipates any possibility of prejudicial error arising from the question. This assignment of error is overruled.

Defendant contends that the trial court erred in its instruction to the jury with respect to defendant's plea of self-defense in general and specifically as related to the crime of manslaughter.

In the case of *State v. Fowler,* 250 N.C. 595, 108 S.E. 2d 892, this Court stated:

> "The pertinent principles of law are clearly set forth in *S. v. Marshall,* 208 N.C. 127, 129, 179 S.E. 427, as follows:
>
> 'The right to kill in self-defense or in defense of one's family or habitation rests upon necessity, real or apparent, and the pertinent decisions are to the effect:
>
> '1. That one may kill in defense of himself, or his family, when necessary to prevent death or great bodily harm. (Citing authority.)
>
> '2. That one may kill in defense of himself, or his family, when not actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief. (Citing authority.)
>
> '3. That the reasonableness of this belief or apprehension must be judged by the facts and circumstances as they appeared to the party charged at the time of the killing. (Citing authority.)
>
> '4. That the jury and not the party charged is to determine

> the reasonableness of the belief or apprehension upon which he acted. (Citing authority.)' See also *S. v. Goode, supra,* at page 634.
>
> . . . . .
>
> A defendant, when acting in his proper self-defense, may use such force only as is necessary, or as reasonably appears to him at the time of the fatal encounter to be necessary, to save himself from death or great bodily harm. 'The reasonableness of the apprehension of necessity to act, and the amount of force required, must be judged by the jury upon the facts and circumstances as they *appeared* to the defendant at the time of the killing.' *S. v. Moore,* 214 N.C. 658, 661, 200 S.E. 427; *S. v. Bryant,* 231 N.C. 106, 55 S.E. 2d 922."

See also *State v. Francis,* 252 N.C. 57, 112 S.E. 2d 756.

In this connection defendant relies on three assignments of error.

By his Assignment of Error No. 4 defendant attacks the trial judge's instruction in that "the court required the jury to consider upon the question of self-defense as to whether or not the defendant used excessive force in his defense when the question before the jury, as to self-defense, was whether or not he had reasonable cause to believe and did believe that such force was necessary to protect himself from impending danger or great bodily harm."

The judge in this portion of the charge, *inter alia,* instructed the jury:

> "Now, in this case, if you should be satisfied from all the evidence in the case, that at the time and place in question, the defendant, Kirby, was without fault and that he was being wrongfully assaulted by Harvey McPhail with a knife and under such circumstances that would create in the defendant, Kirby's, mind, a reasonable ground for him to believe or for him to reasonably apprehend that he, that is the defendant at the time was about to suffer death or great bodily harm unless he cut McPhail; and that he, the defendant did not use more force than reasonable appeared to him under the circumstances, to repel the assault on him by McPhail, if such an assault if you find to have occurred by McPhail; thence the defendant, Kirby, had the right to kill McPhail and the defendant, Kirby, would not be guilty in such case of any crime, neither murder in the second degree nor manslaughter."

Defendant contends by Assignment of Error No. 5 that the court erred "in that the court has charged the jury to decide whether or not the defendant used excessive force while in defense of his life

when the question before the jury was whether or not the defendant had, under all the circumstances, reasonable cause to believe and did believe that the force he used was necessary to protect himself from impending danger or great bodily harm."

Within the portion of the charge here assigned as error the trial court charged:

> ". . . then it would be your duty to convict the defendant of manslaughter, unless he has established to the satisfaction of you the jury of the facts he relies on to make good his plea of self-defense and when you come to consider his plea of self-defense, you should ask yourself these questions: Did the defendant stab Harvey McPhail with a knife, that took the life of the deceased, Harvey McPhail; if such you find and was the defendant at a place where he had the right to be and was he, that is the defendant himself, without fault in bringing on or entering into an encounter or difficulty with the deceased; was he unlawfully or feloniously assaulted by the deceased; did he believe and have reasonable grounds to believe that he was about to suffer death or great bodily harm at the hands of the deceased, Harvey McPhail; did he act with ordinary firmness and prudence, under the circumstances as they reasonably appeared to him and under the belief that it was necessary to kill the deceased in order to overcome an assault being made upon him; if such you find, to save his own life or to protect his person from enormous bodily harm. Did he use no more force that was reasonably necessary or reasonably appeared to him to be necessary to repel the assault which he contends the deceased was making upon him at the time he struck him with a knife."

The court then charged that if the jury should answer these questions in the affirmative, it would be their duty to acquit defendant.

Defendant by Assignment of Error No. 6 contends that the court erred in that "included in this portion of the charge as to the guilt or innocence of the defendant of manslaughter is a requirement placed upon the defendant to show, under his plea of self-defense that he used no more force than he believed to be reasonably necessary to repel the assault when the question before the jury was not the force used but whether or not he had, under all the circumstances, reasonable cause to believe and did believe that such force was necessary to protect himself from impending danger or great bodily harm."

Here the court charged:

> ". . . that (if) the prisoner has satisfied you from the evidence in the case, that at the time he stabbed and killed the deceased, Harvey McPhail, if you find that he did, that he, the defendant was at a place where he had a right to be and that he was himself without fault and that he was unlawfully or feloniously assaulted or threatened with an assault by the deceased, Harvey McPhail, in such a way and manner, that the defendant believed and had reasonable grounds to believe, that he was about to suffer death or great bodily harm at the hands of the deceased, and that in the exercise of ordinary firmness and prudence, he used no more force than he believed to be reasonably necessary to repel the assault which the deceased was making upon him at the time he struck the deceased with a knife."

The judge then charged: "Then I charge you, that the killing of the deceased, Harvey McPhail, would be excusable homicide and if you so find to your satisfaction, it would be your duty to render a verdict of not guilty in the case."

In each of the assignments of error the court properly and in substantial compliance with recognized principles of law instructed the jury as to actual or apparent necessity for defendant to act in self-defense, and as to whether defendant used only such force as was necessary, or reasonably appeared to him to be necessary, at the time of the killing to save himself from death or great bodily harm.

In the case of *State v. Howard,* 222 N.C. 291, 22 S.E. 2d 917, the trial judge read to the jury a statute in regard to punishment and cautioned the jury that punishment was not to be considered by them as bearing on defendant's guilt or innocence. Defendant excepted and appealed. In considering this exception, this Court said:

> "While the reading of a statute to the jury in regard to punishment is not to be commended, we are not prepared to hold that it alone is sufficiently prejudicial to the defendant to require a new trial. Such a rule, strictly applied, might unduly fetter the judge in giving instructions to the jury, or advising them of the exact language of the statute the defendant is charged with violating. The trial judge has wide discretion as to the manner in which he presents an issue of fact to the jury, so long as he charges the applicable principles of law correctly, and states the evidence plainly and fairly without expressing an opinion as to whether any fact has been fully or sufficiently proven. C.S. 564. It is his high duty to hold the scales evenly between all parties. There are no stereo-typed forms of instruc-

tions. No two cases are exactly alike, and the trial judge's ruling should be considered by the appellate Court in the light of the circumstances of the trial. The rule prevails that in order to overthrow the verdict and judgment it must be made to appear not only that the action of the trial judge complained of was erroneous, but that it was 'material and prejudicial, amounting to a denial of some substantial right.' *Collins v. Lamb,* 215 N.C. 719, 2 S.E. 2d 863."

Here, the trial court charged the applicable principles of law correctly, fairly presented the evidence and contentions of defendant and the State, and properly applied the law to the substantive features of the case.

Defendant has failed to show any prejudicial error.

No error.

MRS. BETTY S. PARDUE, ADMINISTRATRIX OF THE ESTATE OF JAMES M. PARDUE, DECEASED, v. CHARLOTTE MOTOR SPEEDWAY, INC.

(Filed 20 March 1968.)

1. Games and Exhibitions § 3—

As a general rule the owner or operator of an automobile race track is charged with the duty of exercising care commensurate with any known or reasonably foreseeable danger to prevent injury to patrons or participants.

2. Games and Exhibitions § 2—

The owner or operator of an automobile race track is under a duty to erect fences or barriers for the safety of the spectators where the need is obvious or where experience shows that such barriers are necessary for the reasonable protection of the spectators.

3. Pleadings § 2—

The complaint must allege the facts constituting the cause of action so as to disclose the issuable facts determinative of plaintiff's right to relief.

4. Pleadings § 12—

A demurrer admits for the purpose of testing the legal sufficiency of the pleading the truth of well stated facts and relevant inferences of fact reasonably deducible therefrom, and the pleading will be liberally construed with a view to substantial justice between the parties.

5. Negligence § 20—

A complaint which alleges negligence in a general way without setting forth with some reasonable degree of particularity the things done, or

omitted to be done, by which the court can see that there has been a breach of duty is defective and open to demurrer.

6. Games and Exhibitions § 3—

Allegations that plaintiff's intestate was engaged in testing tires on defendant's race track at speeds in excess of 150 miles per hour, that the front right tire of intestate's automobile ruptured, causing the car to veer toward the edge of the track, that a guard rail maintained by defendant gave way upon contact, and that intestate crashed to his death outside the track, *are held* insufficient to state a cause of action in the absence of allegations setting forth particular facts detailing defendant's negligence in improperly maintaining the guard rails.

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

APPEAL by plaintiff from *Gambill, J.*, in Chambers, 13 May 1967 Session of WILKES. Docketed and argued as Case No. 445, Fall Term 1967, and docketed as Case No. 441, Spring Term 1968.

Civil action to recover damages for alleged wrongful death heard upon a demurrer.

This is a summary of the crucial allegations of fact contained in the complaint: On 22 September 1964 and prior thereto defendant was engaged in Mecklenburg County in the operation of a race track or motor speedway where automobile races and tests of automobiles and automobile equipment were conducted. On 16 September 1964 defendant for a valuable consideration entered into an agreement whereby defendant made its race track available to the Goodyear Tire & Rubber Company of Akron, Ohio, for the purpose of allowing said tire company to conduct certain high-speed tests of Goodyear tires. These were to be conducted during a three-day period. A xerox copy of this agreement is attached to the complaint and made a part thereof. In this agreement the Goodyear Tire & Rubber Company stated that the charge for using the race track on these days would be $100 a day. This is also set forth in this agreement:

> "While these tests are in progress, we will arrange to have you named as an additional insured on our policy of public liability insurance. A certificate of such policy showing the insurance limits will be furnished to you before testing commences. In addition, we will provide competitor's insurance including certain death, disability, dismemberment and medical benefits for all personnel engaged in these tests. In consideration of making this insurance available to drivers and other personnel involved in the tests, we will secure from them full releases which will cover you as well as ourselves."

Plaintiff's intestate, James M. Pardue, for a consideration of $3 per mile, as an employee of Burton-Robinson, Inc., was hired by Goodyear Tire & Rubber Company of Akron, Ohio, to conduct certain tests of the tires of said tire company on defendant's race track on 21, 22, and 23 September 1964. Pursuant to said contract, plaintiff's intestate went to the Charlotte Motor Speedway for the purpose of conducting said tests.

On 22 September 1964 while plaintiff's intestate was engaged in conducting high-speed tests of Goodyear tires on the race track of the Charlotte Motor Speedway, Inc., at speeds in excess of 150 miles per hour, the right front tire on the automobile driven by plaintiff's intestate ruptured causing said automobile to speed toward the steel corrugated guard rail which defendant had placed along the outside edge of the race track for the purpose of preventing automobiles from leaving said track. However, this guard rail came apart when the automobile driven by plaintiff's intestate crashed through it. The automobile then fell approximately 50 feet to the ground and struck a fence. The steel post of this fence was knocked from the ground and flew through the left side window of the automobile and hit plaintiff's intestate in the head causing his death.

The death of plaintiff's intestate was proximately caused by the negligence of the defendant in the following particulars: (1) Defendant maintained, leased, and permitted the use of its race track for the purposes of conducting automobile races and tests of automobiles and automobile equipment at speeds in excess of 150 miles per hour, when defendant knew, or in the exercise of due care should have known, that the guard rail through which this automobile crashed was improperly constructed and inadequate for preventing automobiles traveling at these high speeds from leaving said race track. (2) Defendant failed to warn the drivers on its race track of this inadequacy and improper construction of the guard rail.

The record shows that the "defendant demurs *ore tenus* in that the complaint fails to state cause of action against the defendant."

From a judgment sustaining the demurrer to the complaint, plaintiff appeals.

Jordan, Wright, Henson & Nichols and McElwee & Hall by Welch Jordan and Edward L. Murrelle for plaintiff appellant.

John H. Small; Sanders, Walker and London by Robert G. Sanders; Moore and Rousseau by Larry S. Moore for defendant appellee.

PARKER, C.J. The instant case does not involve an injury to a

spectator. We have here the death of a voluntary participant who was killed on defendant's race track while conducting high-speed tests of Goodyear Tire & Rubber Company tires at a speed of about 150 miles per hour, when the right front tire on the automobile he was operating ruptured and the automobile crashed through a guard rail on the outside edge of the race track, fell approximately 50 feet to the ground, and struck a steel post which came through the left side window of the automobile killing the driver. Do the facts of this case disclose the breach of any duty owed to plaintiff's intestate by the race track owner?

The general rule is that the owner or operator of an automobile race track is charged with the duty of exercising reasonable care, under the circumstances present, for the safety of patrons and participants in the racing; that is, a care commensurate with any known or reasonably foreseeable danger. *Williams v. Strickland,* 251 N.C. 767, 112 S.E. 2d 533; *Lane v. Drivers Association,* 253 N.C. 764, 117 S.E. 2d 737; 37 A.L.R. 2d 391, where many cases are cited; 4 Am. Jur. 2d, Amusements and Exhibitions § 81.

This is said in Annot. 37 A.L.R. 2d 391 at 394, and quoted with approval in the *Williams* and *Lane* cases: "If the need is obvious or experience shows that an automobile race of the character and in the place proposed requires, in order to afford reasonable protection to spectators, the erection of fences or similar barriers between the track and the places assigned to them, it becomes a part of the duty in exercising reasonable care for their safety to provide fences or barriers, the adequacy of which is dependent on the circumstances present, principally the custom of the business." At page 395 of this same annotation will be found a number of cases in respect to the absence or inadequacy of fences, barricades, or other protective devices, where, under the circumstances of individual cases, a recovery has been upheld or denied.

G.S. 1-122 provides that "the complaint must contain . . . (2) a plain and *concise statement of the facts* constituting a cause of action. . . ." (Italics added.) The cardinal requirement of this statute, as emphasized in numerous decisions of this Court, is that the facts constituting a cause of action rather than the conclusions of the pleader must be set forth in the complaint so as to disclose the issuable facts determinative of the plaintiff's right to relief. *Shives v. Sample,* 238 N.C. 724, 79 S.E. 2d 193; *Griggs v. Griggs,* 213 N.C. 624, 197 S.E. 165; *Gillis v. Transit Corp.,* 193 N.C. 346, 137 S.E. 153; *Lassiter v. Roper,* 114 N.C. 17, 18 S.E. 946; *Moore v. Hobbs,* 79 N.C. 535.

It is hornbook law that on a demurrer a pleading will be liberally

construed with a view to substantial justice between the parties giving the pleader the benefit of every reasonable intendment in his favor; and a demurrer admits, for the purpose of testing the legal sufficiency of the pleading, the truth of factual averments well stated and relevant inferences of fact reasonably deducible therefrom, but legal inferences and conclusions of the pleader will be disregarded. 3 Strong, N. C. Index, Pleadings, § 12.

This is said by Johnson, J., in *Shives v. Sample, supra:*

> "In an action or defense based upon negligence, it is not sufficient to allege the mere happening of an event of an injurious nature and call it negligence on the part of the party sought to be charged. This is necessarily so because negligence is not a fact in itself, but is the legal result of certain facts. Therefore, the facts which constitute the negligence charged and also the facts which establish such negligence as the proximate cause, or as one of the proximate causes, of the injury must be alleged. *Daniels v. Montgomery Ward & Co.,* 217 N.C. 768, 9 S.E. 2d 388; *Furtick v. Cotton Mills,* 217 N.C. 516, 8 S.E. 2d 597; *Moss v. Bowers,* 216 N.C. 546, 5 S.E. 2d 826. See also *Baker v. R. R.,* 232 N.C. 523, 61 S.E. 2d 621."

In *Thomason v. R. R.,* 142 N.C. 318, 55 S.E. 205, Connor, J., said for the Court:

> "A complaint which alleges negligence in a general way, without setting forth with some reasonable degree of particularity the things done, or omitted to be done, by which the Court can see that there has been a breach of duty, is defective and open to demurrer."

See also McIntosh, North Carolina Practice and Procedure, § 359.

In the present case plaintiff predicates her right of recovery on (1) the failure of defendant to equip its race track with an adequate and properly constructed guard rail capable of preventing automobiles traveling at speeds in excess of 150 miles per hour from leaving the track when it knew, or in the exercise of reasonable care should have known, that this guard rail was insufficient; and (2) on its failure to warn the drivers on its race track that the guard rail was inadequate. No particular facts are alleged as to how the guard rail was inadequate or improperly constructed, nor is there any allegation of fact to show how the guard rail could have been constructed to prevent an automobile which has sustained a blowout at this high rate of speed from plunging through it and off the track. There is no factual allegation in the complaint that any other car has broken

through the railing at this race track, nor any specific allegations of fact showing how defendant could have been aware of any purported inadequacy of the guard rail. Furthermore, there are no allegations of fact in the complaint showing that it is the general custom and practice among auto raceway proprietors to maintain guard rails capable of absorbing the shock of cars traveling at speeds of 150 miles per hour. The complaint does not allege any specific negligent act of commission or omission on the part of defendant which proximately resulted in her intestate's death. It is alleged in the complaint that the "defendant knew or in the exercise of due care should have known that the guard rail through which the automobile being driven by the plaintiff's intestate went was inadequate. . . ." In the absence of supporting factual allegations, this is a conclusion of the pleader to be disregarded. *Shives v. Sample, supra.*

To paraphrase Justice Connor's language in *Thomason v. R. R., supra,* the complaint alleges negligence in a general way without setting forth with some reasonable degree of particularity the things done or omitted to be done by which the Court can see that there has been a breach of duty. Therefore, the complaint is defective and open to demurrer.

The interesting questions of contributory negligence and assumption of risk mentioned in defendant's brief are affirmative defenses and cannot be raised on a demurrer. 3 Strong, N. C. Index, Negligence § 11; 1 McIntosh, N. C. Practice and Procedure § 1236(13) (2nd Ed. 1956).

The judgment below sustaining the demurrer to the complaint is Affirmed.

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

DORIS S. GRAY, WILLIAM MORRIS GRAY, APRIL GRAY, MINOR, BY AND THROUGH HER NEXT FRIEND, DORIS S. GRAY, MARY TORRENCE GRAY, MINOR, BY AND THROUGH HER NEXT FRIEND, DORIS S. GRAY, v. GEORGE A. GRAY, JR.

(Filed 20 March 1968.)

1. Parent and Child § 5—

A father is legally obligated to support his children until they reach the age of twenty-one years and cease to be dependent, or until they become emancipated by marriage or otherwise.

2. Same—

An order relieving the father from making payments to his former wife for the support of a daughter of the marriage' which is based upon a finding that the daughter has attained the age of 18 years, is erroneous in the absence of findings that the daughter has become emancipated by marriage or otherwise.

3. Same—

The court entered an order reducing a father's payments for the support of a minor daughter upon a finding from the evidence that the father's income had materially changed, but the court heard no evidence as to the needs of the daughter. The order further provided that, upon dissatisfaction of either party, a further hearing would be held to review defendant's income and the daughter's needs. *Held:* The order is vacated and the cause remanded for a hearing *de novo* on the father's motion to reduce support payments.

APPEAL by plaintiffs from *McLean, J.,* August 28, 1967 Regular Session of GASTON.

The record indicates that, prior to the hearing before Judge McLean, the events referred to below had occurred.

A separation agreement of February 25, 1955, executed by George A. Gray, Jr., and Doris S. Gray, recited that they were lawfully married; that they had four children, namely, George A. Gray, III, eleven years of age; William Morris Gray, nine years of age; April Gray, five years of age; Mary Torrence Gray, two years of age; and that they had agreed to live "separately and apart" from each other. It contained, *inter alia,* the following provisions: The sole and exclusive custody of the four children was awarded to Doris S. Gray. George A. Gray, Jr., was to have specified visitation privileges. George A. Gray, Jr., was to pay each calendar month "to the wife the sum of Four Hundred Dollars ($400.00) for the support of the wife and the four children of the marriage." These payments were to continue until the youngest of said children attained the age of eighteen (18) years. It was provided that "said payments shall not be diminished nor shall the husband be relieved of his responsibility to make said payments in the event of the granting of a divorce from bed and board or an absolute divorce upon application of either of the parties to this instrument, but the husband shall continue to make said payments without regard to his marital status with the wife, it being the intent and purpose of the husband and wife that the husband shall provide funds upon which the wife may maintain a home and have the means wherewith to support and maintain the children born of the marriage of the husband and wife." (Note: Provisions with relation to property settlement and insurance are omitted.)

George A. Gray, Jr., and Doris S. Gray were granted an absolute divorce in Nevada in October, 1958. The Nevada decree and also a judgment entered in the present action by Pless, J., in October, 1958, required defendant to make payments as provided in the separation agreement.

The 1958 judgment of Pless, J., was modified by a 1961 judgment of Craven, J., which was entered by consent of plaintiff's counsel and of defendant's counsel. The 1961 judgment bears the caption: *"Doris S. Gray and George A. Gray, III, minor, William Morris Gray, minor, April Gray, minor, and Mary Torrence Gray, minor, by and through their next friend, Doris S. Gray, Plaintiffs, vs. George A. Gray, Jr., Defendant."* It provides that defendant "shall pay into the office of the Domestic Relations Court of Gaston County, North Carolina, the sum of Two Hundred Dollars ($200.00) per month for the sole use, benefit, support and maintenance" of *three* minor children, to wit, William Morris Gray, April Gray and Mary Torrence Gray, "said funds to be disbursed to their mother, Doris S. Gray, and to be expended on behalf of said minor children."

On April 17, 1967, plaintiffs filed a motion that the 1961 judgment of Craven, J., be modified so as to increase the amount of the required payment. On May 1, 1967, defendant filed an answer to this motion. Plaintiffs' said motion and defendant's answer thereto were signed by their counsel. Neither was verified.

On May 5, 1967, after a hearing on the motion filed by plaintiffs on April 17, 1967, a judgment was entered by Judge Riddle providing, *inter alia,* that "the defendant shall pay into the office of the Clerk of the Superior Court for Gaston County, North Carolina, for the sole use, benefit, support and maintenance of his minor child, April Gray, the sum of $100.00 on the 15th day of May, 1967, and shall also thereafter pay into the office of said Court the sum of $100.00 per month on the first day of each June, July and August thereafter, and the sum of $200.00 per month on the first day of each September, October, November, December, January, February, March, April and May thereafter; and further, that said sums when paid by the defendant shall be paid over to Doris S. Gray, mother of April Gray, for the sole use, benefit, support and maintenance of said child *so long as said child is in the care and custody of said mother."* (Our italics.) The judgment contained an identical provision with reference to defendant's other minor child, namely, Mary Torrence Gray.

On August 11, 1967, defendant, asserting adverse changes in his circumstances, filed a motion that the court reduce the amount of the payments required by Judge Riddle's judgment of May 5, 1967. This motion was signed by counsel for defendant. It was not verified. The

hearing before Judge McLean on September 6, 1967, was on said motion filed by defendant on August 11, 1967.

The order entered September 6, 1967, by Judge McLean, after reciting the court had heard the evidence and had interviewed one of the daughters, April Gray, sets forth particular findings of fact as to adverse changes in defendant's circumstances since May 5, 1967. Judge McLean's order continues and concludes as follows:

"Upon the foregoing, the Court finds that the defendant's income has materially changed. The Court further finds as a fact that April Gray, as aforesaid, is eighteen years of age; that she was employed during the past summer months and earned a considerable amount of money, a portion of which she now has on hand; that she is planning on entering the University of North Carolina at Greensboro on September 7, 1967, and that her father has agreed with her and with the Court to bear all of the expenses of April Gray in college, vacation, or otherwise; that he prefers to deal directly with his daughter, April Gray, in furthering her education, and has agreed to do so. The Court further finds *that upon April Gray attaining the age of eighteen years that the defendant is not longer responsible for her upkeep and for that reason* and the other reasons heretofore stated that the father desires to take over her expenses and pay them himself directly to the college and bear her other expenses while in college or on vacation until she has completed her college course. The Court, therefore, makes no order for her maintenance and support except that the defendant need not pay to the mother any further monies for the maintenance, support and education of his daughter, April Gray. (Our italics.)

"The Court further finds as a fact that the defendant, after the separation of the defendant and Doris S. Gray, remarried and has two children of the second marriage; that his Honor J. Braxton Craven entered an order in January of 1961, requiring the defendant to pay $200.00 per month to the Next Friend, Doris S. Gray, for the then four minor children of plaintiff and defendant; that the two sons are now twenty-one years of age and over and have completed their college careers; that one son is a Captain in the Army in Germany and the other son has worked with his father during this past summer and has completed his college training. The Court further finds as a fact that the daughter, Mary Torrence Gray, is fifteen years of age and is in high school and while no evidence has been offered as to the specific needs of Mary Torrence, the Court finds as a fact that a reasonable amount under all the circumstances would approximate the sum of $125.00 and that this amount should be paid

to the mother of said child, Doris S. Gray, with whom she lives, pending the further orders of the Court.

"IT IS NOW, THEREFORE, ORDERED that the defendant pay in manner heretofore required to Doris S. Gray the sum of $125.00 for the months of September, October, November, and December, and that on the 2nd day of February, 1968, if either party is dissatisfied with the payments made to Doris S. Gray for and on behalf of Mary Torrence Gray, that by notice duly given, the parties appear before the Presiding Judge in order that the Court may review the income of the defendant at that time and the requirements of the minor child, Mary Torrence, and make such other and further orders as conditions may warrant."

Plaintiffs filed exceptions to designated findings of fact and to the court's failure to make findings of fact in accordance with plaintiffs' request. Plaintiffs excepted to the order and appealed.

Mullen, Holland & Harrell and Thomas H. Morgan for plaintiff appellants.

Ernest R. Warren for defendant appellee.

BOBBITT, J. During the pendency of this action, the two older children attained their majority. The present status of Doris S. Gray in this action is twofold, that is, as mother and also as next friend of the two minor children, April Gray (18) and Mary Torrence Gray (15).

The record indicates the provisions of the separation agreement of February 25, 1955, including the provision that Doris S. Gray was to have sole and exclusive custody of the *four* minor children and provide a home for them, were incorporated in the judgment entered herein by Pless, J., in October, 1958; and that, as contemplated, the children during minority have made their home with the mother. The record contains no order providing for a change in respect of the custody of April. Nor does it appear that April has left or has attempted to leave the home in which she has resided with her mother and sister.

Even if we assume April's college expenses will be provided for by her own earnings and by contributions made by her father directly to April or directly in payment of college expenses, as long as she is in the custody of her mother and makes her home with her mother and sister provision must be made for her support there, whether her actual residence there be occasional or continuous. Moreover, if there is to be a reduction in the amount defendant is required to pay for April's support when in the home with her mother

and sister because of her part-time residence at college, it would seem the court should incorporate in its judgment provisions spelling out, at least in substance, what the father is obligated to do rather than accept informal assurances as to his intentions and plans.

It appears affirmatively that Judge McLean's order was entered under the apprehension that defendant was "not longer responsible" for the "upkeep" of April after she attained "the age of eighteen years." This explains comments and findings in his order apparently based on informal conversations with April and with defendant. However, we are of opinion, and so decide, that Judge McLean's order in this respect is based on a misapprehension of the applicable law.

In *Wells v. Wells,* 227 N.C. 614, 44 S.E. 2d 31, Winborne, J., (later C.J.), for this Court, stated: "Ordinarily a child, in the eyes of the law, is in a condition to provide for his own maintenance when he has reached the age of twenty-one years, that is, has attained the status of majority. That age was arbitrarily fixed at common law for the termination of the child's minority, and the attainment of his majority, and the rule has remained in force throughout the United States." Quoting further from the opinion in *Wells:* "Hence, we hold that ordinarily the law presumes that when a child reaches the age of twenty-one years he will be capable of maintaining himself, and in such case the obligation of the father to provide support terminates." The precise holding in *Wells* was that a father is under legal obligation to continue to provide necessary support to his son *after* he reaches the age of twenty-one years when prior thereto and thereafter the son is insolvent, unmarried and incapable, mentally and physically, or earning a livelihood.

Citing *Wells,* Rodman, J., in *Ford v. Bank,* 249 N.C. 141, 105 S.E. 2d 421, states: "While a parent is under a legal as well as a moral obligation to support his minor children, that obligation normally terminates when the child reaches his majority and ceases to be dependent." In North Carolina, a child attains his or her majority when he or she reaches the age of twenty-one years. 3 Lee, North Carolina Family Law, § 229, p. 60.

In the recent case of *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77, the lower court, without making findings of fact as a basis for its order, vacated a prior order which required the father to pay $25.00 per week to the mother for the support of their nineteen-year-old daughter until she became twenty-one years old. The order was vacated by this Court and the cause remanded "for more detailed findings of fact." Underlying decision is the rule that ordinarily a father's obligation and responsibility for the support of his daughter

continues until she attains the age of twenty-one years. This rule will control decision herein in the absence of findings based on competent evidence that April has become fully emancipated by marriage or otherwise. See 3 Lee, *op. cit.*, § 233.

For the reasons stated, there was error in the portion of Judge McLean's order relating to the support of April.

With reference to the support of Mary Torrence, Judge McLean's order expressly states no evidence had been offered as to her specific needs. The order provided that if either party were dissatisfied on February 2, 1968, with this portion of the order, a further hearing would be conducted to "review the income of the defendant at that time" and the needs of Mary Torrence.

It seems appropriate to say there was evidence before Judge McLean sufficient to support his finding that defendant's income had "materially changed" between May 5, 1967, the date of Judge Riddle's judgment, and September 6, 1967, the date of Judge McLean's order. However, since the order as to April was entered under a misapprehension of the applicable law, and the order as to Mary Torrence was tentative and subject to full review in February, 1968, it seems appropriate that Judge McLean's order of September 6, 1967, be vacated in its entirety and that the cause be remanded for a hearing *de novo* on the motion filed by defendant on August 11, 1967, for modification of the judgment entered by Judge Riddle on May 5, 1967. It is so ordered.

Error and remanded.

STATE v. DILLARD PINK RAMEY.

(Filed 20 March 1968.)

1. Criminal Law § 24—

A plea of not guilty puts in issue every essential element of the crime charged.

2. Homicide § 14—

The presumptions that a killing was unlawful and with malice, thereby constituting murder in the second degree, do not arise until the State has satisfied the jury beyond a reasonable doubt that the defendant intentionally shot deceased with a deadly weapon and thereby proximately caused his death.

3. Homicide § 24—

Where defendant enters a plea of not guilty and does not withdraw or modify this plea, defendant's testimony that he shot deceased in self-de-

fense is not an admission that he killed the deceased, and the trial court should not assume such fact but should instruct the jury, even in the absence of a specific request, that the State has the burden to satisfy them beyond a reasonable doubt that deceased came to his death as a proximate result of the bullet wound inflicted by defendant. Inconsistent expressions in *State v. Cole*, 270 N.C. 382, are withdrawn.

4. **Homicide § 28—**

An instruction that defendant would be guilty of manslaughter if he unlawfully killed the deceased in the heat of passion unless the jury should find that defendant acted in self-defense *is held* erroneous, since an unlawful killing in the heat of passion is not excusable on the ground of self-defense.

APPEAL by defendant from *Snepp, J.*, September 1967 Criminal Session of MECKLENBURG.

Defendant, indicted for the first degree murder of Ardell Mabry, pleaded "Not Guilty." When the case was called for trial, the State elected to waive the first degree murder charge and place defendant on trial for murder in the second degree.

Evidence was offered by the State and by defendant.

The Ramey and Mabry families were next door neighbors on Kirby Drive in the Paw Creek section of Mecklenburg County. The shooting occurred about 5:00 p.m. on Sunday, May 28, 1967. A review of the evidence as to events prior to the shooting is unnecessary to decision on this appeal.

The State offered evidence which, in brief summary, tends to show that Mabry came out of his house and was walking towards his car, away from defendant and away from the apple tree referred to in defendant's evidence; that Mabry had a shotgun over his arm but did not fire it; that, before he reached his car, a bullet from a .22 rifle fired by defendant from a position on defendant's porch struck Mabry in the left arm; that Mabry got to his car, aided by his son, Roger, a Marine, and was taken to a hospital; and that the bullet passed through Mabry's arm, entered his left chest and lodged in his heart sac, thereby proximately causing his death.

Defendant offered evidence which, in brief summary, tends to show that Mabry came out of his house, carrying a shotgun; that, in a crouched position, he made his way to an apple tree, located some 50-60 feet from defendant's porch; that Mabry stood up behind this tree and aimed his shotgun by resting it in a fork of the tree; that Mabry fired his shotgun and defendant thereupon fired his .22 rifle, aiming at Mabry's arm; and that, after defendant had fired, Mabry "ran and laid his gun down at the doorstep. Then he went and got in the car and Roger met him and grabbed him by the arm and pulled him on a little faster."

The jury returned a verdict of guilty of manslaughter. Thereupon, the court pronounced judgment imposing a prison sentence of twenty years.

Defendant excepted and appealed. On account of his indigency, the court appointed counsel, Max L. Childers, Esq., to represent him in perfecting and prosecuting his appeal, and ordered Mecklenburg County to pay all necessary costs incident to such appeal.

Attorney General Bruton and Staff Attorney Vanore for the State.
Childers & Fowler for defendant appellant.

BOBBITT, J. All assignments of error brought forward in defendant's brief relate to the charge.

At the outset of the charge, the court explained defendant was presumed to be innocent and that the burden rested upon the State to satisfy the jury beyond a reasonable doubt as to defendant's guilt before they could convict him.

After general instructions and a review of the evidence of the State and of defendant, instructions were given as to the elements of second degree murder and of manslaughter.

The court then charged the jury in substance that the intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions (1) that the killing was unlawful, and (2) that it was done with malice, and that an unlawful killing with malice is murder in the second degree. *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322; *State v. Phillips,* 264 N.C. 508, 142 S.E. 2d 337; *State v. Cooper,* 273 N.C. 51, 159 S.E. 2d 305. The court charged further that, *in such event,* it would be incumbent upon defendant to satisfy the jury of facts sufficient to mitigate the killing and reduce it to manslaughter or to excuse it altogether on the ground of self-defense. These instructions with reference to manslaughter and self-defense presuppose the State has satisfied the jury from the evidence beyond a reasonable doubt that defendant intentionally shot Mabry *and* thereby proximately caused his death. If the State failed to establish either of these two propositions, no presumptions would arise as to an unlawful killing with malice. No instruction to this effect was given.

After giving instructions relating to second degree murder, the court instructed the jury if they found defendant not guilty of second degree murder it would be their duty to determine whether he was guilty of manslaughter. The court's final instruction to the jury is quoted below.

"(I)f you find from the evidence beyond a reasonable doubt, the

burden being upon the State to so satisfy you, that on the 28th day of May, 1967, Dillard Pink Ramey intentionally shot and killed the deceased, Mr. Ardell Mabry; that he killed him with a deadly weapon, and you are further satisfied from all the evidence, both that of the State and the defendant, that he killed Mr. Mabry in the heat of passion by reason of anger suddenly aroused on account of an assault or threatened assault upon him or his family, and before sufficient time had elapsed for the passion to subside and reason to resume its habitual control, then the defendant would be guilty of manslaughter, and if you so find, it would be your duty to render a verdict of guilty of manslaughter against the defendant, *unless the prisoner has satisfied you that he killed the deceased* in self-defense or in defense of his family, that is to say, if he has satisfied you from the evidence in the case that at the time he shot *and killed* the deceased, Mr. Ardell Mabry, he was in his own home, that he was himself without fault in bringing on the difficulty; that he was assaulted by the deceased; that he believed and had reasonable grounds to believe that he was about to suffer death or great bodily harm or that some member of his family was about to suffer death or great bodily harm at the hands of the deceased, and that in the exercise of ordinary prudence and firmness he used no more force than he believed to be reasonably necessary to repel and overcome the assault which the deceased was making upon him or upon some member of his family at the time *the fatal shot* was fired, then I charge you that *the killing* of the deceased Ardell Mabry would be excusable homicide and if you so find to your satisfaction, it would be your duty to render *a verdict of not guilty in this case.*" (Our italics.)

The only portions of the charge in which the jury was instructed as to circumstances under which they might return a verdict of not guilty relate directly and solely to the return of a verdict of not guilty in the event the jury found defendant acted in the lawful exercise of his right of self-defense.

A plea of not guilty puts in issue *every essential element of the crime charged. State v. McLamb,* 235 N.C. 251, 256, 69 S.E. 2d 537, 540, and cases cited; *State v. Courtney,* 248 N.C. 447, 451, 103 S.E. 2d 861, 864; *State v. Moore,* 268 N.C. 124, 126, 150 S.E. 2d 47, 49.

The italicized statements in the quoted excerpt from the charge indicate defendant contended he *killed* Mabry in self-defense. Defendant's contention was that he *acted* in defense of himself and of members of his family who were on his porch when Mabry fired his shotgun towards them.

Nothing in the record suggests that defendant's plea of not guilty was withdrawn or modified. There was no judicial admission by de-

fendant or by his counsel that Mabry's death was proximately caused by a bullet wound inflicted by defendant. Although he testified he fired his .22 rifle once under circumstances referred to in our preliminary statement, defendant made no admission or statement that he *killed* Mabry. Whether Mabry's death was caused by a bullet wound inflicted by defendant was not within the knowledge of defendant. Mabry was alive when he left or was taken from defendant's view.

The factual situation is quite similar to that considered in *State v. Redman,* 217 N.C. 483, 485, 8 S.E. 2d 623, 624, where Barnhill, J. (later C.J.), speaking for this Court, said. "*Non constat* it is admitted that the defendant shot the deceased, it does not follow of necessity that he inflicted a fatal wound. The burden of so showing rested upon and remained with the State throughout the trial." Accord: *State v. Howell,* 218 N.C. 280, 10 S.E. 2d 815; *State v. Anderson,* 222 N.C. 148, 22 S.E. 2d 271; *State v. DeGraffenreid,* 223 N.C. 461, 27 S.E. 2d 130; *State v. Ellison,* 226 N.C. 628, 39 S.E. 2d 824; *State v. Minton,* 228 N.C. 15, 44 S.E. 2d 346.

Quoting further from the opinion in *State v. Redman, supra:* "At no time was the jury instructed that the State was required to show that the deceased came to his death as a proximate result of the pistol shot wound inflicted by the defendant. The existence of this fact was assumed." As stated by Devin, J. (later C.J.), in *State v. Ellison, supra:* "In the absence of an admission to that effect the burden of proof was upon the State to show from the evidence beyond a reasonable doubt that the shots admittedly fired by defendant caused the death of the deceased."

In our opinion, and we so decide, defendant was entitled to an explicit instruction, even in the absence of a specific request therefor, to the effect the jury should return a verdict of not guilty if the State failed to satisfy them from the evidence beyond a reasonable doubt that a bullet wound inflicted upon Mabry by defendant proximately caused his death. The trial judge inadvertently failed to give such instruction. The necessity for such instruction is not affected by the fact there was plenary evidence upon which the jury could base a finding that a bullet wound inflicted upon Mabry by defendant proximately caused his death. *State v. Redman, supra.*

As indicated, the quoted excerpt from the charge was the court's final instruction to the jury. It is noted that no instruction was given that if the State failed to satisfy the jury from the evidence beyond a reasonable doubt that defendant was guilty of murder in the second degree, and failed to satisfy the jury from the evidence beyond a reasonable doubt that defendant was guilty of manslaughter, the jury should return a verdict of not guilty.

Expressions in *State v. Cole,* 270 N.C. 382, 154 S.E. 2d 506, inconsistent with the legal principles stated herein, are withdrawn and may not be considered authoritative.

A new trial is awarded on account of the indicated error (deficiency) in the charge. Hence, it is unnecessary to consider assignments challenging the charge as erroneous in other respects.

This Court, *ex mero motu,* deems it appropriate to call attention to an error in the quoted excerpt from the charge. The trial judge instructed the jury in substance to return a verdict of guilty of manslaughter if they found defendant unlawfully killed Mabry in the heat of passion *unless* the jury found defendant acted in the lawful exercise of his right of self-defense in which case they would return a verdict of not guilty. An unlawful killing in the heat of passion is not excusable on the ground of self-defense. Conversely, a person acting in the lawful exercise of his right of self-defense is not guilty of any criminal offense. However, a person is guilty of manslaughter if he kills his adversary when acting to defend himself but in doing so uses more force than is or reasonably appears to be necessary to protect and defend himself from death or great bodily harm.

New trial.

STATE OF NORTH CAROLINA v. JAMES FRED ROGERS.

(Filed 20 March 1968.)

1. Criminal Law § 30—

Where the solicitor announces in open court that the State will not prosecute defendant for first degree murder as alleged in the indictment, the defendant may not be convicted of that offense but may be convicted of some lesser offense embraced within the charge.

2. Homicide § 1—

Where defendant intends to kill one person and kills an innocent bystander, he is guilty in the same degree as though he had killed the person intended.

APPEAL by defendant from *Hasty, S.J.,* September 4, 1967 Schedule A Criminal Session, MECKLENBURG Superior Court.

This criminal prosecution originated by bill of indictment which charged the defendant with the crime of murder in the first degree in the killing of Julie Elizabeth Coyle. The minutes of the Superior Court disclose that at the time of arraignment the solicitor for the State announced in open court the State "will not seek the capital

verdict but will seek a verdict of guilty to the charge of Murder in the Second Degree or Manslaughter or whatever the evidence might warrant. . . ."

Charles Graham, father of the deceased Julie Elizabeth Coyle, testified he knew the defendant, had talked to him on many occasions, sometimes by telephone, and knew his voice. About 6:00 in the afternoon of July 16, 1967 the witness answered the telephone and recognized the voice of the defendant, James Fred Rogers, as the caller. "He asked me was Elizabeth there. . . . I said 'Yes, and so am I.' He said, 'Say you are, you S.B.?' and I said, 'Yes, you S.B.' He said, 'I'll be up there in a few minutes and get every one of you' and I said, 'We'll try to be here.' "

At the end of the telephone conversation the witness Graham, his 22 pistol in his pocket, took a position on his front porch, which faced the city street. "When I saw Rogers I was standing almost in front of my daughter on the front porch. She was sitting in a swing." The defendant, alone in his convertible automobile with the top down, approached on Pegram Street. "When he got in front of my driveway is where he started shooting." The witness stated he fired two shots after the defendant had first fired a number of shots. After the shooting was over, the daughter said, "Daddy, have mercy; I'm hit; help me. She walked to my front door, . . . and slid down. That's the last words she ever spoke." She died as a result of a 22 caliber bullet wound. The bullet had entered at the shoulder, traveled down and back, and lodged in the spinal cord, just under the heart.

Pursuant to a telephone call, officers, within a few minutes after the shooting, went to a residence on Person Street where they were invited in and inquired for James Fred Rogers. Five or six persons were standing in the kitchen. The defendant placed his hand behind him. One of the officers ". . . heard something hit the floor . . . I knew where the sound came from. I looked behind the defendant on the kitchen floor and saw the gun." The officer examined the weapon, a 22 pistol with 4 spent shells and one live shell in the weapon (evidently a revolver).

The defendant testified as the only witness for the defense. He said the deceased was his sweetheart. He had talked to her on the porch and she told him her father was in the kitchen and she could not go with him while he was up. He went to King's place nearby, bought a beer, which he and Forrest Pope drank. He started to drive home and as he passed Charles Graham's house, Graham ran out on the front porch and started shooting at him and he shot over Graham's head "to spoil his aim" and continued to drive towards home. He

saw Elizabeth Coyle scuffling with her father trying to take the gun from him.

The jury returned a verdict of guilty of murder in the second degree. From the judgment of imprisonment for not less than 20 years, nor more than 25 years, the defendant appealed.

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

T. O. Stennett for defendant appellant.

HIGGINS, J. As a result of the solicitor's announcement, the defendant could not be convicted of murder in the first degree, but of some lesser offense embraced within that charge. *State v. Miller,* **272** N.C. **243**. The verdict of guilty of murder in the second degree was within the indictment.

According to the State's evidence, the defendant called Charles Graham, father of Elizabeth Coyle, over the telephone and made threats against all of the family. Graham armed himself and waited on the porch. His daughter, Julie Elizabeth Coyle, was sitting in a swing to her father's right. The defendant, as he had threatened, appeared in his automobile on Pegram Street and started shooting at Graham, who returned the fire. A shot struck Elizabeth Coyle as she was seated in the swing. She died within a few minutes.

The defendant testified he happened to pass the home of Charles Graham, who began the shooting. The defendant thereafter fired only to spoil Graham's aim. As he continued by the Graham home, he saw Elizabeth Coyle struggling with her father, apparently in an effort to prevent further shots.

The jury accepted the State's evidence which disclosed the defendant appeared at the Graham home, as he had threatened to do, and began shooting at Graham. Apparently the jury was not impressed by the defendant's testimony that he happened to be passing on his way home when Graham began shooting, and he returned the fire only to spoil Graham's aim.

The day was Sunday. The time, place and readiness of both participants to do battle on sight indicate prior preparation as contended by the State, rather than a meeting by accident as contended by the defendant. According to Graham's story, he was defending his home and his family against the defendant's threat that "he would be up there in a few minutes and get every one of you". Had the defendant killed Graham, a conviction of murder would have been warranted. If in the attempt to kill Graham he accidentally killed Elizabeth Coyle, a conviction of murder would likewise be justified.

"Where A. aims at B. with malicious intent to kill B., but by the same blow unintentionally strikes and kills C., this has been held by authorities of the highest rank to be murder. *S. v. Benton,* 19 N.C. 196; *S. v. Fulkerson,* 61 N.C. 233; *S. v. Cole,* 132 N.C. 1069." *State v. Sheffield,* 206 N.C. 374, 174 S.E. 105. See also *State v. Burney,* 215 N.C. 598, 3 S.E. 2d 24. The rule is stated in 26 Am. Jur., Homicide, Section 35, Page 170: "The fact that the homicidal act was directed against or intended to effect the death of one other than the person killed does not relieve the slayer of criminal responsibility. . . . Under this rule the fact that the bystander was killed instead of the victim becomes immaterial and the only question at issue is what would have been the degree of guilt had the result intended been accomplished. . . . The malice or intent follows the bullet."

We have assumed the defendant intended to kill Graham and accidentally killed Elizabeth Coyle. However, this assumption is favorable to the defendant. He may have intended to kill Elizabeth Coyle and accomplished that purpose, and thus committed an even more reprehensible offense.

The several questions on the part of the court do not appear objectionable as going beyond the purpose of clarification. Likewise the court's statement of contentions and its instructions as to the principles of law applicable to the facts in evidence are free from valid objection. In the trial and judgment of the Superior Court, we find

No error.

STATE OF NORTH CAROLINA v. DONALD LEE GRIFFIN.

(Filed 20 March 1968.)

1. Homicide § 6—

Any unjustifiable and reckless or wanton use of a firearm which jeopardizes the safety of another is unlawful, and if an unintentional killing results, it is an unlawful homicide.

2. Homicide § 20—

The State's evidence tended to show that defendant had been drinking during the day, that he and his wife played with a pistol by twirling it and throwing it to each other, and that while the wife was sitting on her husband's lap the pistol, which the wife was twirling around her finger, fired, fatally wounding the wife. *Held:* The evidence, taken in the light most favorable to the State, shows only an accidental killing, and defendant's motion for nonsuit was improperly denied.

APPEAL by defendant from *McLean, J.*, 4 September 1967 Criminal Session of GASTON.

Defendant was tried upon a bill of indictment which charged him with the murder of his wife, who died from a pistol wound. The solicitor did not seek a verdict of murder in the first degree. The verdict was "guilty of involuntary manslaughter."

The evidence for the State tended to show: On the evening of 30 December 1966, about 6:30 p.m., defendant and his wife were at home watching TV. During the afternoon defendant had consumed 4-5 beers and a fourth of a pint of liquor, and the two had played with a .22 caliber pistol, twirling it and throwing it at each other. Mrs. Griffin had paid $10.00 for the gun and had given it to her husband as a Christmas present. Just before she was shot, at his request, she had brought defendant a drink, which she had mixed in the kitchen.

Defendant told the investigating officers that at the time his wife was shot, they were sitting in front of the television in a big, overstuffed rocker across from the sofa in the den. Mrs. Griffin was sitting on defendant's lap, and they were taking turns twirling the gun. At the time the gun fired, she had it on her finger. He was fondling her; she bent down to kiss him, and the gun discharged. He placed her on the sofa and told her to hang on until he could get help. She replied, "I think I can make it if you hurry." He ran next door, called an ambulance, and returned with some of the neighbors, from whom he sought assistance.

When the officers arrived, they found Mrs. Griffin sitting in an upright position with her head on the back of the couch. Defendant, who was in a state of shock, gave them the pistol and told them he had no objection to talking to them.

An autopsy revealed that a bullet had entered Mrs. Griffin's left chest "just below the clavicle in the midline at a slight upward angle." The course of the bullet was down between the clavicle and the first rib. After penetrating the left lung and the pulmonary artery, it went back and struck the 10th rib, where it lodged in the muscle. Death was caused by a massive hemorrhage into the left thorax.

Defendant and his neighbors told the police that he and Mrs. Griffin "were getting along fine." Defendant said that there had been no trouble between them that day; that neither was angry; and that he did not know why the gun went off.

At the close of the State's evidence, defendant moved for nonsuit. The motion was "allowed as to murder in the second degree and

manslaughter"; it was denied as to the charge of involuntary manslaughter.

Defendant's evidence tended to show: Defendant, a man of good character and reputation, has been employed at the same manufacturing plant for the past nine years. At the time of her death, Mrs. Griffin was 22 years old; defendant, 25. They had been married 4 years. Mrs. Griffin was shot on 30 December 1966 about 8:00 p.m. During the preceding 12 hours, both defendant and his wife had been drinking. He had had 6 beers and one-fourth of a pint of bourbon. Twice during the afternoon, they had played with the gun, each taking turns twirling it on a finger. Tiring of this, Mrs. Griffin had put the gun on the arm of the big chair in which defendant was sitting at the time she was shot. Thereafter, from 6:00 to 7:30 p.m., she had lain on the couch. About 7:30, at his request, she got up and mixed them a drink. About 8:00 p.m., she left the couch, where she had been sitting, and came over to kiss him. He was lying back in the big chair, and she "half-sat" on his lap. He was fondling her; she put her arms around him, bent to kiss him, and the gun went off. The last time he saw the gun it was on the right arm of the chair. He did not know it was loaded, and he could not explain why the gun discharged. He knew she was shot when he saw a red spot on her shoulder. He placed her on the couch and ran to the next door neighbor's house to telephone for an ambulance.

At the close of defendant's evidence, he again moved for judgment of nonsuit, and the motion was overruled. The jury's verdict was "guilty of involuntary manslaughter." From a prison sentence of not less than 4 nor more than 5 years, defendant appeals.

T. W. Bruton, Attorney General and Dale Shepherd, Staff Attorney for the State.

Frank P. Cooke for defendant.

SHARP, J. When the State undertakes a prosecution for unlawful homicide, it assumes the burden of producing evidence sufficient to prove that the deceased died as the result of a criminal act committed by the defendant. *State v. Hendrick,* 232 N.C. 447, 61 S.E. 2d 349; *State v. Palmer,* 230 N.C. 205, 52 S.E. 2d 908. Any unjustifiable and reckless or wanton use of a firearm which jeopardizes the safety of another constitutes a criminal act, *State v. Turnage,* 138 N.C. 566, 49 S.E. 913; and, if an unintentional killing results, it is an unlawful homicide. *State v. Brooks,* 260 N.C. 186, 132 S.E. 2d 354; *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889; *State v. Hovis,* 233 N.C. 359, 64 S.E. 2d 564.

Defendant's first assignment of error presents the question whether the evidence, taken in the light most favorable to the State, was sufficient to support a finding that he was handling the gun in a culpably negligent manner at the time it fired and killed his wife. *State v. Honeycutt,* 250 N.C. 229, 108 S.E. 2d 485.

The brief for the State contains this statement: "[T]here was evidence of death occurring under mysterious circumstances, which could lead to the conclusion that it was perpetrated by culpable negligence." Conceding the truth of this assertion, there remains unanswered the question, whose was the culpable negligence? Did deceased herself cause the pistol to discharge when she "half-sat" on defendant's lap and on the arm of the big, overstuffed chair, where she had placed the weapon? Did it fire when she embraced defendant while holding the pistol in her hand? If not, did any act of defendant's cause the gun to fire? There is no evidence that he had the pistol in his hand when it fired or that he had touched it immediately before. Had deceased been shot while she and defendant were tossing the pistol back and forth, or when defendant was twirling it on his finger, an entirely different situation would be presented.

The evidence of both the State and defendant tends to show an accidental killing, and there is no evidence that it was defendant who caused the gun to discharge. His motion for nonsuit made at the close of all the evidence should have been allowed. *State v. Pope,* 252 N.C. 356, 113 S.E. 2d 584.

Reversed.

CITY OF DURHAM v. THURSTON BATES AND WIFE, DORA BATES.

(Filed 20 March 1968.)

1. Constitutional Law § 4—

Ordinarily, the acceptance of benefits under a statute or an ordinance estops a party from attacking the constitutionality of the statute or ordinance.

2. Same; Eminent Domain § 7—

Where landowners accept a sum of money deposited by a municipality with the clerk as estimated compensation due the landowners for the taking of their property pursuant to G.S. Chapter 136, Art. 9, the landowners are thereafter estopped from attacking the constitutionality of the statutes, the jurisdiction of the court to put the municipality in possession, or the failure of the city to comply strictly with the provisions of the statutes.

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

APPEAL by defendants from *Bone, E.J.*, May 1967 Civil Session of DURHAM. This case was docketed and argued as No. 773 at Fall Term 1967.

The City of Durham instituted this proceeding to condemn and appropriate to the public use a tract of land owned in fee simple by defendants and known as 611 S. Roxboro Street in the City of Durham. Plaintiff filed complaint and declaration of taking and notice of deposit on 5 April 1967, and deposited the sum of $8,650.00 in the Superior Court of Durham County as estimated compensation for the use of the persons entitled thereto. At the same time, plaintiff filed for registration a memorandum of action with the Register of Deeds of Durham County as required by section 104 of Article 9 of Chapter 136 of N. C. General Statutes. By order dated 24 April 1967, Judge Leo Carr allowed plaintiff's motion to amend its complaint and declaration of taking so as to allow plaintiff to elect to adopt the procedures provided in Article 9 of Chapter 136 of the General Statutes, as authorized by G.S. 136-66.3. The record does not show that plaintiff filed a supplemental memorandum of action. On 5 April 1967 defendants were served with summons in this action, together with copies of the complaint, declaration of taking, which included the notification of the deposit of the estimated compensation.

Plaintiff offered in evidence affidavits which tended to show that defendants were given notice, by letter and personal contact from representatives of the City of Durham, that the City must acquire the property occupied by them because the same was a necessary part of an expressway project. These notices commenced on 3 November 1966. Defendants were told they would have to vacate by February 1967 and that assistance in relocation would be available to them. In January 1967, a negotiator was hired by the property manager of the Public Works Department of the City of Durham to negotiate the purchase of defendants' property. An official offer to purchase the property was sent to defendants by certified mail on 7 February 1967. Defendants were notified that if they did not accept the City's offer to purchase the property, the property would be condemned by the City for the expressway project.

On 19 April 1967, plaintiff filed motion asking that the court enter an order requiring defendants to appear and show cause why they should not be removed from possession of the premises. Order was entered requiring defendants to appear on 20 April 1967 to show cause why they should not be removed from the premises. On 25 April 1967, defendants petitioned the court to declare Chapter 136, Article 9, section 104 of the General Statutes of North Caro-

lina unconstitutional, and further prayed that the court not hear plaintiff's pending motion to show cause. By order dated 1 May 1967 Judge Walter Bone adjudged section 104, Article 9, Chapter 136 of the General Statutes to be constitutional, and further ordered that defendants vacate the premises at 611 S. Roxboro Street in the City of Durham on or before 31 May 1967.

From this order defendants appealed.

Claude V. Jones and S. F. Gantt for plaintiff appellee.

Nathaniel L. Belcher, George L. Bumpass, E. R. Avant and Franklin M. Moore for defendant appellants.

Attorney General Bruton, Deputy Attorney General Lewis, and Assistant Attorney General McDaniel for Amicus Curiæ on Behalf of The State Highway Commission.

BRANCH, J. Defendants attack the constitutionality of Chapter 136, Article 9, and contend that the trial court was without jurisdiction to enter the order putting plaintiff in possession of the property. They also contend that there was error in that plaintiff failed to comply with the requirements of a portion of Chapter 136, Article 9, to wit, G.S. 136-104.

Defendants petitioned to withdraw the sum of $8,500.00 from the sum of $8,650.00 which plaintiff deposited with the clerk of superior court of Durham County as estimated compensation due defendants for the taking of their property. By order dated 26 May 1967 Judge Leo Carr ordered "that the Clerk of Superior Court, Durham County pay to the defendants, Thurston Bates and wife, Dora Bates the sum of EIGHT THOUSAND FIVE HUNDRED ($8,500.00) DOLLARS of the sum on deposit with said Clerk, as a credit against just compensation without prejudice to further proceedings in the cause to determine just compensation as permitted under G.S. Chapter 136, Article 9, Section 105."

In the case of *Convent v. Winston-Salem,* 243 N.C. 316, 90 S.E. 2d 879, Winborne, J. (later C.J.), speaking for the Court, stated:

> "The acceptance of benefits under a statute generally precludes an attack upon it. See 11 Am. Jur., pp. 765 to 767; *Cameron v. McDonald,* 216 N.C. 712, 6 S.E. 2d 497; *Wall v. Parrott,* 244 U.S. 407, 61 L. Ed. 1229, 37 S. Ct. 609.
>
> "In the *Wall* case the U. S. Supreme Court had this to say: 'They cannot claim the benefit of statutes and afterwards assail their validity. There is no sanctity in such a claim of constitutional right as prevents it being waived as any other claim of right may be.'

"And in 11 Am. Jur., p. 766, the text writer states: 'Estoppel to question the constitutionality of laws applies not only to acts of the Legislature, but to ordinances and proceedings of municipal corporations, and may be extended to cases where proceedings of a municipal corporation are questioned on the ground of the unconstitutionality of the statute under which they are had, as well as to cases where they are attacked on other grounds.'

"The writer continues: 'Estoppel is most frequently applied in cases involving constitutional law where persons, in some manner, partake of advantages under statutes. The rule is well settled that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens. Certainly such a person will not be allowed to retain his advantage or keep his consideration and then repudiate the act as unconstitutional. This principle applies also to questioning the rules or actions of state commissions.'

"Moreover, in *Cameron v. McDonald, supra,* this Court said: 'It is the general rule, subject to certain exceptions, that a defendant may waive a constitutional as well as a statutory provision made for his benefit . . . and this may be done by express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it,' citing *S. v. Hartsfield,* 188 N.C. 357, 124 S.E. 629."

The constitutionality of G.S. 116-149(b) was attacked by a petitioner who was seeking scholarship benefits provided by said statute in the case of *Ramsey v. Veterans Commission,* 261 N.C. 645, 135 S.E. 2d 659. The superior court denied relief to the petitioner, and in affirming the action of the superior court, this Court stated: ". . . she may not question the constitutionality of the Act upon which she bases her claim."

6 Nichols on Eminent Domain, Third Edition, § 28.321(2), p. 682, states:

"It is undoubtedly the law that an owner of land taken by virtue of eminent domain proceedings who has accepted and been paid the award of damages cannot afterwards contest the validity of the taking, either directly or collaterally, or seek to recover or retain possession of his land, no matter how fundamental the defect in the proceeding may be."

Upon accepting the benefits under the statute, defendants are

precluded from attacking the statute, the jurisdiction of the court to enter the order putting plaintiff in possession of the property, or the failure of the plaintiff to strictly comply with the provisions of the statute which defendants attack.

Defendants may proceed in the cause to determine just compensation under G.S. Chapter 136, Article 9.

This cause is remanded to the superior court of Durham County for a determination of just compensation under provisions of G.S. Chapter 136, Article 9.

Remanded.

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

MARY O. SPELLER v. LUTHER W. SPELLER.

(Filed 20 March 1968.)

1. **Deeds § 8—**

   The consideration recited in a deed is presumed to be correct but under certain circumstances may be inquired into by the court.

2. **Cancellation and Rescission of Instruments § 1—**

   An action for rescission of a deed does not lie for the breach of promises honestly made but not thereafter performed.

3. **Cancellation and Rescission of Instruments § 2; Fraud § 1—**

   An action for fraud or for rescission of an instrument must be based upon a false representation knowingly made with intent to deceive which is relied on and does deceive, and which results in loss or injury to the party deceived.

4. **Cancellation and Rescission of Instruments § 8; Fraud § 9— Plaintiff's action for rescission of deed must fail in absence of allegation showing loss by defendant's conduct.**

   In an action to rescind a deed of conveyance, plaintiff alleged that part of the consideration for the conveyance to defendant of her share of her deceased husband's estate consisted of defendant's agreement that certain debts were obligations of the estate and not of the plaintiff, that this agreement was omitted from the deed by mistake, fraud or inequitable conduct, and that defendant subsequently denied that the debts were obligations of the estate. *Held:* The complaint fails to state a cause of action for rescission in the absence of any allegation that plaintiff has suffered loss from defendant's conduct, it appearing from the complaint that the estate's responsibility for the debts has not yet been determined.

APPEAL by plaintiff from *Parker, J.*, September, 1967 Session, BERTIE Superior Court.

The plaintiff, Mary A. Speller, widow of Aaron Speller, instituted this civil action on May 27, 1966 against Luther W. Speller for the purpose of having the court set aside as fraudulent her deed to Luther W. Speller in which she conveyed to him all her right, title and interest in the specifically described real and personal property of which her husband was seized and possessed at the time of his death. The deed, made a part of the amended complaint, dated and delivered on December 8, 1965, recited: "(I)n consideration of the sum of Ten Dollars and other valuable considerations, paid by the party of the second part to the party of the first part, receipt of which is hereby acknowledged. . . ." The first party sold and conveyed to the second party all her right, title, interest and estate in the real and personal property to which she was entitled as widow.

The amended complaint alleged the plaintiff received from the defendant the sum of $3,000 in cash as considered for the property embraced in her deed. In addition to the foregoing, the amended complaint, in material substance, further alleged that the real estate owned by Aaron Speller at the time of his death was worth $25,000, and that his lawful debts, as itemized in the complaint, amounted to $13,184.72. The plaintiff alleged that in addition to the $3,000 paid in cash, the defendant, as further consideration for the deed, agreed that the listed debts constituted valid obligations of Aaron Speller and should be paid out of his estate. However, by mistake of the draftsman of the deed, or by the fraudulent or inequitable conduct of the defendant, the provision was omitted from the deed.

The amended complaint further alleged that W. L. Cooke, administrator, had filed in the Superior Court of Bertie County a special proceeding asking authority to sell the Aaron Speller land to pay the indebtedness of the estate, and that the defendant and the other children had filed an answer to the petition denying the validity of some of the listed debts. By inference, it appears the plaintiff was the co-obligor with her husband on some of the listed obligations. The amended complaint further alleged that the plaintiff is willing to return the $3,000 paid to her in cash and that upon its return, she is entitled to have her deed cancelled.

At the trial, the defendant filed a demurrer *ore tenus* on the ground the amended complaint failed to allege facts sufficient to constitute a cause of action. The court entered judgment sustaining the demurrer *ore tenus*. The plaintiff excepted and appealed.

John R. Jenkins, Jr., for plaintiff appellant.
Gillam & Gillam by M. B. Gillam, Jr., for defendant appellee.

HIGGINS, J. The plaintiff, widow of Aaron Speller, alleged in her amended complaint that she sold and by deed conveyed to the defendant, son of her husband by a former marriage, all her right, title and interest in the tract of land and personal property owned by her husband at the time of his death. The deed, made a part of the amended complaint, recites a consideration of $10 and other valuable considerations. She alleged the grantee paid her $2,000 in cash and executed his note for $1,000, which he has paid in full. She further alleged that the tract of land owned by her husband was reasonably worth $25,000 and that his debts, which were listed in the complaint, amounted to $13,184.72.

The amended complaint further alleged the defendant, his brothers and sisters, and the administrator of her husband's estate, had all agreed that the listed debts constituted valid obligations of her husband's estate. She alleged inferentially that although she may have been a co-signer with her husband on some of the notes listed in the schedule of debts, nevertheless they were to be satisfied out of her husband's property and that according to her agreement with all other interested parties, she was to be saved harmless from any personal liability; and that provision to the effect should have been inserted in the deed; that the omission was a result of mistake on the part of the draftsman, or on her part induced by the defendant's fraudulent and inequitable conduct.

The amended complaint, by way of attempt to show breach of the agreement to save her harmless, alleged the defendant and the other brothers and sisters had filed an answer in the special proceeding challenging the validity of some of the listed debts. The plaintiff argues the answer is a breach of the agreement to save her harmless. She contends the breach of the condition constituted a total failure of consideration and that she be permitted to return the $3,000 which she had received, and upon its return, she is entitled to have the deed set aside.

Ordinarily, the consideration recited in a deed is presumed to be correct. *Hinson v. Morgan,* 225 N.C. 740, 36 S.E. 2d 266. The question of consideration, however, under certain circumstances may be inquired into by the court. *Smith v. Smith,* 249 N.C. 669, 107 S.E. 2d 530; *Conner v. Ridley,* 248 N.C. 714, 104 S.E. 2d 845. Assuming the defendant and his seven brothers and sisters, and the administrator, agreed that all the listed debts were the valid obligations of Aaron Speller, and that the answer challenging some of these debts

has been filed by the defendant and his brothers and sisters; nevertheless, there has been no determination of the question. The plaintiff alleged she is a party to the special proceedings. The liability for the debts will be determined in the due course of administering the estate. The filing of the answer raises, but does not decide, the issue. The plaintiff may or may not be held liable in some amount. Admitting she has $3,000 paid to her for the property, she may not set aside the deed on contingency. However, at some future date she may be able to assert a claim that the defendant has not paid all the consideration for the property she conveyed to him. If she is forced to pay any of her husband's debts which the defendant, as a part of the consideration for the deed agreed to assume, at the proper time and in the proper tribunal, she may be heard on her claim. Where promises are honestly made and not thereafter performed, action for rescission is not the proper remedy. *Hinsdale v. Phillips*, 199 N.C. 563, 155 S.E. 238. In order to establish fraud, there must be a showing of actual loss, injury or damage. *Johnson v. Owens*, 263 N.C. 754, 140 S.E. 2d 311. Any action for fraud or for rescission of an instrument must be laid on this foundation: "A false representation knowingly made with intent to deceive which is relied on and does deceive, and results in loss, damage or injury." *Johnson v. Owens, supra; Keith v. Wilder*, 241 N.C. 672, 86 S.E. 2d 444; *Parker v. White*, 235 N.C. 680, 71 S.E. 2d 122.

In this case, the plaintiff's complaint does not allege any loss. She does not allege sufficient facts upon which to base a cause of action for rescission or even for damages. In bringing her action before ascertaining whether she has suffered loss, and if so how much, the plaintiff has jumped off side before the center snapped the ball starting the play. The judgment of the Superior Court sustaining the demurrer *ore tenus* is

Affirmed.

WAKE COUNTY AND CITY OF RALEIGH, A MUNICIPAL CORPORATION, v. BEN H. INGLE, SR.

(Filed 20 March 1968.)

1. Taxation § 19—

Statutes enacted by the Legislature in the exercise of its constitutional authority to exempt certain classes of property from taxation, Constitution of N. C., Article V, § 5, are to be strictly construed, when there is room for construction, against exemption and in favor of taxation, but

this rule of strict construction does not require that the statute be narrowly construed but only that its application should be restricted to those classifications coming within its terms.

2. Statutes § 5—

Where the language of a statute is plain and unambiguous, it needs no construction, and the statute must be applied according to its plain and obvious meaning.

3. Taxation § 22; Religious Societies and Corporations § 2—

Property owned or occupied gratuitously by a church and used solely for religious worship is exempt from *ad valorem* taxation. G.S. 105-296(3).

4. Same—

Property leased by a church for religious worship without the payment of rent to the owner is property occupied gratuitously within the meaning of G.S. 105-296(3) and is exempt from *ad valorem* taxation, notwithstanding the fact that the church maintains the property and pays the expenses connected with its use.

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

APPEAL by plaintiffs from *Copeland, S.J.*, March 1967 Nonjury Assigned Civil Session of WAKE. Docketed and argued as Case No. 519, Fall Term 1967, and docketed as Case No. 524, Spring Term 1968.

This is a civil action to collect and foreclose certain tax assessments upon real estate heard upon a waiver of jury trial upon stipulated facts agreed to and signed by counsel on either side after the complaint and answer had been filed.

The relevant stipulated facts are in essence as follows: (1) That Wake County is a body politic and corporate of the State of North Carolina and the city of Raleigh is a municipal corporation of Wake County, North Carolina, and each corporation has power and authority to assess, levy, and collect taxes against real and personal property located within their respective boundaries; (2) that defendant Ingle is the owner of a certain lot of realty located in Raleigh Township, Wake County, within the taxing authority of each plaintiff, which realty is described particularly by metes and bounds; (3) that this realty was leased by defendant to the Trustees of the First Missionary Church of Raleigh, North Carolina, by a written lease which is incorporated in the record; (4) that the First Missionary Church of Raleigh, North Carolina, is a duly organized church and religious body, and that the above described premises are used wholly and exclusively for religious worship; (5) that defendant receives no rent from the said First Missionary Church for the use of the property although the said church is to maintain and pay the

expenses connected with its use of the property; (6) that the said lease is in full force and effect; (7) that plaintiffs have listed the leased realty for taxation and assessed the realty for taxation against defendant, and defendant has consistently asserted that the said realty is exempt from taxation by virtue of G.S. 105-296(3); and (8) defendant has not paid any taxes upon the property in controversy.

Upon the stipulated facts Judge Copeland adjudged and decreed that the realty described in the complaint is exempt from taxation, that the plaintiffs recover nothing of the defendant as *ad valorem* taxes for the period covered in this action, that no lien attach to said property by virtue of the taxes levied, and that the costs of this action be taxed against the plaintiffs.

From this judgment plaintiffs appeal to the Supreme Court.

John A. Robertson for plaintiff appellants.
Vaughan S. Winborne for defendant appellee.

PARKER, C.J. Plaintiffs have two assignments of error reading as follows:

> "The plaintiffs except to the failure of the Court to find as a fact and as a conclusion of law that the defendant is not exempt from taxation by virtue of the provisions of G.S. 105-296(3).
>
> "The plaintiffs except to the judgment allowing the defendant to be exempt from taxation by virtue of the provisions of G.S. 105-296(3)."

The North Carolina Constitution, Article V, section 5, declares in respect to property exempt from taxation that "the General Assembly may exempt cemeteries and property held for educational, scientific, literary, cultural, charitable or religious purposes. . . ."

Pursuant to that constitutional authority, the General Assembly enacted G.S. 105-296, which reads:

> "The following real property, and no other, shall be exempted from taxation:
>
> * * *
>
> "(3) Buildings, with the land upon which they are situated, lawfully owned and held by churches or religious bodies, wholly and exclusively used for religious worship or for the residence of the minister of any such church or religious body or occupied gratuitously by one other than the owner which if it were the

> owner, would qualify for the exemption under this section, together with the additional adjacent land reasonably necessary for the convenient use of any such building."

The 1961 General Assembly amended G.S. 105-296(3) by inserting near the middle the words "or occupied gratuitously by one other than the owner which if it were the owner, would qualify for the exemption under this section."

What is said in *Seminary, Inc. v. Wake County*, 251 N.C. 775, 112 S.E. 2d 528, is relevant here:

> "In this connection this Court stated in *Harrison v. Guilford County*, 218 N.C. 718, 12 S.E. 2d 269, that statutes exempting specific property from taxation because of the purposes for which such property is held and used, are and should be construed strictly, when there is room for construction, against exemption and in favor of taxation (citing cases).
>
> " 'By the rule of strict construction, however, is not meant that the statute shall be stintingly or even narrowly construed * * * but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used.' Stacy, C.J., in *S. v. Whitehurst*, 212 N.C. 300, 193 S.E. 657."

When the relevant language of a statute is plain and unambiguous, there is no occasion for construction. Such being the case a statute must be given effect according to its plain and obvious meaning. 82 C.J.S. Statutes § 322b(2) at 577 and 583.

The words used in G.S. 105-296(3), as it is now written, are clear and unambiguous and require no construction. So far as relevant here, these words mean that realty owned and held by churches or religious bodies, wholly and exclusively used for religious worship or occupied gratuitously by one other than the owner which, if it were the owner, will qualify for the exemption under this section.

The relevant stipulated facts are these: (1) The property which is the subject matter of this litigation has been leased to the Trustees of the First Missionary Church of Raleigh, North Carolina; (2) that the said church is a duly organized church and religious body, and that the property is used wholly and exclusively for religious worship; and (3) that defendant receives no rent from said church for the use of said property although the said church is required to maintain and pay the expenses connected with its use of the property. The parties stipulated that the lease described in the pleadings is incorporated in the stipulated facts by reference. In

this lease the property is described as follows, in part: "That the said Lessor, in consideration of the terms, agreements and covenants hereinafter set forth to be fulfilled by the Lessee, does hereby demise and lease to the said Lessee for a period to begin as of the date of this lease and to terminate as set forth below, that certain lot of land, together with the church building and appurtenances located. . . ."

The word "gratuitous" is defined in Black's Law Dictionary, 4th ed., as follows: "Without valuable or legal consideration." It is our opinion, and we so hold, that the fact that the church maintains and pays expenses connected with its use of the leased property, which is a church building and its appurtenances on Rhamkatte Road, does not prevent the church from occupying this property gratuitously. It pays no rent for the leased property, and merely maintains and pays the expenses connected with its use of the leased property which it must do to use properly the leased property for religious purposes. If the church had owned this leased property and had used it, it would have had to maintain it and pay the expenses connected with its use as church property. To adopt a contrary construction would mean a narrow and stinting construction of the statute. It is clear that if the church were the owner of this property which it uses wholly and exclusively for religious worship, it would be exempt from taxation. It seems to us, and we so hold, that to hold this property in controversy exempt from taxation pursuant to G.S. 105-296(3) comes clearly within the scope and purpose of the language used in that statute, and it clearly comes within the scope and language of the constitutional provision of Article V, section 5, that property held for religious purposes shall be exempt from taxation. Plaintiffs' assignments of error are overruled.

The judgment below is
Affirmed.

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

STATE OF NORTH CAROLINA v. ALTON BRYANT KELLUM.

(Filed 20 March 1968.)

1. Automobiles § 120—

The elements of the offense defined by G.S. 20-138 are the driving of a vehicle upon a highway within the State while under the influence of intoxicating liquor.

2. Automobiles § 127—

Evidence in this case *held* sufficient to sustain defendant's conviction of the violation of G.S. 20-138.

APPEAL by defendant from *Hubbard, J.*, September 1967 Session, JONES County Superior Court.

Defendant was charged in a warrant with operating an automobile on a public highway while under the influence of intoxicating liquor. He was tried and convicted in Jones County Recorder's Court on April 7, 1967, and appealed to superior court. His trial there before a jury resulted in conviction of the offense charged, and defendant appealed to the Supreme Court.

The State offered three witnesses whose evidence tended to show the following facts:

Denford Eubanks, while sitting in his living room on the night of February 22, 1967, saw a car turn into his driveway and go around to the back door where a horn commenced blowing until he went to investigate. The driver asked "how do you go home from here . . . I live at Kellum" and was advised "17, the road that you just came off of goes to Kellum." Eubanks called Sheriff Yates. There is only one driveway leading into the Eubanks premises from highway No. 17, and it crosses a culvert in the ditch line of the highway approximately fifteen feet from the door of the Eubanks home. In leaving the vehicle was driven into the ditch. Patrolman Mercer arrived about ten minutes later followed by Sheriff Yates, and they took defendant out of the car and assisted him to the patrol car. Several empty Country Club Malt Lager beer cans were on the floor of defendant's car and a very strong odor of some intoxicant on his breath. Defendant had consumed a sufficient quantity of intoxicants as to appreciably impair his mental and physical faculties. He was unable to walk without assistance.

Defendant Kellum, a witness in his own behalf, testified that "[t]he last time that I remembered anything on that night I was about a mile north of Kellum in Onslow County. I don't have any idea how I got on highway 17 or into Mr. Eubank's [*sic*] yard. . . . I didn't know and still do not know Mr. Denford Eubanks. I don't

know where he lives and I have never been back and looked at his place. I didn't know where it was. I guess I was so drunk that night that I didn't remember anything that happened. I don't remember blowing the horn — I just don't know anything."

Donald P. Brock, Attorney for defendant appellant.

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

PER CURIAM. G.S. 20-138 makes it unlawful for any person, whether licensed or not, who is under the influence of intoxicating liquor to drive any vehicle upon the highways within this State. The three elements of the offense are (1) driving a vehicle, (2) upon a highway within the State, (3) while under the influence of intoxicating liquor. *State v. Haddock,* 254 N.C. 162, 118 S.E. 2d 411.

All the evidence points unerringly to the conclusion that defendant operated a vehicle along highway 17 in arriving at the Eubanks home. The only vehicular entrance to that home was the driveway connected with said highway. Mr. Eubanks saw the car enter his premises. In response to the horn he went to the rear of the house and observed defendant to be the driver and only occupant of the car. Defendant himself says he was so drunk he has no idea where he was or how he got there. The circumstances revealed by the record are, as stated by Parker, J., now C.J., in *State v. Lowther,* 265 N.C. 315, 144 S.E. 2d 64, "consistent with the hypothesis that the accused is guilty, and at the same time are inconsistent with the hypothesis that he is innocent and with every other reasonable hypothesis except that of guilt."

No other verdict could have been rendered on the evidence. Prejudicial error does not appear.

No error.

STATE v. JAMES CHARLES DAVIS.

(Filed 20 March 1968.)

1. Criminal Law § 164—

The sufficiency of the evidence of the State in a criminal case is reviewable upon appeal without regard to whether a motion has been made pursuant to G.S. 15-173 in the trial court. G.S. 15-173.1.

2. Robbery § 4—

Evidence in this case *held* sufficient to be submitted to the jury on the issue of defendant's guilt of armed robbery. G.S. 14-87.

APPEAL by defendant from *Snepp, J.*, September 4, 1967 Schedule "C" Session of MECKLENBURG.

Defendant was tried on a bill of indictment which charged him with the armed robbery, as defined in G.S. 14-87, of Donald R. Jones on January 29, 1967. He was represented at trial by privately retained counsel.

The State's evidence, in brief summary, tends to show: Jones was a taxi driver. About midnight on Saturday, January 28, 1967, in front of the bus station in Charlotte, North Carolina, defendant got into the front seat of the cab with Jones and gave directions that he be taken to an address on Burton Street. Upon arrival in the Burton Street area, defendant by means of a pistol drawn on Jones took from his person the cab company's money and the money from Jones's personal billfold. Jones was constantly put in fear his life would be taken until defendant left him. Defendant was arrested on or about February 3, 1967, in the Burton Street area. He was positively identified by Jones as the man who had robbed him.

Defendant's testimony tends to show that he was not involved in any way in the alleged robbery referred to in the State's evidence.

The jury returned a verdict of guilty as charged in the bill of indictment; and the court pronounced judgment imposing a prison sentence of thirty years.

Defendant gave notice of appeal.

Defendant's privately retained counsel was permitted to withdraw. Thereupon, the court, on account of defendant's indigency, appointed defendant's present counsel to represent him on appeal and ordered Mecklenburg County to pay all necessary costs incident to such appeal.

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

Lila Bellar for defendant appellant.

PER CURIAM. Defendant's brief brings forward the contentions (1) that judgment as in case of nonsuit should have been entered, and (2) that the verdict is contrary to the greater weight of the evidence.

Our attention is directed to the 1967 Act (S.L. 1967, c. 762), now codified as G.S. 15-173.1, which provides: "The sufficiency of

the evidence of the State in a criminal case is reviewable upon appeal without regard to whether a motion has been made pursuant to G.S. 15-173 in the trial court." Even so, there was plenary evidence that defendant is guilty as charged. Motion(s) for judgment as in case of nonsuit, if made in apt time, would have been without merit.

It seems clear the verdict is in accord with the greater weight of the evidence. In any event, whether the verdict should be set aside as contrary to the greater weight of the evidence is for determination by the trial judge in his discretion. Certainly no abuse of discretion has been shown.

Since defendant's assignments do not disclose error, the verdict and judgment will not be disturbed.

No error.

STATE OF NORTH CAROLINA v. SIMON S. LAWRENCE, JR.

(Filed 20 March 1968.)

Criminal Law § 19—

Where a prosecution is transferred from the recorder's court to the Superior Court upon the prosecutor's demand for a jury trial, Session Laws of 1955, Chapter 573, the jurisdiction of the recorder's court is ousted and the Superior Court acquires original jurisdiction to try the defendant upon indictment, and such transfer being mandatory, defendant is not entitled to notice thereof.

APPEAL by defendant from *Fountain, J.*, August-September, 1967 Session, WILSON Superior Court.

The defendant, Simon S. Lawrence, Jr., was arraigned in the Superior Court of Wilson County upon a Grand Jury indictment charging the unlawful operation of a motor vehicle upon the public highway of Wilson County while he was under the influence of intoxicating liquor.

Before pleading to the indictment, the defendant challenged the jurisdiction of the Superior Court upon the ground the defendant was first charged with the same offense in the Recorder's Court of Wilson, and the cause was not legally transferred to the Superior Court. The court held the cause was properly before the Superior Court for trial. The defendant entered a plea of not guilty. Both the State and the defendant introduced evidence. The jury returned a verdict of guilty. From the judgment, the defendant appealed.

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

Gardner, Connor & Lee by Cyrus F. Lee for defendant appellant.

PER CURIAM. The police officers of Wilson arrested the defendant and charged him with operating a motor vehicle on the city streets while under the influence of intoxicating liquor. After the warrant was served the prosecuting officer in the Recorder's Court moved for a jury trial. The "transfer" statute (Chapter 573, Session Laws of 1955) provided for a mandatory transfer to the Superior Court upon special demand for a jury trial, either by the defendant or by the Recorder's Court prosecutor.

After the case was transferred to the Superior Court, the Grand Jury returned a bill of indictment upon which the defendant was tried in the Superior Court. The defendant challenged the order of transfer upon the ground the defendant was not given notice of the motion for transfer and was not present when the order was entered by the Recorder. The transfer, being mandatory, notice was not required. Neither was there necessity for the defendant to be present. The foregoing is apparent from the terms of the statute requiring the defendant to give a new bond in an amount fixed by the Recorder for his appearance at the next session of the Superior Court. The transfer ousted the jurisdiction of the Recorder's Court and gave the Superior Court exclusive original jurisdiction to try the defendant upon indictment. *State v. Peede,* 256 N.C. 460, 124 S.E. 2d 134.

The trial court did not commit error in sustaining the State's objection to an argumentative question asked the arresting officer. The witness was later permitted to say he did not find any intoxicants in the automobile and that he stopped the vehicle because of its high rate of speed — 40 miles per hour in a 20 miles per hour zone — and not for operating while intoxicated. The charge of operating while intoxicated stemmed from the information the officer acquired at the time of and incident to the arrest.

No error.

ROY L. KING, T&DBA KING'S FURNITURE COMPANY v. ADLAY AUGUSTA BASS AND WIFE, MARY JEANETTE P. BASS; ALEXANDER MALPASS, SR., AND ALEXANDER MALPASS, JR.

(Filed 20 March 1968.)

Trial § 34—

The failure of the court to instruct the jury as to which party has the burden of proof upon an issue is prejudicial error and warrants a new trial.

APPEAL by defendants Alexander Malpass, Sr., and Alexander Malpass, Jr., from *Mintz, J.*, August 1967 Civil Session of NEW HANOVER.

This is a civil action based on contract by which plaintiff seeks to recover the sum of $601.00, with interest, from defendants, jointly and severally. Plaintiff contends the sum is due for carpeting installed in a dwelling house constructed by defendants Malpass and owned by defendants Bass. Plaintiff further seeks to enforce a lien under Chapter 44, Article 8, General Statutes of North Carolina, against the premises belonging to defendants Bass. All defendants deny owing plaintiff any amount.

Issues were submitted to and answered by the jury as follows:

"I. Did Adlay Augustus Bass and wife, Mary Jeanette P. Bass, enter into an agreement with Roy L. King, trading and doing business as King's Furniture Company, for the installation of certain carpeting in a house being constructed for them in Cape Fear Township, New Hanover County, North Carolina, as alleged in the Complaint?

ANSWER: No.

"II. Did Alexander Malpass, Sr. and Alexander Malpass, Jr. enter into an agreement with Roy L. King, trading and doing business as King's Furniture Company, for the installation or carpet in a house being constructed for Adlay Augustus Bass and wife, Mary Jeanette P. Bass, in Cape Fear Township, New Hanover County, North Carolina, as alleged in the Complaint?

ANSWER: Yes.

"III. What amount, if any, are the defendants indebted to the plaintiff?

ANSWER: $601.00."

Defendants Malpass moved to set aside the verdict, which motion was denied. Judgment was entered against defendants Malpass

in the amount of $601.00, with interest from 2 May 1966, and the action was dismissed as to defendants Bass.

Defendants Malpass appealed.

Robert Calder for defendants Malpass, appellants.
No Counsel Contra.

PER CURIAM. Appellants' assignments of error include the following:

> "1. The Court erred in failing to state anywhere in his charge to the jury that the burden of proof on all the issues was on the plaintiff.
>
> "2. The Court erred in failing to charge concerning the second issue submitted to the jury that the burden of proof was on the plaintiff and the intensity of proof required."

Plaintiff asserted the affirmative on all the issues presented, and the burden was on him to offer evidence in support of all essential and material elements of his cause of action. *Bank v. Construction Co.,* 203 N.C. 100, 164 S.E. 621.

This Court considered the duty of the trial judge to instruct on burden of proof in the case of *Watt v. Crews,* 261 N.C. 143, 134 S.E. 2d 199, wherein Denny, C.J., speaking for the Court, stated:

> "'In *Tippite v. R. R.,* 234 N.C. 641, 68 S.E. 2d 285, this Court said: "G.S. 1-180, as amended, requires that the judge 'shall declare and explain the law arising on the evidence given in the case.' This places a duty upon the presiding judge to instruct the jury as to the burden of proof upon each issue arising upon the pleadings. It is said that ' "the rule as to the burden of proof is important and indispensable in the administration of justice. It constitutes a substantial right of the party upon whose adversary the burden rests; and, therefore, it should be carefully guarded and rigidly enforced by the court. *S. v. Falkner,* 182 N.C. 793, and cases cited." *Hosiery Co. v. Express Co.,* 184 N.C. 478.' *Coach Co. v. Lee,* 218 N.C. 320, 11 S.E. 2d 341; *Crain v. Hutchins,* 226 N.C. 642, 39 S.E. 2d 831."'"

The trial court failed to give instructions as to the burden of proof on any of the issues. This omission violates a substantial right of appellants and constitutes prejudicial error.

New trial.

C. A. KNUTTON, T/A REID MUSIC COMPANY v. JAMES E. COFIELD, T/A COFIELD RESTAURANT.

(Filed 27 March 1968.)

1. Appeal and Error § 45—

Exceptions and assignments of error not brought forward and discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Trial § 57—

When trial by jury is waived, the court is required to give its decision in writing with its findings of fact and conclusions of law stated separately, G.S. 1-185, and its findings have the force and effect of a jury verdict and are conclusive on appeal if supported by evidence, even though the evidence may sustain a finding to the contrary.

3. Trial § 56—

Where a jury trial is waived, the weight and credibility of the evidence are for the trial judge.

4. Monopolies § 2—

A contract whereby plaintiff and defendant jointly undertake to provide a coin-operated phonograph for the use of patrons in defendant's restaurant, the plaintiff agreeing to furnish and service the machine and the defendant agreeing to furnish the space and the cost of electricity, is not a contract for the sale of goods, wares or merchandise within the contemplation of the statutes against restraint of trade. G.S. 75-1, G.S. 75-2, G.S. 75-5(b)(2).

5. Damages § 7—

Liquidated damages may be collected; a penalty will not be enforced.

6. Same—

A stipulated sum is for liquidated damages (1) where the damages which the parties might reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty and, (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach or is reasonably proportionate to the damages which have actually been caused by the breach.

7. Same—

A provision in a contract for the installation of a coin-operated phonograph that in the event the store proprietor breached the contract the owner of the phonograph might recover a sum equal to the proprietor's average weekly profit prior to the breach, multiplied by the number of weeks remaining under the contract, is a provision for the payment of liquidated damages and not penalty.

8. Same—

Liquidated damages may be recovered in the event of a breach, notwithstanding no actual damages are suffered.

9. Same—

The effect of a provision for liquidated damages is to substitute the amount agreed upon as liquidated damages for the actual damages resulting from breach of contract, and the recovery must be for the stipulated amount.

10. Contracts § 1—

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

BOBBITT, J., dissenting.

SHARP, J., joins in dissenting opinion.

APPEAL by defendant from *Copeland, S.J.*, April 1967 Session HERTFORD Superior Court.

Plaintiff alleged in summary as follows:

1. That plaintiff resides in Hertford County and defendant resides in Bertie County, North Carolina.

2. That on 26 June 1963 plaintiff and defendant executed a contract for the installation of an electric phonograph in defendant's place of business, providing in pertinent part as follows:

(a) Plaintiff agreed to install in defendant's premises ready for use an electric automatic coin-operated phonograph and agreed to supply the records and to replace parts that might have been damaged by wear and tear.

(b) Defendant agreed to provide adequate and reasonable space in his premises for the installation of the phonograph in an area mutually agreed upon.

(c) Defendant agreed to keep the phonograph connected to an electric outlet in the premises and ready for operation at all times during business hours and pay for the electric current consumed in the operation of the machine.

(d) Defendant agreed that during the term of the contract or any renewal thereof he would not permit the installation in his premises of any other phonograph or other device for the reproduction of music, the privilege granted to the plaintiff in that respect being exclusive.

(e) Plaintiff and defendant agreed that the gross receipts

resulting from the operation of the phonograph should be shared equally.

(f) The parties agreed that the life of the contract should be for a term of five years from its date.

(g) The contract was subject to other terms and conditions contained on the reverse side, including Clause F as follows:

"Should the Location Owner disconnect the Phonograph or cause its removal or permit the installation of another Phonograph not owned or operated by Music Operator or otherwise fail promptly to perform any of the terms, covenants and conditions of this agreement, or any renewal thereof, then and in such event, at the option of the Music Operator, there shall become immediately due and payable, as liquidated damages and not as a penalty, the sum which the Music Operator would have received under the terms of this agreement for the balance of the term of the agreement. The amount payable to the Music Operator shall be computed as follows: The total receipts from the operation of the Phonograph, less the amount paid over to the Location Owner for the weeks preceding the breach by the Location Owner of the terms, covenants and conditions of this agreement, shall be totalled and divided by the number of weeks that have elapsed since the commencement date of this agreement and the sum resulting shall constitute the 'net average weekly payment.' This 'net average weekly payment' shall be multiplied by the number of weeks remaining under the terms of this agreement, and such resulting sum shall immediately become due and payable. It is further agreed that, upon default by the Location Owner of any of the terms, covenants or conditions of this agreement or any renewal thereof, the Location Owner's right to continue in possession of the Phonograph shall, at the option of the Music Operator, cease without notice or demand."

3. That on 11 November 1964, without notice, defendant disconnected plaintiff's phonograph and caused another phonograph not the property of the plaintiff to be placed in defendant's place of business, known as the Cofield Restaurant; that defendant has refused to remove the additional phonograph and refused to reconnect the phonograph of the plaintiff, in breach of the terms and conditions of the contract.

4. That from 26 June 1963 to 11 November 1964, a period of

seventy-two weeks, the gross receipts from plaintiff's phonograph in defendant's place of business were $2,254.30; that each party received one half of said amount; that plaintiff's average weekly payment from said machine was $15.65; that a total of 188 weeks remained on said contract at the time of its breach, and plaintiff is entitled to recover a total sum of $2,942.20 as liquidated damages pursuant to the terms and conditions of Clause F of the contract.

Defendant demurred to the complaint for that it does not state facts sufficient to constitute a cause of action "in that the plaintiff has failed to allege a cause of action and that the matter as set out in the complaint does not constitute a cause of action and is void, as the purported contract is against public policy and a restraint of trade, in violation of the laws of the State of North Carolina." The demurrer was overruled, and defendant filed answer denying the material allegations of the complaint. By way of further answer and defense, he denied signing the contract and averred that if he did sign it same was void as against public policy and in restraint of trade.

The parties waived a jury trial and consented that the matter be heard by Copeland, S.J., without a jury; whereupon, after hearing the evidence and arguments of counsel, he made findings of fact substantially in accord with the allegations of the complaint and concluded as a matter of law that the contract was valid and binding. Judgment was rendered that plaintiff recover liquidated damages in the sum of $2,968.52 with interest from 11 November 1964 at six per cent per annum until paid, and for costs.

Defendant excepted and appealed.

Joseph J. Flythe and Carter W. Jones, Attorneys for defendant appellant.

Cherry & Cherry by Thomas L. Cherry, and Gillam & Gillam by M. B. Gillam, Jr., Attorneys for plaintiff appellee.

HUSKINS, J. Defendant preserves three exceptions and assigns same as error. All others are deemed abandoned since they are not brought forward and discussed in the brief. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783 at 810; *State v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781.

Defendant assigns as error the judgment overruling his demurrer. We are unable to find in the record proper any exception to support this assignment. An assignment of error is worthless unless it is based upon an exception duly taken in apt time during the trial and preserved as required by Rule 19(3) and Rule 21, Rules of Practice

in the Supreme Court, *supra; State v. Strickland, supra; Tynes v. Davis,* 244 N.C. 528, 94 S.E. 2d 496; *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223. Even so, we have examined the complaint and in our opinion it states a good cause of action.

When trial by jury is waived and issues of fact are tried by the court, it is required to give its decision in writing with its findings of fact and conclusions of law stated separately. G.S. 1-185; *In Re Wallace,* 267 N.C. 204, 147 S.E. 2d 922; *Taney v. Brown,* 262 N.C. 438, 137 S.E. 2d 827. Its findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary. *Sherrill v. Boyce,* 265 N.C. 560, 144 S.E. 2d 596; *Priddy v. Lumber Co.,* 258 N.C. 653, 129 S.E. 2d 256; *Insurance Co. v. Lambeth,* 250 N.C. 1, 108 S.E. 2d 36; *Trust Co. v. Finance Corp.,* 238 N.C. 478, 78 S.E. 2d 327. The trial judge becomes both judge and juror, and it is his duty to consider and weigh all the competent evidence before him. *Hodges v. Hodges,* 257 N.C. 774, 127 S.E. 2d 567. He passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. If different inferences may be drawn from the evidence, he determines which inferences shall be drawn and which shall be rejected. *Hodges v. Hodges, supra.*

There is plenary evidence in the record to support the findings of fact; hence, this Court is bound by them. Defendant in his own testimony admitted signing the contract and breaching it. He must therefore stand or fall upon his contentions that (1) the contract is void as against public policy because it is in restraint of trade and prohibited by G.S. 75-1, -2 and -5; or (2) that the "liquidated damages" clause of the contract is in fact a penalty and not enforceable.

G.S. 75-1 declares "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce" to be illegal. Any such act, contract, combination or conspiracy which violates the principles of common law is declared to be illegal by G.S. 75-2. Numerous particular acts are prohibited by G.S. 75-5, subsection (b)(2) thereof making it unlawful for any person to have any contract "[t]o sell any goods in this State upon condition that the purchaser thereof shall not deal in the goods of a competitor or rival in the business of the person making such sales." Hence, it becomes necessary to examine these statutes and determine their applicability, if any, to the contract between plaintiff and defendant in this case.

The statutes on monopolies and trusts, codified as Chapter 75 of

the General Statutes of North Carolina, are addressed to the sale and movement in commerce of goods, wares, merchandise and other things of value. Cases arising under them ordinarily involve a vendor and a purchaser. Thus the prohibited acts are usually connected with a purchase and sale, whereas the contract between plaintiff and defendant involves their joint undertaking to provide a coin-operated phonograph for the use of the patrons at defendant's restaurant, plaintiff to furnish and service the machine and defendant to furnish the space for its occupancy and pay for the electricity used to operate it. Profits were to be equally divided. In our opinion, this contractual arrangement does not involve a sale of goods, wares, or merchandise within the contemplation and scope of Chapter 75 of the General Statutes. Defendant was not engaged in the business of selling music machines and did not contract to refrain from selling machines of plaintiff's competitors. Hence, *Fashion Co. v. Grant,* 165 N.C. 453, 81 S.E. 606; *Shoe Co. v. Department Store,* 212 N.C. 75, 193 S.E. 9, and *Arey v. Lemons,* 232 N.C. 531, 61 S.E. 2d 596, relied on by defendant, are readily distinguishable.

In *Bradshaw v. Millikin,* 173 N.C. 432, 92 S.E. 161, defendant sold his barber shop to plaintiff and agreed that he would not engage in the barber shop business in the town of Hamlet for a period of two years; and in case of breach of his agreement, defendant agreed to pay $400.00 as liquidated damages. Upholding the contract the Court said:

> "Contracts in restraint of trade, like the one we are now considering, were formerly held to be invalid as against public policy, but the more modern doctrine sustains them when the restraint is only partial and reasonable. The test . . . is to consider whether it is such only as will afford a fair protection to the interests of the party in favor of whom it is given, and not so large or extensive as to interfere with the interests of the public."

In *Mar-Hof Co. v. Rosenbacker,* 176 N.C. 330, 97 S.E. 169, it was held that a contract, made in good faith for a valuable consideration, whereby the manufacturer of middy suits gave the plaintiff an exclusive agency to sell the suits in a named territory, was valid and enforceable and not within the inhibition of the antitrust statutes or of the common law. Accord, *Buick Co. v. Motors Corp.,* 254 N.C. 117, 118 S.E. 2d 559.

Finally, defendant contends that plaintiff seeks to recover a penalty erroneously denominated in the contract as liquidated damages. "Liquidated damages may be collected; a penalty will not be en-

forced." *Kinston v. Suddreth,* 266 N.C. 618, 620, 146 S.E. 2d 660, 662.

"The phrase 'liquidated damages' means a sum stipulated and agreed upon by the parties, at the time of entering into a contract, as being payable as compensation for injuries in the event of a breach. . . . [A] stipulated sum which is determined to be liquidated damages rather than a penalty is enforceable." 22 Am. Jur. 2d, Damages § 212.

"*Liquidated damages* are a sum which a party to a contract agrees to pay or a deposit which he agrees to forfeit, if he breaks some promise, and which, having been arrived at by a good-faith effort to estimate in advance the actual damage which would probably ensue from the breach, are legally recoverable or retainable . . . if the breach occurs. A *penalty* is a sum which a party similarly agrees to pay or forfeit . . . but which is fixed, not as a pre-estimate of probable actual damages, but as a *punishment,* the threat of which is designed to prevent the breach, or as *security* . . . to insure that the person injured shall collect his actual damages." McCormick, Damages § 146 (1935). Quoted with approval in *Kinston v. Suddreth, supra.*

Whether a stipulated sum will be treated as a penalty or as liquidated damages may ordinarily be determined by applying one or more aspects of the following rule: "[A] stipulated sum is for liquidated damages only (1) where the damages which the parties might reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty and (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach *or* is reasonably proportionate to the damages which have actually been caused by the breach." 22 Am. Jur. 2d, Damages § 214. This rule was generally followed in *Bradshaw v. Millikin, supra* (173 N.C. 432, 92 S.E. 161) where the Court stated:

> "In deciding whether the sum fixed by the contract as the measure of a recovery, if there is a breach, should be regarded as a penalty or as liquidated damages, the court will look at the nature of the contract, and its words, and try to ascertain the intentions of the parties; and also will consider that the parties, being informed as to the facts and circumstances, are better able than any one else to determine what would be a fair and reasonable compensation for a breach; but the courts have been greatly influenced by the fact that in almost all the cases the damages are uncertain and very difficult to estimate."

While early opinions tended to regard stipulations in contracts purporting to fix sums to be paid in the event of breach as penalties

rather than as liquidated damages, and courts were slow to enforce stipulated sums, "it is doubtful that there is any longer sufficient authority to support a rule that the courts tend to regard such provisions as penalties. In fact, some courts have given expression to the opposite rule and have said that the modern tendency is to look upon stipulated sums with candor, if not with favor." 22 Am. Jur. 2d Damages § 214; *Kothe v. R. C. Taylor Trust,* 280 U.S. 224, 74 L. ed. 382, 50 S. Ct. 142; *Wise v. United States,* 249 U.S. 361, 63 L. ed. 647, 39 S. Ct. 303. "Ordinarily, even a court of equity will not relieve against a stipulation for liquidated damages." 22 Am. Jur. 2d, Damages, *supra; Sun Printing and Publishing Association v. Moore,* 183 U.S. 642, 46 L. ed. 366, 22 S. Ct. 240.

Applying the foregoing principles of law to the contract before us, we are of the opinion that the terms of the agreement are within the principles under which such contracts are held to be valid and that the sum to be paid upon breach should be considered as liquidated damages and not as a penalty. The formula for ascertaining the amount of damages, contained in Clause F of the contract, affords a mathematical method of making certain that which otherwise is very uncertain. Furthermore, the result of such calculation is a reasonable estimate of the damages which would probably be caused by a breach as it appeared to the parties at the time the contract was made. In addition, absent Clause F there is no standard by which a jury could fix with any degree of certainty the amount of damages sustained by plaintiff by reason of the breach. "Where the damages resulting from a breach of contract cannot be measured by any definite pecuniary standard, as by market value or the like, but are wholly uncertain, the law favors a liquidation of the damages by the parties themselves; and where they stipulate for a reasonable amount, the agreement will be enforced." Hale on Damages, p. 133, quoted with approval in *Machine Co. v. Tobacco Co.,* 141 N.C. 284, 297, 53 S.E. 885, 889.

In light of these principles, defendant's exceptions and assignments of error are overruled. There is evidence to support the findings of fact and the authorities cited support the conclusions of law.

Appellant concludes his brief by saying: "Admittedly, there was a breach of the written agreement alleged by the plaintiff; but the damages awarded to the plaintiff in this case, if upheld, would not only compensate him for any loss suffered by the breach, but would enrich him to such an extent that he would reasonably hope that all of his contracts similar to the one in question would be broken." Even so, it is the general rule that the amount stipulated in a contract as liquidated damages for a breach thereof, if regarded by the

court as liquidated damages and not as a penalty, may be recovered in the event of a breach even though no actual damages are suffered. 22 Am. Jur. 2d, Damages § 234, citing *United States v. Bethlehem Steel Co.,* 205 U.S. 105, 51 L. ed. 731, 27 S. Ct. 450; *United States v. LeRoy Dyal Co.* (C.A. 3 N.J.), 186 F. 2d 460, cert. den. 341 U.S. 926, 95 L. ed. 1357, 71 S. Ct. 797; *Robbins v. Plant,* 174 Ark. 639, 297 S.W. 1027, 59 A.L.R. 1128; *McCarthy v. Tally,* 46 Cal. 2d 577, 297 P. 2d 981; *Parker-Washington Co. v. Chicago,* 267 Ill. 136, 107 N.E. 872; *Salem v. Anson,* 40 Ore. 339, 67 P. 190; *Kelso v. Reid,* 145 Pa. 606, 23 A. 323; *Mead v. Anton,* 33 Wash. 2d 741, 207 P. 2d 227, 10 A.L.R. 2d 588. Unless the provision for liquidated damages be regarded as a penalty and unenforceable, the effect of such clause in a contract "is to substitute the amount agreed upon as liquidated damages for the actual damages resulting from breach of the contract, and thereby [prevent] a controversy between the parties as to the amount of damages. . . . [T]he sum stipulated forms, in general, the measure of damages in case of a breach, and the recovery must be for that amount." 22 Am. Jur. 2d, Damages § 235, citing numerous cases from other jurisdictions. In this connection, plaintiff alleged he had received an average weekly payment of $15.65 for 72 weeks, and sued for that weekly amount during the remaining 188 weeks of the contract period, totalling $2,942.20. The trial judge found as a fact, supported by the evidence, that plaintiff's average weekly payment had been $15.79 and entered judgment for $2,968.52. ($15.79 x 188 weeks). This slight variation is not material. McIntosh, N. C. Practice and Procedure § 1288(1); *McCrillis v. Enterprises,* 270 N.C. 637, 155 S.E. 2d 281; *Dennis v. Albemarle,* 242 N.C. 263, 87 S.E. 2d 561.

Courts do not make contracts. As stated by Higgins, J., in *Roberson v. Williams,* 240 N.C. 696, 83 S.E. 2d 811, "Ordinarily, when parties are on equal footing, competent to contract, enter into an agreement on a lawful subject, and do so fairly and honorably, the law does not permit inquiry as to whether the contract was good or bad, whether it was wise or foolish."

In the trial below we find

No error.

BOBBITT, J., dissenting: I agree the demurrer was properly overruled and that Clause F of the contract is not void as violative of statutory provisions relating to restraint of trade. Moreover, I do not question the general statements in the Court's opinion relating to distinctions between "liquidated damages" and "penalty."

The judgment of the court below, and this Court's decision, is

predicated on an interpretation of Clause F which completely relieves plaintiff of any obligation, notwithstanding he has had possession and control of the electric "music machine" or "piccolo" during the period for which he seeks to recover from defendant, to minimize his damages by accounting for what he has received or by the exercise of due diligence should have received from the installation thereof in another or other locations. In my opinion, the provisions of Clause F when so interpreted provide for a penalty rather than for liquidated damages; that the judgment of the court below was entered under misapprehension of the applicable law; and that the cause should be remanded for determination of plaintiff's damages in accordance with the rules ordinarily applicable in determining damages for such breach of contract.

Evidence offered by plaintiff tends to show he discovered on November 11, 1964, that his electric "music machine" or "piccolo," located in defendant's restaurant-dance hall, had been disconnected; that plaintiff removed it from defendant's place of business on or about November 16, 1964, and thereupon placed it in the place of business of Eli Cofield, defendant's brother, who operated "a sort of combination pool room and beer parlor"; and that an older machine, theretofore located in Eli's place of business, was removed and taken to plaintiff's shop. The agent for plaintiff who handled these matters testified the older machine did not need repairs or service and that he was "almost sure we put it out some place later." There was evidence that defendant and his brother Eli had adjoining places of business "right there at Midway in Bertie County."

Upon waiver of jury trial, the issues of fact were determinable by the trial judge. It does not appear that defendant's counsel undertook to explore and develop evidence with reference to what plaintiff actually received or by the exercise of due diligence should have received from the operation of its machine in Eli Cofield's place or other places of business during the unexpired portion of defendant's contract with plaintiff. It would appear that any attempt to do so would have been futile in the face of the court's opinion that Clause F provided for "liquidated damages" and not a "penalty" and defined with precision a complete method for determining what plaintiff was entitled to recover in event of such breach. My dissent is directed to this interpretation of Clause F, an interpretation now accepted and approved by this Court.

Relevant general principles are set forth in the Restatement of Contracts, § 339, entitled, "Liquidated Damages and Penalties," which, in pertinent part, provides: "(1) An agreement, made in advance of breach, fixing the damages therefor, is not enforceable as a

contract and does not affect the damages recoverable for the breach, unless (a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and (b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation."

In *Gorco Construction Company v. Stein,* 256 Minn. 476, 99 N.W. 2d 69, Matson, J., speaking for the Supreme Court of Minnesota, stated: "In determining the issue (whether a particular provision is one for a penalty or one for liquidated damages) neither the intention of the parties nor their expression of intention is the governing factor. The controlling factor, rather than intent, is whether the amount agreed upon is reasonable or unreasonable in the light of the contract as a whole, the nature of the damages contemplated, and the surrounding circumstances." In an earlier Minnesota case, *Schommer v. Flour City Ornamental Iron Works,* 129 Minn. 244, 152 N.W. 535, the opinion states: "The law adopts as its guiding principle that the injured party is entitled to receive a fair equivalent for the actual damages necessarily resulting from failure to perform the contract and no more." Accord: *Jolley v. Georgeff,* 110 N.E. 2d 23 (Ohio).

Ordinarily liquidated damages consist of an amount fixed as of the date the contract is made as damage resulting from a breach thereof or a breach of some specific provision thereof. The word "liquidated" has been defined as follows: "A demand is not liquidated though it appears that something is due, unless it appears how much is due." Ballentine's Law Dictionary, Second Edition, p. 763. It is said that "(t)he term is applicable when the amount of the damages has been ascertained by the judgment in the action, or when a specific sum of money has been expressly stipulated by the parties to a bond or other contract as the amount of damages to be recovered by either party for a breach of the agreement by the other." Black's Law Dictionary, Fourth Edition, p. 468.

"The provision for the payment of liquidated damages founded upon a sum that is uncertain and unliquidated at the time that the agreement is entered into cannot be said to constitute liquidated damages as to the amount to be paid in the event of a breach of contract. A liquidated damages clause presupposes an agreement between the parties for the payment of a sum certain upon the breach of the contract. (Citation.)" *Frankel's Carpet Fashions, Inc., v. Abraham,* 228 N.Y.S. 2d 123.

Here, as in *Weinstein v. Griffin,* 241 N.C. 161, 84 S.E. 2d 549, discussed below, the contract provision does not fix a stipulated amount as damages resulting from a breach of any one or more of

the contract provisions. It purports to establish a method for determining the amount of damages different from the rule otherwise prescribed by law. In my view, the stipulated method imposes a penalty and therefore is unenforceable. Assuming its validity in determining what plaintiff would have received if the machine had remained in defendant's place of business, it cannot relieve plaintiff of the legal obligation to minimize his damage.

The lease considered in *Christie, Mitchell and Mitchell Co. v. Selz,* 313 S.W. 2d 352 (Texas), obligated the lessee to pay a rental of seventy-five dollars per month. The lessee surrendered the premises ten and one-half months before the lease term of two years expired. The lease contained the following provision: "Lessee shall nevertheless be liable to Lessor for the remaining balance then unpaid on such lease, at the rate of $75.00 per month as hereinabove specified, for the number of months then remaining in said term . . . , *and Lessee hereby expressly covenants to pay to Lessor such sum in such event at the time of surrendering up said premises,* . . ." (Emphasis by Massey, C.J., in his opinion for the Court of Civil Appeals of Texas.) Based thereon, the trial judge granted summary judgment for $787.50. The evidence disclosed that three months and ten days after lessee surrendered possession, the lessor rented the same premises to a third party as tenant and received substantial rentals from the new tenant. It was held that the contract provision on which the lessor relied, if and when construed as relieving the lessor of an obligation to account for the rentals received from the new tenant, provided for a penalty rather than liquidated damages. The judgment of the trial court was reversed and the cause remanded.

In *Weinstein v. Griffin, supra,* the factual situation was quite different. There, the lease stipulation provided for the recovery by the lessor of the difference between the reasonable rental value and the rent provided in the contract during the unexpired portion of the term of the lease. This provision was treated by this Court as a stipulation for liquidated damages. The basis of decision is indicated by this excerpt from the opinion: "While liquidated damages, if in the nature of a penalty, are not favored (*Crawford v. Allen,* 189 N.C. 434, 127 S.E. 521), the liquidated damages fixed in the contract are not less favorable to the defendants than the rule of law would impose in the absence of any provision for liquidated damages." In *Weinstein,* it was stipulated that, if the premises were surrendered during the term, the rental for the unexpired portion of the term was to be reduced by the *reasonable rental value* of the premises during this period rather than by what the lessors, by the exercise of due diligence, could obtain by a rental thereof. Although the evidential

approach was different, there would be little variance, if any, in the result reached *by these methods of minimizing* the lessee's damages.

In *Melodies, Inc., v. Mirabile,* 179 N.Y.S. 2d 991, the contract related to the installation of "music service" in the defendant's bar. The plaintiff alleged and offered evidence tending to show the defendant breached the contract by discontinuing the service. Paragraph 10 of the contract provided: "10. Any act by the second party (defendant) causing an interruption, cessation or limitation of the full use of the equipment in accordance with the terms of this agreement shall be deemed a repudiation of this agreement by the second party. In such event, it is agreed that the measure of damages sustained by the first party . . . shall be the total original cost of installation as set forth in Exhibit 'B' *plus* a sum equal to the average return per week to the first party (plaintiff) up to the happening of such event from the equipment installed pursuant to this agreement, multiplied by the number of weeks remaining under the terms of this agreement or any renewal thereof." (Our italics.) Plaintiff offered evidence that its gross collections the year and five months the contract was in operation amounted to $2,383.15 and that the average weekly collection for the same period was $33.09. The court, in a trial without jury, awarded damages in the amount of $2,000.00, the jurisdictional limit. On appeal, it was held "that Paragraph 10 of the contract, conditioned as it was, constituted a penalty." The finding as to damages was reversed and the cause was "remitted" for a new trial "on damages."

In *Unit Vending Corporation v. Tobin Enterprises,* 194 Pa. Super. 470, 168 A. 2d 750, a similar factual situation was considered. The gist of the decision is accurately stated in this portion of the first headnote in the Atlantic Reporter, *viz.:* "Provision in agreement for location of cigarette vending machine that in event of breach or imminent breach by proprietor, operator might recover balance of loan made to proprietor *and* sum equal to operator's average profit prior to breach multiplied by months remaining in unexpired term, plus collection fees, was penalty . . ." (Our italics.) The opinion of Ervin, J., citing Restatement, Contracts, § 339, states: "If the amount of damages assessed is subsequently adjudged unreasonable in the light of either anticipated or actual harm, the contractual provision will be voided as a penalty." The opinion also states: "The operator should not be compensated for any profits that it might have been able to obtain by placing the machine in another location. It had the duty to minimize its damages by so doing if this were possible."

Where a stipulation as to damages recoverable in the event of a breach of contract is construed a penalty and not an agreement as

to liquidated damages, the party claiming damages may recover only such compensatory damages as he may be able to prove. *Jolley v. Georgeff, supra;* 25 C.J.S., Damages § 116(b), p. 1105; 22 Am. Jur. 2d, Damages § 235, p. 321.

I find no decision upholding as a valid "liquidated damages" provision a stipulation similar to that contained in Clause F as construed by the trial judge and now by this Court. The only decisions I have found involving closely analogous factual situations are set forth above.

SHARP, J., joins in dissenting opinion.

REDEVELOPMENT COMMISSION OF HIGH POINT v. DENNY ROLL AND PANEL COMPANY; EDWARD N. POST; SUBSTITUTED TRUSTEE; HIGH POINT BANK AND TRUST COMPANY; GUILFORD COUNTY AND CITY OF HIGH POINT.

(Filed 27 March 1968.)

1. Eminent Domain § 11—

In condemnation proceedings the issue as to the amount of damages or 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—

Whether property involved in a voluntary sale is sufficiently similar in nature, location and condition to the property appropriated by condemnation to admit evidence of its sale and the price paid therefor as a guide to the value of the condemned property is a question to be determined by the trial judge in the exercise of his sound discretion.

3. Same—

Evidence tending to show a decrease in the market value of one piece of property some three and one-half blocks from the property sought to be condemned *is held* properly excluded by the trial court in the exercise of its discretion.

4. Same—

The exclusion of testimony relating to the value of property sought to be condemned by a municipal redevelopment commission *is held* without error where testimony of similar import was admitted without objection.

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

APPEAL by petitioner from *Crissman, J.,* March 20, 1967 Civil Session of GUILFORD, High Point Division, docketed and argued as No. 691 at Fall Term 1967.

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 215 South Centennial Avenue, High Point, North Carolina, owned by defendant Denny Roll and Panel Company (Panel Company). Edward N. Post, substituted trustee, and High Point Bank and Trust Company, were joined as respondents on account of their respective interests under a deed of trust on said property. The City of High Point and Guilford County were joined as respondents on account of their claims for *ad valorem* taxes. Hereafter the word "respondent" will refer only to respondent Panel Company.

It was stipulated November 8, 1965, the date the petition was filed, was "the date of taking"; and that the only issue for determination was the issue of damages. The assistant clerk of superior court, by order consented to by counsel for petitioner and for respondent, appointed Commissioners. They assessed respondent's damages at $195,000.00. The assistant clerk affirmed their report and entered judgment in accordance therewith. Both petitioner and respondent excepted and appealed to the superior court for trial by jury of the issue of damages.

Upon trial in the superior court, evidence was offered by respondent and by petitioner.

The subject property is located in the City of High Point, approximately two blocks from the courthouse. It fronts 294.4 feet on South Centennial Avenue and extends east, at varying widths, to Mangum Street, the frontage on Mangum being 390 feet. It is approximately in the center of the block bounded on the north by East Commerce Street and on the south by East Green Street.

On November 8, 1965, the subject property, then the site of respondent's operations as a plywood manufacturing plant, consisted of a land area of 98,394 square feet and of a complex of buildings. The oldest buildings were erected in 1902 and others were added from time to time through the years. The buildings, including balconies and basements, had a total floor space of 65,691 square feet.

There was evidence describing the subject property in detail. Each of the thirteen buildings and additions thereto, including its age, composition, location, function, etc., was described. Fixtures, including the heating, sprinkler and wiring systems, were described. Outside facilities, including retaining walls, fencing, paved driveways and parking lots, railroad spur track, etc., were described. In

addition to this descriptive testimony, the jurors, under the court's order and supervision, saw for themselves the land, buildings and facilities constituting the subject property.

There was conflicting evidence as to the use for which the subject property was best suited. Evidence offered by respondent was to the effect that as of November 8, 1965, the best use was for light industry, such as furniture manufacturing. Evidence offered by petitioner was to the effect its best use as of that date was for warehouse purposes.

Opinion evidence of five witnesses offered by respondent as to the fair market value of the subject property as of November 8, 1965, was as follows: Hylton, $282,500.00; Shavitz, $290,000.00; Conrad, $298,000.00; Samet, $321,129.00; Smith, $425,000.00.

The opinion evidence of two witnesses offered by petitioner as to the fair market value of the subject property as of November 8, 1965, was as follows: Mendenhall, $150,500.00; Robb, $135,000.00.

The issue submitted, and the jury's answer thereto, were as follows: "What is the total fair market value of the real property described in the petition? ANSWER: $240,000.00."

The court entered judgment providing that, upon payment of $240,000.00 plus interest and costs, including a fee to respondent's attorneys, the title of respondent would be divested and petitioner would be the owner in fee simple of the subject property.

Petitioner excepted and appealed.

Haworth, Riggs, Kuhn & Haworth and Walter W. Baker, Jr., for petitioner appellant.

Smith, Moore, Smith, Schell & Hunter; Richmond G. Bernhardt, Jr.; and Morgan, Byerly, Post & Keziah for Denny Roll and Panel Company, respondent appellee.

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; *Redevelopment Commission v. Smith,* 272 N.C. 250, 158 S.E. 2d 65.

There was evidence that, in the appraisal of property, there are three standard approaches, namely, (1) the cost approach, (2) the income approach, and (3) the market comparison approach; that the cost approach involves a determination of the fair market value of the (vacant) land, the cost of reproduction of the buildings or replacement thereof by new buildings of modern design and materials

less depreciation; and that the income and market approaches include a consideration of the rentals and prices obtained from the lease or sale of comparable properties reasonably related in respect of location and time. Expert witnesses for respondent and for petitioner were in substantial accord that all of these approaches should be considered in forming an opinion as to the fair market value of the subject property as of November 8, 1965.

There was conflicting evidence as to each of the elements involved in the cost approach. The income approach was stressed by petitioner's evidence. It was minimized by respondent's evidence on the ground the buildings on the subject property were for a special purpose and therefore not readily rentable. Expert witnesses for respondent and for petitioner testified that, with reference to the market approach, they had taken into consideration the sale prices of comparable properties.

The legal principles governing the admissibility of evidence as to sales of comparable properties are set forth fully in prior decisions. *Barnes v. Highway Commission,* 250 N.C. 378, 109 S.E. 2d 219; *Highway Commission v. Pearce,* 261 N.C. 760, 136 S.E. 2d 71; *Highway Commission v. Coggins,* 262 N.C. 25, 136 S.E. 2d 265; *Highway Commission v. Conrad,* 263 N.C. 394, 139 S.E. 2d 553.

"Actually no two parcels of land are exactly alike. Only such parcels may be compared where the dissimilarities are reduced to a minimum and allowance is made for such dissimilarities." *Barnes v. Highway Commission, supra.* Ordinarily, the dissimilarities are greater between two sites on each of which is located a complex of buildings in use for manufacturing purposes. In *Highway Commission v. Coggins, supra,* Moore, J., for the Court, stated the basic general principle as follows: "Whether property involved in a voluntary sale is sufficiently similar in nature, location and condition to the property appropriated by condemnation to admit evidence of its sale and the price paid therefor as a guide to the value of the condemned property is a question to be determined by the trial judge in the exercise of his sound discretion."

Petitioner assigns as error rulings of the court sustaining objections to questions asked Mr. Mendenhall, petitioner's witness, on direct examination. These questions, set forth below, do not relate *directly* to the subject property. They relate to specific transactions involving the Thomas Mills property and the Continental Furniture Company property.

Witnesses for respondent had testified that, in forming an opinion as to the fair market value of the subject property on November 8, 1965, they had considered, *inter alia,* the prices at which *compar-*

able properties had been sold. For example, Mr. Hylton had testified that, in the market comparison approach, he had considered the prices at which eighteen different pieces of property had been sold, sixteen being vacant lots and two with buildings thereon. The proximity of each of these eighteen properties to the subject property is shown on a map offered in evidence and identified as respondent's Exhibit No. 6. Respondent's witnesses were not asked the sale price of any of these properties.

Mr. Mendenhall testified that, in the market comparison approach, he had considered sales of "fifteen, twenty, twenty-five properties," but "specifically" had "considered perhaps four." Only five properties, inclusive of the Thomas Mills property and the Continental Furniture Company property, were identified in Mr. Mendenhall's testimony.

The Thomas Mills property, to which petitioner's Exception No. 1 refers, is located some three and one-half blocks from the subject property. Mr. Mendenhall was permitted to testify the Thomas Mills property was rented on November 8, 1965, and as to the amount of rental paid therefor; and that this was one of the factors upon which he based his opinion. He testified the Thomas Mills property had been sold in January of 1960, and again in July of 1963, and that he had considered the sale prices on these occasions as one of the factors on which he based his opinion. He was asked, "What was the sale price in January, 1960, Mr. Mendenhall?" The court sustained respondent's objection to this question. If permitted to do so, Mr. Mendenhall would have answered: "Eighty-Five Thousand Dollars." Petitioner's Exception No. 1 is directed to this ruling. Thereafter, Mr. Mendenhall was permitted to testify, over objection by respondent, that the Thomas Mills property had sold in July of 1963 for $65,000.00.

It would seem that, on account of differences in location and otherwise, the trial judge, in his discretion, would have been justified in finding that the Thomas Mills property was not sufficiently comparable to permit evidence as to the rental or sale prices therefor. Certainly, the exclusion of evidence with reference thereto could not be considered an arbitrary exercise of discretionary power.

Petitioner contends the proffered testimony of Mr. Mendenhall as to the sale price in January, 1960, should have been admitted as tending to show a downward trend in the market value for property in this section of High Point. Petitioner calls attention to the fact that Mr. Hylton had testified (on cross-examination by petitioner's counsel) that "the market for old industrial plants here in High Point" was good as of November, 1965. Mr. Mendenhall expressed

the opinion "there was as of November 8, 1965, a limited market for older industrial properties comparable to" the subject property, and that he believed "the market was less strong than it might have been two years before that."

In our view, petitioner's said contention lacks substantial merit. In the first place, all relevant factors involved in and explanatory of the two sales are not disclosed. Be that as it may, the evidence, if admitted, would tend to show at most a downward trend in the market value of the Thomas Mills property. A downward trend in the market value of one piece of property some three and one-half blocks from the subject property is insufficient to show a general downward trend in property values in this section of High Point. As stated in our prior decisions, the admissibility of evidence in relation to specific facts concerning so-called comparable properties must be left in large measure to the discretion of the trial judge. Manifestly, to explore the status of each such comparable property in depth would be diversionary rather than helpful in evaluating the subject property.

The Continental Furniture Company property, to which petitioner's Exception No. 2 relates, was "within sight of," and "right across Green Street from," the subject property. Mr. Mendenhall was asked: "Do you know of your own knowledge as to the actual sale price for the land and buildings of Continental Furniture Company?" Mr. Mendenhall answered: "I know of my own knowledge that they put a price of two hundred thousand —" At this point respondent's counsel objected. The court sustained the objection and instructed the jury not to consider said partial answer of the witness. Thereafter, for the record, petitioner's counsel was permitted to ask the following question: "I asked you if you knew of your own knowledge that a price was placed on the land and buildings only by the parties and I want you to give your answer to the reporter, please." The record shows the witness whispered the following answer to the reporter: "The purchasers placed a value of two hundred thousand dollars on the land and buildings."

The transaction to which Mr. Mendenhall was referring involved the conveyance of the subject property by Continental Furniture Company to Globe Furniture Corporation, a subsidiary of Burlington Industries, in January, 1967. The exact nature of the Continental-Globe transaction is unclear. The whispered answer relates to the value placed on the land and buildings by the purchasers. Mr. Hylton, respondent's witness, testified that he did not consider said 1967 transaction in forming his opinion "due to the fact that this sale was made because of the corporate sale of stock and the value

that was placed on the land and buildings was a mutually agreed figure, and not from an actual sales figure, for the benefit of each one from the standpoint of income tax and what-have-you." He testified the Continental property "was not sold as a piece of land," but that it was a sale consisting "of buying and selling of assets, liabilities, business, good will, the whole works." Mr. Hylton's testimony seems to explain Mr. Mendenhall's testimony to the effect that two hundred thousand dollars was a valuation *the purchasers had placed* on the land and buildings in the Continental-Globe transaction.

Mr. Mendenhall testified he had taken into consideration the Continental-Globe transaction in forming his opinion as to the fair market value of the subject property on November 8, 1965. Although the jury was instructed to disregard it, the incomplete answer of Mr. Mendenhall in the hearing of the jury was to the effect that, in the Continental-Globe transaction of 1967, "a price of two hundred thousand" had been placed on the land and buildings. Error, if any, with reference to the exclusion of this evidence relating to the Continental property is not considered of such prejudicial nature as to justify the award of a new trial.

The court sustained respondent's objections to certain questions asked John Adams, petitioner's witness, on direct examination. Petitioner's Exceptions Nos. 3, 4, 5, 6 and 7 relate to these rulings.

Petitioner's Exception No. 3 is not brought forward in petitioner's assignments of error. Moreover, consideration thereof discloses it is without merit.

Mr. Adams was offered as an expert in "industrial plant layouts" and was permitted to give opinion evidence as such expert. He was permitted to testify, over respondent's objection, that, in his opinion, as of November 8, 1965, the subject property was best suited for "warehousing." Thereupon, he was asked to explain his reasons for that opinion. Respondent's objection was overruled and Mr. Adams testified: "The physical layout is too cut up and too varied. The buildings — the physical layout of the buildings makes it virtually impossible to efficiently manufacture a product such as furniture or plywood at a profit. You have many levels." When asked the further question by petitioner's counsel — "Do you mean many different floor levels?" — counsel for respondent again objected. This objection was sustained, the court stating to counsel for petitioner that he would "have to pursue his reasons for concluding that the highest and best use is for warehousing." Thereupon the court instructed the jury as follows: "(Y)ou will not consider this testimony as to the

inefficiency as to the manufacturing that he has just related." Petitioner's Exceptions Nos. 4 and 5 are directed to this ruling.

Thereafter, Mr. Adams was asked: "Mr. Adams, did you form an opinion satisfactory to yourself as to the suitability or desirability of the Denny Roll and Panel Company property, that is as to the layout of the land, the buildings, the design of the buildings, in relation to its suitability for industrial manufacturing purposes?" Respondent's objection was overruled and Mr. Adams testified: "The layout is not a satisfactory layout to efficiently run a manufacturing plant for the purpose of making a profit." Mr. Adams was also permitted to testify over respondent's objection that "the physical layout of the plant and the buildings makes it virtually impossible to efficiently process raw materials, manufacturing a finished product of the nature and make a profit."

Mr. Adams was asked: "Mr. Adams, my question is are there any particular things about this property as of November 8, 1965, that you point out as helping you arrive at your opinion?" No objection was interposed to this question. Mr. Adams answered: "Well, I said the different levels, the cut up nature of the main plant, and there are posts everywhere. I can't conceive of how a supervisor can supervise." Upon motion of respondent's counsel, the court instructed the jury: "(Y)ou will not consider what he conceives of as to a supervisor." Petitioner's Exception No. 6 is directed to this ruling.

Mr. Adams was asked: "Now Mr. Adams, can you explain how the cut up nature of the buildings which you have referred interferes with the efficiency in operation in this layout?" Respondent's objection was sustained. Petitioner's Exception No. 7 is directed to this ruling. Thereafter, whispering his answer to the reporter, Mr. Adams said: "Excessive handling."

The impression prevails that Mr. Adams' admitted testimony was sufficient to convey to the jury his opinion that the subject property was not adapted to efficient use as a manufacturing plant and the reasons for his opinion. The upshot of the matter seems to be that petitioner elicited from Mr. Adams virtually everything it sought to elicit from him. Moreover, "the cut up nature of the buildings," if such be the case, was plainly observable by the jurors when they viewed the subject property.

The court sustained respondent's objection to a question asked Joe Robb, petitioner's witness, on direct examination. Petitioner's Exception No. 9 is directed to this ruling.

Mr. Robb was offered and testified as an expert in the field of real estate appraisals. He testified, *inter alia,* that in his opinion "the highest and best use to which (the subject property) could be

put was for warehousing purposes"; that in his opinion the fair market value of the subject property as of November 8, 1965, was $135,000.00, $84,000.00 representing the value of the land and $51,-000.00 representing the value of the buildings; and that, when considering the cost approach of appraisal, he used "a replacement cost approach as opposed to a reproduction cost approach."

With further reference to the replacement cost approach, Mr. Robb referred to "functional obsolescence" and "superfluous or superadequate construction." The record shows the following occurred:

"Q. Can you tell us what some of those superfluous items are? A. One of those that come to mind immediately is the type of wall construction in the brick portion of the building. Today they build with eight-inch block and one four-inch course of brick on the veneer. This is primarily on the front. Most manufacturers on the side and rear just put the block. They don't veneer it. The floor structure is — MR. BERNHARDT: I believe I will object. I don't think he is qualified in this area. I object and move to strike. MR. POST: On his own testimony, he said he was not qualified. COURT: Well, I have forgotten what the question was now. Read the question. (The question was read by the Reporter as follows: 'Can you tell us what some of those superfluous items are?' COURT: The objection is sustained. PETITIONER'S EXCEPTION No. 9. MR. HAWORTH: We would like to get his answer into the record. COURT: Let him whisper his answer to the Reporter so that the jury can't hear it. (The witness whispered his answer to the Reporter as follows: 'I mentioned the brick walls and floor system, the roof structure, that will be enough.')"

Petitioner had not offered Mr. Robb as an expert construction engineer or an expert in respect of construction costs. It is noted that when the question, "Can you tell us what some of those superfluous items are," was first asked, respondent did not object; and a rather extensive answer was given by Mr. Robb before any objection was interposed. The court did not at any time instruct the jury not to consider the testimony Mr. Robb had given. This testimony was far more extensive than the answer Mr. Robb later whispered to the reporter. Each of the buildings had been described in considerable detail and the jurors had observed them. Mr. Robb testified he "took the approach of replacement rather than reproduction," and "estimated the depreciation or the loss of value that had occurred in this property due to age, due to functional deficiencies, not being of modern construction."

Much testimony was offered during the course of a long trial. Conceding there may have been technical errors in rulings on evi-

dence, some adverse to petitioner and others adverse to respondent, petitioner's assignments of error based on the exceptions discussed above do not disclose any error of such prejudicial nature (to petitioner) as to justify the award of a new trial.

Plaintiff's remaining assignments of error, other than formal assignments, involve (1) two instances where plaintiff asserts the presiding judge made prejudicial comments, and (2) an excerpt from the court's charge. After careful consideration of each, the conclusion reached is that these assignments do not disclose prejudicial error or present questions of sufficient substance to merit discussion thereof in detail.

Petitioner having failed to show prejudicial error, the verdict and judgment will not be disturbed.

No error.

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

STATE v. LINDA E. COOK, JOYCE A. FURR, FRANCES ANN OWENS.

(Filed 27 March 1968.)

1. Public Officers § 5; Courts § 17—

A clerk of a county recorder's court vacates his office *eo instanti* he accepts the office of justice of the peace, since both are public offices under the State within the purview of Art. XIV, § 7, of the Constitution of North Carolina, and he is thereafter authorized to issue search warrants for barbiturates as a justice of the peace. G.S. 15-25.1.

2. Criminal Law § 79—

Evidence obtained by search under a valid warrant is competent.

3. Narcotics § 3; Criminal Law § 64—

A lay witness may give an opinion as to whether or not defendant was under the influence of barbiturates on a given occasion when the witness observed him, and such evidence is relevant to the issue of defendant's alleged unlawful possession of barbiturates.

4. Criminal Law §§ 114, 118—

While the trial court is not required to state the contentions of the litigants even upon request, when the court does undertake to state the contentions of one party it must also fairly present the contentions of the other.

5. Criminal Law § 104—

All the evidence admitted which is favorable to the State, whether com-

petent or incompetent, must be considered by the court upon motion for nonsuit.

6. Criminal Law § 106—

The test of the sufficiency of circumstantial evidence to withstand nonsuit is whether a reasonable inference of defendant's guilt may be drawn from the evidence; if so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is guilty.

7. Narcotics § 4—

Evidence that barbiturate capsules were found in an apartment occupied by three defendants, that in the opinion of an arresting officer the defendants were under the influence of drugs, and that while in jail two of the defendants surrendered a quantity of barbiturate capsules, *is held* sufficient to be submitted to the jury on the issue of the three defendants' guilt of unlawful possession of barbiturates.

APPEAL by defendants from *Beal, S.J.*, 4 September 1967, Conflict Schedule "D" Criminal Session, MECKLENBURG Superior Court.

Criminal prosecution on warrants charging that each defendant on 12 April 1967 "with force and arms, at and in the County aforesaid and within the City Limits, did willfully, maliciously and unlawfully and feloniously DID POSSESS AND HAVE IN HER POSSESSION A QUANTITY OF BARBITUATE [*sic*] DRUGS WITHOUT FIRST HAVING OBTAINED A PRESCRIPTION IN GOOD FAITH FROM A LICENSED PRACTITIONER IN VIOLATION OF G. S. OF NORTH CAROLINA #90-113.2(3) of N. C., against the Statutes in such case made and provided, against the peace and dignity of the State, and in violation of the City Ordinance."

Upon trial *de novo* in superior court on appeal by defendants from City Recorder's Court of Charlotte, the jury returned a verdict of guilty. From judgment imposing a prison sentence, each defendant appealed.

The State offered evidence tending to show that on 12 April 1967, pursuant to a search warrant, police officers went to a house at 1009 E. 18th Street in Charlotte to search the premises for barbiturate and stimulant drugs. The front door was open as one officer approached, but a female slammed and locked it. The door was forced open by the officer who found Linda Cook in the middle room of the three-room house, Joyce Furr in the bathroom, and Frances Owens elsewhere in the house (apparently in the living room). Various other people were also there.

Linda Cook's eyes were sleepy, glassy and partially dilated. She had no odor of alcohol about her. A large number of Nembutal capsules, a barbiturate, were found scattered on the floor and in a

plastic bag in the middle room. Linda Cook said she stayed there.

Joyce Furr was unsteady on her feet, had glassy, dilated eyes, no odor of alcohol about her. She seemed to be in a stupor, mumbling unintelligibly. Several Nembutal capsules were found under the lavatory in the bathroom and one under the tub.

Frances Owens was staggering, had sleepy, glassy, dilated eyes and no odor of alcohol about her.

These three females and a male were arrested and taken to jail at 3:15 p.m. No pills or capsules were taken off the person of any of them. The females were not searched at the jail because no female attendant was on duty at that time.

The following morning Mrs. Betty L. Brown was deputized to search Linda Cook and Frances Ann Owens. She found nothing. The jail cells were searched and nothing found. She left and in less than five minutes returned to the cells, put out her hand, and said "give me the pills." Linda Cook handed her twenty and Frances Ann Owens handed her thirteen barbiturate pills or capsules.

T. O. Stennett, Attorney for defendant appellants.

T. W. Bruton, Attorney General, and James F. Bullock, Deputy Attorney General, for the State.

HUSKINS, J. Defendants were convicted of violating G.S. 90-113.2(3) which makes it unlawful "for any person to possess a barbiturate or stimulant drug unless such person obtained such barbiturate or stimulant drug in good faith on the prescription of a practitioner . . ." licensed to prescribe or dispense such drugs. Any person violating this statute, or any person who conspires, aids, abets or procures another to violate it, is, for the first offense, guilty of a misdemeanor. G.S. 90-113.7.

Defendants assign as error that: (1) the search warrant was not issued by one legally authorized to do so and therefore void; (2) the evidence obtained by use of the void search warrant was inadmissible; (3) lay evidence was admitted to prove defendants were under the influence of drugs; (4) the trial judge refused to state the contentions of the defendants in the charge; and (5) the motion for nonsuit at the close of all the evidence should have been allowed. The assignments will be discussed in the order named.

1. R. G. Hinson took the oath of office as a justice of the peace on 19 November 1965 and resigned from that office on 20 August 1967. He had previously taken the oath of office as clerk of the Mecklenburg County Recorder's Court on 1 December 1964 and continued to serve in that capacity after taking the oath as a justice

of the peace, and was so serving on the date of the trial of this case. He had also been wearing the uniform of a policeman for years and acting as court bailiff, but he was paid through the recorder's court budget and in reality was not a police officer. The search warrant in this case was issued on 12 April 1967 and signed "R. G. Hinson, Justice of the Peace." Defendants challenge his authority to issue it.

G.S. 15-25.1 authorizes a justice of the peace, or any judge, clerk or assistant clerk of any court of record to issue search warrants authorizing an officer to search a person or place for barbiturate or stimulant drugs.

The County Recorder's Court of Mecklenburg County, established under Chapter 7, Article 25 of the General Statutes of North Carolina, is a court of record. G.S. 7-218. Hence, whether R. G. Hinson was a justice of the peace or clerk of county recorder's court on 12 April 1967, he could issue warrants to search persons or places for barbiturates. He had such authority in either capacity. G.S. 15-25.1. See also 1949 N. C. Session Laws, Chapter 955. Of course he could not hold both offices at the same time. Constitution of North Carolina, Article XIV, Sec. 7. The record discloses that while holding the office of clerk of the county recorder's court he accepted the office of justice of the peace without surrendering the first office. In doing so, "he automatically and instantly vacates the first office, and he does not thereafter act as either a *de jure* or a *de facto* officer in performing functions of the first office because he has neither right nor color of right to it." *Edwards v. Bd. of Education,* 235 N.C. 345, 351, 70 S.E. 2d 170, 175, and cases cited; accord: *Atkins v. Fortner,* 236 N.C. 264, 72 S.E. 2d 594. "It is doubtless the general rule that where a man accepts an office under the state, he vacates another held under the same sovereignty . . ." *Foltz v. Kerlin,* 105 Ind. 221, 4 N.E. 439.

We hold, therefore, that Hinson was a justice of the peace at the time of the issuance of the search warrant on 12 April 1967 and was legally empowered to issue it. Hence, challenge to its validity is overruled.

2. Evidence obtained by search under a valid warrant is competent. *State v. Smith,* 251 N.C. 328, 111 S.E. 2d 188. The second assignment of error is overruled.

3. Defendants contend that a lay witness is incompetent to give opinion evidence to the effect that defendants were under the influence of drugs. In *State v. Brodie,* 190 N.C. 554, 130 S.E. 205, the Court said:

"It is a familiar principle that one who is called to testify

is usually restricted to facts within his knowledge; but if by reason of opportunities for observation he is in a position to judge of the facts more accurately than those who have not had such opportunities, his testimony will not be excluded on the ground that it is a mere expression of opinion. McKelvey on Evidence, 172, 231; *Greensboro v. Garrison,* [190 N.C. 577, 130 S.E. 203]; *Hill v. R. R.,* 186 N.C. 475 [119 S.E. 884]; *Shepherd v. Sellers,* 182 N.C. 701, [109 S.E. 847]; *Marshall v. Telephone Co.,* 181 N.C. 292, [106 S.E. 818]."

From *Beal v. Robeson,* 30 N.C. 276 (1848) to *State v. Flinchem,* 247 N.C. 118, 100 S.E. 2d 206 (1957), and since, a lay witness in this State has been held competent to testify whether or not in his opinion a person was under the influence of an intoxicant on a given occasion when the witness observed him.

Some cases hold that the rule giving a witness the right to state his opinion as to the intoxicated condition of a person applies also to opinion evidence as to whether a person is under the influence of some narcotic or other drug. *Commonwealth v. Johnson,* 198 Pa. Super. 51, 182 Atl. 2d 541; *Miller v. Hamilton Shoe Co.,* 89 S.C. 530, 72 S.E. 397; 31 Am. Jur. 2d, Expert and Opinion Evidence § 102. There is other authority that special experience is required before a witness is qualified to give an opinion as to whether a person is under the influence of drugs. *People v. Moore,* 70 Cal. App. 2d 158, 160 P. 2d 857; 31 Am. Jur. 2d, *supra.*

In this case the officer observed the condition of defendants. They were "sleepy . . . had glassy dilated eyes . . . in a stupor . . . mumbling . . . staggering . . . had no odor of alcohol about them." Nembutal capsules were found on the floor and elsewhere in the room. Laboratory tests showed they were barbiturates. Two defendants later surrendered thirty-three barbiturate capsules. Seeing defendants in their drugged condition and observing their manner of speech and movement, the witness was better qualified than the jury to draw inferences and conclusions from what he saw and heard. Their condition was a surrounding circumstance relevant to the issue of the trial, that is, the alleged unlawful possession of barbiturate drugs. Hence, under the facts of this case it was not prejudicial error to permit the officer to describe their condition to the jury and express an opinion based thereon that defendants were under the influence of drugs. This assignment is overruled.

4. Defendants assign as error the refusal of the trial court, upon request, to charge the jury with respect to the contentions of defendants. A trial judge is not required to state the contentions of

the litigants. But when he undertakes to give the contentions of one party he must fairly charge as to those of the other. Failure to do so is error. *Trust Co. v. Ins. Co.*, 204 N.C. 282, 167 S.E. 854; *Messick v. Hickory,* 211 N.C. 531, 191 S.E. 43; *State v. Colson,* 222 N.C. 28, 21 S.E. 2d 808; *Brannon v. Ellis,* 240 N.C. 81, 81 S.E. 2d 196; *State v. Kluckhohn,* 243 N.C. 306, 90 S.E. 2d 768. Here, however, the judge did not undertake to give the contentions of either the State or the defendants. True, one paragraph of the charge begins, "Now, the State says and contends that the evidence tends to show," but this is followed only by a general summary of the testimony. Hence, although the language used is not the wisest choice of words, no error is made to appear in this respect. *State v. Colson, supra* (222 N.C. 28, 21 S.E. 2d 808).

5. A motion to nonsuit requires consideration of the evidence in its light most favorable to the State, and the State must be given every reasonable intendment and every reasonable inference to be drawn therefrom. *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679; *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44; *State v. Mabry,* 269 N.C. 293, 152 S.E. 2d 112; *State v. Cade,* 268 N.C. 438, 150 S.E. 2d 756.

As to Linda Cook and Frances Ann Owens, there is abundant evidence to go to the jury. Each voluntarily surrendered possession of a quantity of barbiturate drugs in her jail cell on the morning of 13 April 1967. The jury could, and apparently did, find that each of them possessed these barbiturates when arrested and carried them to the jail. This conclusion is fortified by the evidence obtained in the search.

Joyce Furr was not named in the search warrant. No barbiturates were ever found on her person. She was present, however, at 1009 E. 18th Street when the premises were searched. She was in the bathroom where several barbiturate capsules were found under the lavatory and one under the tub. Barbiturates were found elsewhere in the house. She was unsteady on her feet, had glassy, dilated eyes, mumbling unintelligibly, and seemed to be in a stupor. There was no odor of alcohol about her. She was apparently under the influence of drugs. Are these circumstances sufficient to be submitted to the jury on the charge of unlawful possession of barbiturates?

"All of the evidence actually admitted, whether competent or incompetent . . . which is favorable to the State, must be taken into account" and considered by the Court in ruling upon the nonsuit motion. *State v. Cutler, supra* (271 N.C. 379, 156 S.E. 2d 679), and cases cited. If there is substantial evidence — whether direct, circum-

stantial, or both — to support a finding that (1) the offense charged has been committed and (2) the defendant committed it, it is a case for the jury. *State v. Norggins,* 215 N.C. 220, 1 S.E. 2d 533.

"When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the Court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that defendant is actually guilty." *State v. Rowland,* 263 N.C. 353, 139 S.E. 2d 661.

In light of these legal principles, we think a reasonable inference of guilt may be drawn from the circumstances and the evidence against Joyce Furr sufficient to require its submission to the jury. Her assignment of error for failure to nonsuit is without merit.

Defendants have had a fair trial according to law. Having failed to show prejudicial error, the verdict and judgment in each case will not be disturbed.

No error.

IN THE MATTER OF THE PETITION OF NEWSOM OIL COMPANY FOR JUDICIAL REVIEW OF ADMINISTRATIVE DECISION NUMBER 96 OF THE TAX REVIEW BOARD CONCERNING AN ASSESSMENT OF INTANGIBLES TAX FOR THE YEARS 1960, 1961, AND 1962.

(Filed 27 March 1968.)

1. **Taxation § 14—**
The tax on motor fuels imposed by G.S. 105-434 is a privilege tax.

2. **Taxation §§ 29, 30—**
Taxes on gasoline collected by a licensed distributor and held for remittance to the Commissioner of Revenue pursuant to G.S. 105-434 are "taxes of any kind owing by the taxpayer" and cannot be deducted by the distributor from its accounts receivable as an account payable in computing intangibles tax liability. G.S. 105-201.

3. **Taxation § 35—**
It is not unusual for the tax statute, as an aid to enforcement, to make the taxpayer a trustee or agent of the State for the purpose of collecting and remitting taxes. G.S. 105-144, G.S. 105-164.7.

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

APPEAL by petitioner from *Bailey, J.,* August 1967 Assigned Nonjury Civil Session of WAKE. Docketed and argued as Case No. 531, Fall Term 1967, and docketed as Case No. 527, Spring Term 1968.

This is a civil action heard by his Honor James H. Pou Bailey upon the petition of Newsom Oil Company for judicial review of administrative decision No. 96 of the Tax Review Board pursuant to the terms of G.S. 105-241.3 and Article 33 of Chapter 143 of the General Statutes of North Carolina.

From an adverse judgment, petitioner appeals to the Supreme Court.

Hatch, Little, Bunn & Jones by E. Richard Jones, Jr., for petitioner appellant.

Attorney General T. W. Bruton and Assistant Attorney General Robert L. Gunn for respondent appellee.

PARKER, C.J. Appellant Newsom Oil Company is a distributor of motor fuels as defined in G.S. 105-430(2) and is licensed pursuant to G.S. 105-433. As such, appellant is required to account for gasoline taxes as prescribed by Article 36, Chapter 105 of the General Statutes. In computing its intangibles tax liability pursuant to Article 7, Chapter 105, appellant deducted from accounts receivable for the years 1960, 1961, and 1962 the amount of gasoline taxes it had collected for the State of North Carolina as of the taxable date. The Commissioner of Revenue disallowed the deduction and assessed additional intangibles tax for each year involved in the total amount of $168.76 plus interest, the actual amount of which tax is not in dispute. Appellant gave notice of protest and was granted a hearing before the Commissioner. The Commissioner concluded, by order dated 7 April 1966, that the gasoline taxes taken as a deduction were taxes owed by the taxpayer and thus were not deductible from accounts receivable as an account payable under G.S. 105-201. Newsom Oil Company sought administrative review of the ruling of the Commissioner of Revenue as permitted by G.S. 105-241.2. The Tax
view Board to the effect that in computing intangibles tax lia-
peal by Newsom Oil Company to the Superior Court, the judgment of the Tax Review Board was affirmed.

The appellant has five assignments of error. These assignments of error present in essence the following question as stated in petitioner's brief:

> "Did His Honor err in overruling Petitioner's exceptions to and in affirming Administrative Decision No. 96 of the Tax Review Board to the effect that in computing intangibles tax liability, a licensed distributor of motor fuels is not entitled to deduct from accounts receivable, as an account payable, the

amount of motor fuel tax collected and held by that distributor for remittance to the State of North Carolina?"

Chapter 105, Article 7, levies a tax on certain intangible personal property enumerated and defined therein. G.S. 105-201 provides that: "All accounts receivable on December thirty-first of each year, having a business, commercial or taxable *situs* in this State, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25¢) on every one hundred dollars ($100) of the face value of such accounts receivable . . . Provided, that from the face value of such accounts receivable there may be deducted the accounts payable of the taxpayer as of the valuation date of the accounts receivable. . . ." The statute further provides that the term "accounts payable" shall not include "(2) Taxes of any kind owing by the taxpayer."

Newsom Oil Company contends that gasoline taxes which it holds pending the date on which such amounts are required to be transmitted to the Commissioner of Revenue are not "taxes of any kind owing by the taxpayer," but are accounts payable and thus deductible from accounts receivable under the Statute. The Commissioner of Revenue contends that the gasoline tax is a tax owed by Newsom Oil Company, and is thus not deductible.

If the gasoline tax is in fact a tax and is owed by Newsom Oil Company, it may not be taken as a deduction from accounts receivable by appellant in computing its intangibles tax liability. G.S. 105-201. G.S. 105-434 provides: "There is hereby levied and imposed a tax of seven cents per gallon on all motor fuels sold, distributed, or used within this State. *The tax hereby imposed and levied shall be collected and paid by the distributor* producing, refining, manufacturing, or compounding within this State, or holding in possession within this State motor fuels for the purpose of sale, distribution, or use within the State, and shall be paid by such distributor to the Commissioner of Revenue in the manner and at the times hereinafter specified. . . ." (Emphasis added.) The statute further requires all licensed distributors to file reports with the Commissioner of Revenue not later than the twentieth day of each month showing the quantity of motor fuels sold, distributed, or used by such distributor in North Carolina during the preceding calendar month. At its election, the distributor may compute the amount "of the tax levied and assessed against him by this section" on the fuel received during the month, plus the amount of fuel on hand at the beginning of the period, by deducting a tare allowance of 2% on the first 150,000 gallons, plus 1½% on all fuel exceeding 150,000 gallons and not exceeding 250,000 gallons, plus 1% on all in excess of 250,000 gallons.

G.S. 105-431 provides: "The purpose of this article is to provide for the payment and collection of a tax on the first sale of motor fuels when sold, or the use, when used, in this State; double taxation is not intended. Motor fuels manufactured, produced or sold for exportation, and exported are not taxable and should not be included in the reports hereinafter required to be made by distributors." G.S. 105-432 provides: "In the administration of this article the first sale shall not be construed to embrace the sale in tank car shipments from port terminals to licensed distributors within the State, but the tax hereinafter levied on such motor fuel *shall be levied against and paid by such licensed distributor.*" (Emphasis added.)

G.S. 105-436 requires that: "Every distributor, at the time of making the report required by § 105-434, *shall pay to the Commissioner of Revenue, the amount of tax due* for the month covered by such report. . . ." (Emphasis added.)

The tax imposed by G.S. 105-434 is a privilege tax. *In re Oil Co.*, 263 N.C. 520, 139 S.E. 2d 599; *Stedman v. Winston-Salem*, 204 N.C. 203, 167 S.E. 813. The distributor may determine his tax liability by either of two methods. He may compute his liability on his monthly sales, or on his monthly purchases. If he elects to use purchases to determine his tax liability, he is entitled to a tare on his receipts.

The Court construed G.S. 105-431 and G.S. 105-434 in the case of *In re Oil Co., supra.* In that case Sing was a licensed distributor of motor fuels and had elected to compute the gasoline tax levied and assessed against it by using its receipts, and had taken the tare allowance allowed in G.S. 105-434. The Commissioner of Revenue disallowed the tare allowance and assessed a deficiency because Sing never had actual possession of the gasoline. The arrangement between Sing Oil Company and its customer, Tops Petroleum Corporation, was as follows: Sing made sales to Tops. Tops had hired Kenan Petroleum Corporation to haul the gasoline from the terminals of Arkansas Fuel Oil Corporation at Wilmington and Greensboro to Tops' place of business in Durham. Since Kenan actually picked up the fuel from the Arkansas Fuel Oil Corporation's tanks in Wilmington and Greensboro and delivered it to Tops in Durham, the Commissioner contended that Sing never had actual possession of the fuel and was not entitled to the tare allowance. The Court held that the lack of actual possession did not deprive Sing of the right to the tare allowance. The Court said: "If the State's position is correct, no tare or deduction can be claimed by anyone on the sales made by Sing to Tops. *The tax is payable by the first distributor*, G.S. 105-431. *Sing is admittedly liable for the tax.* Tops has no tax liability for gas purchased from Sing. Since it has no tax liability, it cannot claim credit

for the tare." (Emphasis added.) The Court held that the delivery of the gasoline to Tops on Sing's order constituted technical possession and receipt by Sing, and that Sing was liable for the tax on its purchases and thus entitled to the tare on such purchases.

Appellant bases its main argument upon G.S. 105-444, which provides that a licensed distributor is "an agent or trust officer of the State for the purpose of collecting the tax on the sale of gasoline imposed in this article." Thus, appellant contends that it is not a taxpayer, but merely a tax collector. However, this is not an unusual provision in the tax laws as an aid to enforcement and collection. G.S. 105-164.7 provides that the sales tax levied on tangible personal property "shall be paid by the purchaser to the retailer as trustee for and on account of the State and the retailer shall be liable for the collection thereof and for its payment to the Commissioner. . . ." There is no question but that the sales tax is still a tax on the retailer. G.S. 105-164.4.

G.S. 105-434 places the burden on the distributor to pay the tax to the Commissioner of Revenue. When the language of a statute is plain and free from ambiguity, that meaning is conclusively presumed to be the meaning which the Legislature intended, and the statute must be interpreted accordingly. *Davis v. Granite Corp.*, 259 N.C. 672, 131 S.E. 2d 335; *Long v. Smitherman*, 251 N.C. 682, 111 S.E. 2d 834. The Legislature has the power to change the law. The Court must construe the law as written. Gasoline taxes held for remittance to the Commissioner of Revenue are certainly "taxes of any kind owing by the taxpayer," and thus are not deductible from accounts receivable under G.S. 105-201 in computing intangible tax liability.

All appellant's assignments of error are overruled. The judgment entered below is

Affirmed.

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

STATE v. FRANK HEMPHILL.

(Filed 27 March 1968.)

1. **Criminal Law § 124—**

A verdict is the unanimous decision made by the jury and reported to the court.

2. **Criminal Law § 126—**

A verdict is a substantial right, but it is not complete until accepted by the court for record.

3. **Same—**

The court should examine a verdict as to form and substance so as to prevent a doubtful or insufficient finding from becoming the record of the court, but this power to accept or reject a verdict is restricted to the exercise of a limited legal discretion.

4. **Criminal Law § 124—**

A verdict must be responsive to the issues submitted by the court.

5. **Criminal Law § 126—**

In this prosecution for felonious larceny and for felonious breaking and entering, the answer of the jury, "guilty of larceny," to the clerk's inquiry as to how the jury found defendant upon the charge of breaking and entering, *is held* unresponsive, and the action of the court in restating the charges against defendant and directing the jury to reconsider its verdict is proper.

APPEAL by defendant from *Cowper, J.*, August 1967 Criminal Session of WAYNE.

Defendant was tried on a bill of indictment charging felonious breaking and entering and felonious larceny. The State offered evidence tending to support the allegations of the bill of indictment. Defendant offered no evidence.

The court in charging the jury submitted to the jury four verdicts which it might return: (1) guilty of felonious breaking and entering, (2) not guilty of felonious breaking and entering, (3) guilty of larceny of goods of a value of more than $200.00, and (4) not guilty of larceny of goods of a value of more than $200.00. In this connection the court charged:

> "You will consider all of the testimony and argument of counsel based upon the testimony and say how you find this defendant, guilty, or not guilty, as to each separate charge."

When the jury returned to the courtroom to render its verdict, the following occurred:

CLERK: How do you find the defendant as to the charge of breaking and entering?

JUROR: Guilty of larceny.

COURT: He is charged with breaking and entering with intent to commit a felony. He is also charged with larceny of the value of more than $200.00. Go back to your room.

VERDICT: Guilty as charged as to each count.

DEFENDANT'S COUNSEL, Mr. Davis, MOVES TO HAVE THE JURY polled as to each count.

The jury was polled as follows, each juror being asked the questions and given answers as follows:

"You have said by your verdict that you find the defendant 'guilty' of breaking and entering with the intent to commit a felony."

Yes, sir.

You have said by your verdict that you find the defendant guilty of larceny of goods of the value of more than $200.00.

Yes, sir.

Are these your verdicts?

Yes, sir.

Do you still assent thereto?

Yes, sir.

Defendant appealed from judgment entered on the verdict.

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

Joseph H. Davis for defendant appellant.

BRANCH, J. The sole question presented for decision is: Did the trial court err in failing to accept the original verdict and to pass judgment thereon?

It is well established by our decisions that when a jury, in a criminal case, returns a verdict of guilty to some of the counts, but not to all, such verdict has the effect of an acquittal on the counts not referred to. *State v. Rhinehart,* 267 N.C. 470, 148 S.E. 2d 651; *State v. Broome,* 269 N.C. 661, 153 S.E. 2d 384; and *State v. Wolfe,* 227 N.C. 461, 42 S.E. 2d 515.

Defendant contends that when the jury responded "guilty of larceny" to the Clerk's original inquiry, "How do you find the defendant as to the charge of breaking and entering?" the jury returned a verdict of guilty of the misdemeanor of larceny, and that defendant was thereby acquitted of the other charge.

A verdict is the unanimous decision made by the jury and reported to the court. *State v. Gatlin,* 241 N.C. 175, 84 S.E. 2d 880. It is a substantial right, but it is not complete until it is accepted by

the court for record. *State v. Perry,* 225 N.C. 174, 33 S.E. 2d 869. The court should examine a verdict as to form and substance so as to prevent a doubtful or insufficient finding from becoming the record of the court, but this power to accept or reject a verdict is restricted to the exercise of a limited legal discretion. *State v. Perry, supra; State v. Bazemore,* 193 N.C. 336, 137 S.E. 172.

In the case of *State v. Rhinehart, supra,* this Court quoted from *State v. Perry, supra,* as follows:

> " 'When, and only when, an incomplete, imperfect, insensible, or repugnant verdict or a verdict which is not responsive to the issues or indictment is returned, the court may decline to accept it and direct the jury to retire, reconsider the matter, and bring in a proper verdict. *S. v. Arrington,* 7 N.C. 571; *S. v. McKay,* 150 N.C. 813, 63 S.E. 1059; *S. v. Bazemore, supra* [193 N.C. 336, 137 S.E. 172]; *S. v. Noland,* 204 N.C. 329, 168 S.E. 412; *Queen v. DeHart,* 209 N.C. 414, 184 S.E. 7.' "

A verdict must be responsive to the issue or issues submitted by the court. *State v. Perry, supra.*

Here, the indictment charged felonious larceny, and the court by its charge submitted the issue of felonious larceny. All the evidence shows the property to be of a value in excess of $200.00 and to have been taken in connection with a breaking and entering. Thus it was not necessary for the court to submit to the jury the misdemeanor of larceny. G.S. 14-72; *State v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91.

The juror's answer "guilty of larceny" was not responsive to the question, "How do you find the defendant as to the charge of breaking and entering?" The jury was not asked a general question. Rather, the question was directed explicitly to breaking and entering, and the juror's answer when considered in context with the question asked, becomes not only unresponsive but was also incomplete and repugnant.

When the initial attempted verdict was brought in, the trial judge in accord with procedure approved in *State v. Gatlin, supra,* without suggesting the alteration of the substances of the verdict, restated the charges against defendant and directed the jury to retire for further consideration of its verdict.

The polling of the jury, at defendant's request, reflected the unanimity of the verdict as recorded. *State v. Cephus,* 241 N.C. 562, 86 S.E. 2d 70.

The court properly refused to accept the original verdict.

No error.

WILLIAM BRYAN ROBINSON v. NATIONWIDE INSURANCE COMPANY.

(Filed 27 March 1968.)

1. Libel and Slander § 9—

Where an insurer is under no statutory duty to provide an insured with a written explanation of its reason for cancelling or for failing to renew a policy of automobile liability insurance, an explanation given by the insurer in response to an insured's inquiry as to the reason for cancellation is not rendered privileged by G.S. 20-310(b) or G.S. 20-310(c).

2. Libel and Slander § 1—

The term "libel *per se*" means a false written statement which on its face is defamatory.

3. Libel and Slander § 3—

Where the alleged publication is not libelous *per se*, a cause of action arises only upon allegations that defendant intended the publication to be defamatory and that it was so understood by those to whom it was published.

4. Libel and Slander §§ 2, 12—

Allegations that an insurer informed plaintiff insured by letter of the cancellation of an automobile liability policy because of the insured's "infavorable personal habits" fails to state an action for libel *per se* where the complaint does not allege further circumstances, or that the statement was understood to be defamatory by those who saw it, and that plaintiff suffered special damages.

APPEAL by plaintiff from *Froneberger, J.*, at the 4 September 1967 Session of GASTON.

The plaintiff appeals from a judgment sustaining a demurrer to the complaint on the ground that the complaint does not allege facts constituting a cause of action, the alleged publication being privileged by reason of G.S. 20-310.

The complaint alleges that prior to 13 July 1966 the defendant issued to the plaintiff a policy of automobile liability insurance; on that date it cancelled the policy without reason; thereafter the plaintiff inquired of the defendant as to the reason for the cancellation; the defendant by letter to the plaintiff informed the plaintiff, "The reasons for cancellation of your policy is infavorable [*sic*] personal habits"; the reason so stated is not a valid reason for cancellation of the insurance; the statement is untrue and was published maliciously, wantonly and knowingly without justification or excuse; the plaintiff is informed and believes that the statement "has been communicated" to various agents of the defendant, to the North Carolina Department of Motor Vehicles and to others; because of the statement the plaintiff has been subjected to criticism, his good name has been damaged, his policy of insurance has been wrongfully cancelled

and he has been forced to pay an exorbitant rate for insurance thereafter; and by reason of this statement the plaintiff has suffered mental torture, has had his feelings outraged and has been damaged in his reputation. The prayer of the complaint is for the recovery of alleged actual damages and punitive damages.

Childers and Fowler for plaintiff appellant.
Mullen, Holland & Harrell for defendant appellee.

LAKE, J. G.S. 20-310(c) provides that no contract of automobile liability insurance, which has been in effect for 60 days, shall be "terminated by failure to renew" by the insurer unless the insurer gives to the named insured written notice stating that it proposes "to terminate or fail to renew" the contract and that upon receipt of a written request therefor from the named insured it will mail to him a written explanation of its actual reason "for terminating or failing to renew." The statute requires that the insurer, upon receipt of such request, mail to the named insured a written explanation "giving the actual reason or reasons for its failure to renew the contract," and then provides, "Such explanation shall be privileged and shall not constitute grounds for any cause of action against the insurer * * *." The section closes with this provision: "The provisions of this subsection shall not apply to policies of liability insurance issued under the Assigned Risk Plan."

The complaint does not allege that the policy in question was issued under the Assigned Risk Plan. Consequently, there is nothing in the complaint to bring this action within the exception to the absolute privilege granted by G.S. 20-310(c) with reference to such statement by the insurer of its reason for terminating a policy "by failure to renew." However, the complaint does not allege such termination of the plaintiff's policy by the defendant. It alleges that the plaintiff's policy was "cancelled."

G.S. 20-310 applies both to termination by cancellation and to termination by failure to renew. Subsection (b) deals with termination by cancellation and subsection (c) deals with termination by failure to renew. Subsection (b) states the causes for which a policy which has been in effect for 60 days may be terminated by cancellation. It then provides:

> "After the aforesaid sixty-day period, a notice of cancellation from the insurer to the insured shall give the statutory reason for which such cancellation is made. Compliance with this paragraph shall be privileged and shall not constitute grounds for any cause of action against the insurer or its representatives.

> "The provisions of this subsection shall not apply to policies of insurance issued under the Assigned Risk Plan, and shall apply only to policies of insurance issued on vehicles rated as private passenger automobiles."

There is nothing in the complaint to show that the policy of insurance issued by the defendant to the plaintiff had been in effect 60 days prior to its alleged cancellation. Therefore, it does not appear upon the face of the complaint that either G.S. 20-310(b) or (c) has application to this case.

It does not appear upon the face of the complaint that the defendant was under any duty imposed by either of these statutory provisions to give any explanation in response to the request by the plaintiff as to its reason for cancelling the policy. It follows that the absolute privileges granted by these two statutory provisions to an insurer, complying with the mandate thereof, does not extend to an insurer who, of its own volition, advises the policyholder of its reasons for cancelling the policy. Consequently, the demurrer to the complaint in this action cannot be sustained for the reason stated by the superior court in its judgment. If facts exist giving rise to the absolute privilege conferred upon an insurer by either portion of G.S. 20-310, the defendant may so allege in its answer.

However, the demurrer also asserts that the complaint fails to state facts constituting a cause of action for that it does not allege any publication and for that it does not allege a statement which is libelous *per se* or any facts making the statement, which is alleged, libelous *per quod*. If either of these contentions is correct, the demurrer was properly sustained and the judgment of the superior court must be affirmed, notwithstanding the erroneous reasons stated therein.

The term "libel *per se*" is somewhat confusing. The Restatement of the Law, Torts, § 569, quoted with approval in *Kindley v. Privette*, 241 N.C. 140, 84 S.E. 2d 660, states, "The publication of any libel is actionable *per se*, that is, irrespective of whether any special harm has been caused to the plaintiff's reputation or otherwise." However, not every publication of an incorrect written statement with reference to the plaintiff is a libel of him. In this sense, the term "libel *per se*" means a false written statement which on its face is defamatory. In *Flake v. News Co.*, 212 N.C. 780, 195 S.E. 55, Barnhill, J., later C.J., speaking for this Court, said:

> "Libels may be divided in three classes: (1) Publications which are obviously defamatory and which are termed libels *per se*; (2) publications which are susceptible of two reasonable

interpretations, one of which is defamatory and the other is not, and (3) publications which are not obviously defamatory, but which become so when considered in connection with innuendo, colloquium and explanatory circumstances. This type of libel is termed libel *per quod*."

Where the words alleged to have been written and published by the defendant concerning the plaintiff are not, upon their face, susceptible only to a defamatory interpretation, the complaint states no cause of action unless it also alleges that a defamatory meaning was intended by the defendant and understood by those to whom the statement is alleged to have been published. *Wright v. Credit Co.*, 212 N.C. 87, 192 S.E. 844.

In *Flake v. News Co., supra,* this Court said:

"It may be stated as a general proposition that defamatory matter written or printed * * * may be libelous and actionable *per se* * * * if they tend to expose plaintiff to public hatred, contempt, ridicule, aversion or disgrace and to induce an evil opinion of him in the minds of right thinking persons and to deprive him of their friendly intercourse and society. * * *

"In order to be libelous *per se* it is not essential that the words should involve an imputation of crime, or otherwise impute the violation of some law, or moral turpitude, or immoral conduct. * * * But defamatory words to be libelous *per se* must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided. The imputation must be one tending to affect a party in a society whose standard of opinion the court can recognize. * * *

"The general rule is that publications are to be taken in the sense which is most obvious and natural and according to the ideas that they are calculated to convey to those who see them. The principle of common sense requires that courts shall understand them as other people would. The question always is how would ordinary men understand the publication. * * * The fact that super-sensitive persons with morbid imaginations may be able, by reading between the lines of an article, to discover some defamatory meaning therein is not sufficient to make it libelous. * * *

"In determining whether the article is libelous *per se* the article alone must be construed, stripped of all insinuations, in-

nuendo, colloquium and explanatory circumstances. The article must be defamatory on its face 'within the four corners thereof.' "

We think that the statement that one's automobile liability insurance policy has been cancelled because of "infavorable [*sic*] personal habits" is not so obviously defamatory as to meet the requirements of the above test of libel *per se*. Since the complaint does not allege any further circumstances, or that the statement was understood by anyone, to whose attention it came, in a defamatory sense and alleges no special damage suffered by the plaintiff as a consequence of its publication, if any, we conclude that the complaint does not state a cause of action for this reason.

A further defect in the complaint is that it does not allege publication by the defendant to any person other than the plaintiff. This is not a publication within the meaning of the law. The allegation that the statement in the letter from the defendant to the plaintiff "was communicated" to any other persons is not an allegation that it was communicated to them by the defendant.

For these reasons the demurrer to the complaint was properly sustained.

Affirmed.

ROBERT FLOYD KING v. INSURANCE COMPANY OF NORTH AMERICA (A FOREIGN INSURANCE CORPORATION).

(Filed 27 March 1968.)

1. Pleadings § 34; Appeal and Error § 6—

A motion to strike allegations relating to the recovery of punitive damages on the ground that the complaint fails to state a cause of action supporting such a recovery is in the nature of a demurrer, and an appeal will lie from an order allowing the motion to strike, Rule of Practice in the Supreme Court No. 4(a) not being applicable.

2. Damages § 11—

Punitive damages may not be awarded for breach of contract, except for breach of promise to marry or for breach of duty to serve the public imposed by law upon a public utility.

3. Damages § 11—

Allegations which state a cause of action for breach of contract for defendant insurer's failure to perform its obligations under an automobile liability insurance policy to defend plaintiff insured and to pay a judgment rendered against him, but which are insufficient to state a cause of action for deceit or any other tort, will not support an award of punitive damages, and allegations relating to such damage are properly stricken on motion.

APPEAL by plaintiff from *Clarkson, J.*, at the 11 September 1967 Non-Jury Civil Session of MECKLENBURG.

The complaint, which contains 49 paragraphs, alleges the following, in substance:

The defendant issued an automobile liability insurance policy to the plaintiff, who paid the premium therefor. Within the period covered by the policy the plaintiff, while operating the insured vehicle, collided with a vehicle operated by one Herman Mullis, and sued Mullis for damages. Mullis filed a counterclaim for personal injuries sustained by him. The plaintiff forwarded to the defendant a copy of the pleading asserting the counterclaim and requested the defendant to defend him against such counterclaim. This copy and request were received by the defendant. When the action, including the counterclaim, was calendared for trial, the plaintiff so notified the defendant. The defendant refused and failed to defend the plaintiff against the counterclaim. Thereupon, the plaintiff employed counsel so to defend him. At the trial of his action against Mullis, judgment was rendered in favor of Mullis upon his counterclaim for $110, together with the costs of that action. The defendant refused and failed to pay such judgment. By its failure to defend and its failure to pay such judgment the defendant "wilfully breached its covenant with the plaintiff." The defendant's "wilful failure and

refusal to defend the plaintiff * * * was calculated conduct on the part of the defendant to hamper, prevent and/or impair the plaintiff's legal position" in the action against Mullis and "was done by the defendant solely to protect the defendant's interest in wilful and wanton disregard of the rights of the plaintiff' and of the obligations of the defendant to him, and therein it acted arbitrarily and without cause and "did exercise bad faith." For such alleged breach of the contract of insurance the plaintiff prays the recovery of the expenses incurred by him and the amount of the judgment so rendered against him, and further prays the recovery of punitive damages.

The defendant filed a motion to strike 12 paragraphs of the complaint as redundant, 13 as irrelevant, evidential and argumentative, and the paragraph alleging damages and the right to punitive damages on the ground that the remaining allegations of the complaint do not support these claims. The motion was granted in part and denied in part, the allegation that the plaintiff is entitled to recover punitive damages and the prayer for such recovery being among the portions of the complaint which were stricken therefrom. From this order the plaintiff appeals, assigning as error the striking of those portions of the complaint relating to or deemed to relate to his claim for the recovery of punitive damages.

In the Supreme Court the defendant moved to dismiss the appeal for that under Rule 4(a) of the Rules of the Supreme Court the ruling of the superior court is not appealable as a matter of right but is subject to review only upon a writ of *certiorari*. The plaintiff filed a response asserting that the motion to strike was, in effect, a demurrer.

Don Davis for plaintiff appellant.
Carpenter, Webb & Golding for defendant appellee.

LAKE, J. The motion to dismiss the appeal is overruled. The motion to strike the allegations concerning the recovery of punitive damages and the prayer therefor is in the nature of a judgment sustaining a demurrer for the failure to allege facts sufficient to constitute a cause of action for the recovery of punitive damages. *Oil Co. v. Richardson,* 271 N.C. 696, 157 S.E. 2d 369; *Williams v. Hunter,* 257 N.C. 754, 127 S.E. 2d 546. In this respect there is a distinction between an order striking portions of a pleading because redundant, irrelevant, evidentiary or otherwise improper allegations and an order striking portions of a pleading on the ground that the allegations are not legally sufficient to constitute a basis for the asserted

right. The order here in question falls into the second category insofar as the plaintiff's expections thereto, which are now before us, are concerned. We turn, therefore, to a consideration of the appeal on its merits.

Punitive or exemplary damages are never awarded on the ground that the plaintiff has a right thereto. *Cotton v. Fisheries Co., Inc.*, 181 N.C. 151, 106 S.E. 487. With the exception of a breach of promise to marry, punitive damages are not given for breach of contract. *Swinton v. Realty Co.*, 236 N.C. 723, 73 S.E. 2d 785; *Richardson v. R. R.*, 126 N.C. 100, 35 S.E. 235; Restatement of the Law, Contracts, § 342. See also: Williston on Contracts, Rev. Ed., § 1340; Sutherland on Damages, 4th Ed., § 390; Sedgwick on Damages, 9th Ed., § 603; McCormick on Damages, § 81; Hale on Damages, p. 318; 22 Am. Jur. 2d, Damages, § 245; 25 C.J.S., Damages, § 120; Annot., 84 A.L.R. 1345. An apparent exception to this rule is found in cases where such damages have been allowed for a breach of duty to serve the public by a common carrier or other public utility. See: *Carmichael v. Telephone Co.*, 157 N.C. 21, 72 S.E. 619; *Hutchinson v. R. R.*, 140 N.C. 123, 52 S.E. 263. In those instances, there is frequently a contractual relationship between the parties, but the award of punitive damages is upon the ground that the carrier or utility has violated a duty imposed upon it by law to serve those who apply. See *Trout v. Watkins Livery & Undertaking Co.*, 148 Mo. App. 621, 130 S.W. 136.

The complaint in the present action, including the allegations stricken by the order of the superior court, alleges only a breach of contract by the defendant. It is true that one of the stricken allegations was that the defendant's breach of its contract was "aggravated fraud," but no facts which, if true, would give rise to a cause of action for damages for deceit are alleged. Without such allegation, the charge of "aggravated fraud" is a mere epithet and does not alter the nature of the action from that of a mere suit for damages for breach of contract. Even where there is allegation and proof of actionable fraud and the jury has found the issue of fraud against the defendant, an award of punitive damages does not follow as a conclusion of law. *Swinton v. Realty Co., supra.* Here, however, there is no allegation of facts giving rise to a right of action for deceit or any other tort.

The allegations in the complaint that the breach of contract by the defendant was "wilful", "intentional," in "wanton disregard of the rights of the plaintiff" and "calculated * * * to hamper, prevent and impair the plaintiff's legal position" in his suit against Mullis, do not give rise to a cause of action sounding in tort and,

therefore, do not constitute allegations of fact which, if proved, would subject the defendant to liability for punitive damages.

There was, therefore, no basis alleged in the complaint for an award of punitive damages. The striking of the allegations with reference to such award and the prayer therefor did not in any way impair the right of action alleged in the remaining portions of the complaint for the recovery of compensatory damages arising from the alleged breach of the contract by the defendant.

Affirmed.

STATE OF NORTH CAROLINA, EX REL. T. WADE BRUTON, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, v. FLYING "W" ENTERPRISES, INC., A CORPORATION; W. L. WILDE, ROBERT T. SQUYRES, JERRY ADAMS, AND JOHN DOE, RICHARD ROE, AND ALL OTHER PERSONS THREATENING TO TRESPASS UPON THE S/S MODERN GREECE, HER ENGINES, TACKLE, APPAREL, FURNITURE OR CARGO, AND ALL OTHER VESSELS LYING WITHIN A MARINE LEAGUE OFF THE COAST OF THE STATE OF NORTH CAROLINA.

(Filed 10 April 1968.)

1. State §§ 1, 2—

The eastern boundary of this State is fixed at one marine league eastward from the seashore of the Atlantic Ocean bordering the State, measured from the extreme low water mark of the seashore, and the State is entitled to exercise jurisdiction over the territory within, and ownership of the lands under, the littoral waters within the boundaries of the State, subject only to the jurisdiction of the United States over navigation within the territorial waters. G.S. 141-6.

2. Same—

By 43 U.S.C.A. § 1312, the United States has in effect quitclaimed and confirmed the ownership of the State in lands beneath the Atlantic Ocean within a marine league seaward from the eastern boundary of the State.

3. Admiralty—

A marine league is a distance the equivalent of three geographical miles.

4. Same—

A vessel, cargo, or other property is derelict in the maritime sense of the word when it is abandoned by the owners without hope of recovery or without intention of returning, and such abandonment effectively divests the owners of title and ownership thereto.

5. Common Law—

The common law of England is in force in this State to the extent it is not destructive of, repugnant to, or inconsistent with our form of govern-

ment and to the extent it has not been abrogated or has not become obsolete. G.S. 4-1.

6. Same—

The term "common law" refers to the common law of England and not of any particular state.

7. Admiralty—

Under the common law, wrecks or derelicts became the property of the Crown or its grantee after a year and a day if no owner appeared within that time to claim them.

8. Same; State § 2—

The submerged hulks of certain Confederate blockade runners and the wreck of a Spanish privateer sunk during the eighteenth century, together with their cargoes, all of which are resting within the territorial waters of the State and below the surface of the waters at low tide, are derelicts or wrecks within the purview of the common law and belong to the State in its sovereign capacity, and the activities of defendants in going upon the vessels and removing therefrom historical artifacts constitute a trespass, entitling the State to an order permanently enjoining defendants from disturbing the vessels or their cargoes.

9. Trespass § 1—

A trespass is a wrongful invasion of the possession of another.

10. Admiralty—

G.S. 82-1 *et seq.*, relating to the protection and sale of stranded vessels and their cargo, are inapplicable to divest the State of its prerogative right to abandoned vessels lying beneath the territorial waters of the State for more than 100 years.

11. State § 6; Injunctions § 4—

The State is entitled to an order permanently restraining diving and salvage operations by defendants to remove irreplaceable historical artifacts from sunken vessels lying within the territorial waters of the State, and the State is also entitled to a mandatory injunction to compel defendants to return such articles taken from the vessels.

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

APPEAL by defendants from *Mintz, J.*, in chambers, 17 March 1967, NEW HANOVER County. Docketed and argued as Case No. 198, Fall Term 1967, and docketed as Case No. 199, Spring Term 1968.

This controversy had its inception in the diving and salvage operations conducted by defendants upon the submerged hulks of certain Confederate blockade runners sunk in the coastal waters of North Carolina during the War Between the States and in similar activities by defendants upon the wreck of a Spanish privateer sunk off the coast of North Carolina during the early years of the eighteenth century. These old derelict vessels all lie beneath the surface

of the ocean within the territorial waters of this State adjacent to the Counties of Pender, New Hanover, and Brunswick. The State of North Carolina, by its Attorney General, instituted this action to permanently enjoin defendants from proceeding with such diving and salvage operations, to command them to return to the State of North Carolina the various artifacts and objects of historical significance allegedly wrongfully taken by defendants from such wrecks, to recover damages for the alleged wrongful detention of these items, and in the event that these articles cannot be returned to recover damages from defendants of $5,000 for conversion.

A temporary restraining order requiring defendants to appear and show cause why it should not be continued to the final determination of the cause was issued *ex parte* simultaneously with the filing of the summons and the complaint. Upon the return of the order to show cause, Judge Mintz heard evidence and entered an order extending the restraining order until the final determination of the action. Defendants filed answer.

By consent of the parties, the action was heard by Judge Mintz in chambers in New Hanover County which is located in the Fifth Judicial District of which Judge Mintz is the Resident Superior Court Judge. Both parties waived trial by jury.

At the hearing the parties stipulated certain facts which are in substance as follows, except when quoted:

During March, 1962 the State of North Carolina, plaintiff, through its Department of Archives and History, supervised diving operations upon the hulks of the Confederate blockade runners S/S *Modern Greece,* S/S *Phantom,* and S/S *Ranger* "and further, undertook and conducted recovery and restoration of portions of the cargo, furniture, tackle and apparel" of these Civil War derelicts and three others known as the S/S *Venus,* the S/S *Ella Beauregard,* and the S/S *Condor.* The State of North Carolina has opened and is presently maintaining a restoration center and laboratory at Fort Fisher in New Hanover County where "plaintiff has gathered, preserved, identified, studied and maintained parts and parcels of these hulks, their cargoes, furniture, apparel, fixtures, and appliances."

Defendants Flying "W" Enterprises, Inc. (hereinafter referred to as Flying "W"), Wilde, Squyres, and five paid employees of Flying "W", on or about 15 June 1965 and without authority from the State of North Carolina, dived upon the hulk of the S/S *Modern Greece* and removed therefrom the items described as follows in paragraph 11 of plaintiff's amended complaint to which these stipulations of fact refer:

"a. One bar of lead, value $300.00.

b. One file, approximately 14 inches long, value $25.00.

c. A cluster of eighteen small four-inch triangular and half-round files, value $50.00.

d. A metal bar six feet two inches long, composed of copper tubing, value $150.00.

e. Assorted links of copper pipes, approximately one and one-quarter inches in diameter, value $200.00.

f. One bundle of tin-plated steel sheets, 11 inches by 14 inches, $100.00 in value.

g. Nineteen silver-plated spoons, assorted sizes, value $100.00."

Similarly, these individuals went upon the hulks of the Spanish privateer *Fortune* (on or about 23 June 1965); the S/S *Ranger* (on or about 24 June 1965); and the S/S *Phantom* (on or about 3 July 1965). They removed only one item of personalty from the sailing vessel Fortune, to wit, "one round cannon ball." From the S/S *Ranger* they took nothing; but from the S/S *Phantom* they carried away six bars of lead valued at $1,800 and bearing the inscription *Pontifex and Wood, London,* two pieces of copper tubing valued at $150, and one brass valve.

In 1962 defendant Wilde, while a member of the United States Marine Corps stationed at Camp Lejeune, North Carolina, dived upon and explored the hulk of the S/S *Modern Greece* at about the same time that the State, as mentioned above, was conducting its recovery and restoration operations thereon.

All the items of personal property removed by defendants from these derelict vessels "are historical artifacts, each possessing special and peculiar value rendering their loss irreparable in monetary damage."

All the hulks or wrecks herein involved, together with all the property in or upon them, "lie in the Atlantic Ocean, below the surface of the water at low tide, within a marine league seawardly from the Coast of North Carolina, offshore from the waters of Pender, New Hanover and Brunswick Counties, North Carolina."

These wrecks, the property in or upon them, and the property removed by defendants "have never been reclaimed by the original owners thereof, nor have the original owners thereof ever . . . made an attempt to salvage the same since each hulk was wrecked. . . ."

The court, upon consideration of the pleadings, the stipulations, and the argument of counsel, recited in the judgment its initial findings respecting the capacity of the State to sue in its own courts; the authority of the Attorney General, as Relator, to bring this suit; the due corporate existence of Flying "W" under the laws of this State; the status of defendants Wilde, Squyres, and Adams as directors of that corporation; and the usual preliminary findings relating to jurisdiction over the parties and subject matter. The court then proceeded to recite in the judgment its findings of fact which are in substance as follows, except when quoted:

All of these old derelict vessels, together with their "engines, tackle, apparel, furniture, and cargoes," since the dates of their sinking, have lain submerged within the territorial waters of the State of North Carolina unattended and abandoned by their former owners. The sailing vessel *Fortune*, at one time owned by Spain, was sunk during the early 1700's in the Cape Fear River several hundred feet eastward from the western bank of that river near what used to be Fort Anderson, and she now lies in that vicinity on the floor of the Cape Fear River. The S/S *Modern Greece* was sunk in 1862 and lies on the floor of the Atlantic Ocean, in six or seven fathoms of water, about three hundred yards off the beach immediately south of the Air Force Radar Station at Fort Fisher in New Hanover County. The S/S *Ranger* was sunk in 1864 and lies on the floor of the Atlantic about three hundred yards off the coast immediately west of Lockwood Folly Inlet in Brunswick County. The S/S *Phantom* was sunk in 1863 and lies on the ocean floor approximately two or three hundred yards off the coast immediately north of Rich's Inlet in Pender County.

At this point in his findings of fact, Judge Mintz recited facts substantially similar to those agreed to and stipulated by the parties which have been outlined above.

The recitation in the judgment of facts found by the court then continued in substance as follows, except when quoted:

The items specified above as taken from the S/S *Modern Greece* and those designated as removed from the *Phantom* were carried away from those wrecks by defendants Flying "W", W. L. Wilde, Robert T. Squyres, and Tommy Gene Barton "with the intention of converting the same to the use of defendant Flying "W". . . ."

At the time this action was instituted, these defendants intended "to continue their diving and salvage operations aboard the hulks of the S/S *Modern Greece*, the S/S (*sic*) *Fortune*, the S/S *Ranger* and the S/S *Phantom* and many other wrecks within the territorial waters of the State of North Carolina in the Atlantic Ocean within

a marine league seaward from the eastern bank and Coast of the State of North Carolina, unless permanently enjoined from so doing."

A continuation of the diving and salvage operations by defendants upon wrecks within the territorial waters of the State of North Carolina and in the Atlantic Ocean within a marine league seaward from the coast of the State of North Carolina, will result in irreparable loss and damage to the State of North Carolina.

At the end of these findings of fact the judgment recites the following issue which was submitted to the court and answered by it as indicated below:

> "Is the plaintiff the owner and entitled to the immediate possession of the sunken hulks and all property thereon or therein, including those hulks and artifacts specifically described in the Complaint, lying in the Atlantic Ocean seaward within one marine league of the North Carolina coast, as alleged in the Complaint?
>
> "ANSWER: Yes."

The court's conclusions of law appear at this point in the judgment and are in substance as follows:

(1) The State of North Carolina has never abandoned the wrecks of the S/S *Modern Greece*, the S/S *Phantom*, the S/S *Ranger*, and the Spanish privateer *Fortune*, their engines, tackle, apparel, furniture, and cargoes, nor the wrecks of any other ships lying in the Atlantic Ocean within the territorial waters of the State of North Carolina and within a marine league seaward from the coast of North Carolina.

(2) The diving and salvage operations conducted by the individual defendants, the corporate defendant and its servants, agents, and employees, upon the wrecks of the aforesaid vessels constituted unlawful trespasses by them, jointly and severally.

(3) Plaintiff is entitled to injunctive relief enjoining the individual defendants, the corporate defendants and its officers, agents, servants, and employees from in any way diving upon, going on, or molesting the wrecks of the vessels aforesaid, which have lain unattended since the Civil War in the Atlantic Ocean within the territorial waters of the State of North Carolina, seaward within one marine league of the North Carolina coast.

(4) The State of North Carolina has waived all claims for monetary damages against defendants upon the stipulation that those defendants return to the plaintiff the following described items:

"a. One bar of lead.

b. One file, approximately 14 inches long.

c. A cluster of eighteen small four-inch triangular and half-round files.

d. A metal bar six feet two inches long, composed of copper tubing.

e. Assorted links of copper pipes, approximately one and one-quarter inches in diameter.

f. One bundle of tin-plated steel sheets, 11 inches by 14 inches.

g. Nineteen silver-plated spoons, assorted sizes.

h. Six bars of lead, bearing the inscription, Pontifex and Wood, London.

i. Two pieces of copper tubing and one brass valve."

(5) Defendants should be ordered to return the above-described articles to the State of North Carolina at its archeological site at Fort Fisher, North Carolina.

Whereupon, the court ordered and decreed that the individual defendants, the corporate defendant, as well as its officers, agents, servants, and employees, be permanently enjoined from diving upon, going on, or molesting the wrecks of the S/S *Modern Greece,* the Spanish privateer *Fortune,* the S/S *Ranger,* the S/S *Phantom,* their engines, tackle, furniture, apparel, and cargoes, and all other wrecks which have lain unattended since the Civil War in the Atlantic Ocean within the territorial waters of the State of North Carolina within a marine league seaward of the coast of the State of North Carolina. It was further ordered that defendants shall forthwith return to the State of North Carolina at its archeological site at Fort Fisher, North Carolina, those items listed above in Judge Mintz's fourth conclusion of law.

From the judgment entered, defendants appeal.

Poisson & Barnhill by L. J. Poisson, Jr., for defendant appellants.

Attorney General T. W. Bruton, Assistant Attorney General Parks H. Icenhour, and Rountree & Clark by George Rountree, III, for plaintiff appellee.

PARKER, C.J. Defendants have not excepted to any findings of fact except the finding of fact that a continuation of the diving and salvage operation of the defendants will result in irreparable loss and damage to the State of North Carolina. A number of facts were

stipulated by the parties. The parties stipulated in substance that all the hulks or wrecks of the vessels herein involved, together with all the property in and upon them, "lie in the Atlantic Ocean, below the surface of the water at low tide, within a marine league seawardly from the Coast of North Carolina, offshore from the waters of Pender, New Hanover and Brunswick Counties, North Carolina." Under this stipulation of fact, all the hulks or wrecks herein involved, together with all the property in and upon them, lie within the territorial boundaries of the State of North Carolina and have substantially so lain since they were sunk, except the Spanish sailing vessel *Fortune* which, with its cargo therein, was sunk in the early 1700's and has substantially lain in the same position since it was sunk.

G.S. 141-6 (a) and (b) read:

> "(a) The Constitution of the State of North Carolina, adopted in 1868, having provided in article I, § 34, that the 'limits and boundaries of the State shall be and remain as they now are,' and the eastern limit and boundary of the State of North Carolina on the Atlantic seaboard having always been, since the Treaty of Peace with Great Britain in 1783 and the Declaration of Independence of July 4th, 1776, one marine league eastward from the Atlantic seashore, measured from the extreme low water mark, the eastern boundary of the State of North Carolina is hereby declared to be fixed as it has always been at one marine league eastward from the seashore of the Atlantic Ocean bordering the State of North Carolina, measured from the extreme low water mark of the Atlantic Ocean seashore aforesaid.
>
> "(b) The State of North Carolina shall continue as it always has to exercise jurisdiction over the territory within the littoral waters and ownership of the lands under the same within the boundaries of the State, subject only to the jurisdiction of the federal government over navigation within such territorial waters."

See North Carolina Constitution of 1776, Declaration of Rights § 25.

By statute the United States has in effect quitclaimed and confirmed the ownership of the State of North Carolina in the lands beneath the Atlantic Ocean within a marine league seaward from the eastern boundary of the State. 43 U.S.C.A. § 1312 reads:

> "The seaward boundary of each original coastal State is ap-

proved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress. May 22, 1953, c. 65, Title II, § 4, 67 Stat. 31."

A marine league is a distance which is the equivalent of three geographical miles. Ballentine's Law Dictionary (2nd Ed. 1948).

Defendants assign as error that Judge Mintz in answering the issue set forth above "yes" held in effect that the plaintiff is the owner and entitled to the immediate possession of the sunken hulks and all property thereon or therein, including those hulks and artifacts specifically described in the complaint, lying in the Atlantic Ocean seaward within one marine league of the North Carolina coast, as alleged in the complaint. Defendants also assign as error the court's conclusion of law that the State of North Carolina has never abandoned the wrecks of the S/S *Modern Greece,* the S/S *Phantom,* the S/S *Ranger* and the Spanish privateer *Fortune,* and the articles contained therein, nor the wrecks of any other ships, lying in the Atlantic Ocean within the territorial waters of the State of North Carolina and within a marine league seaward from the Coast of North Carolina.

It is well-settled law that the owners of sunken or derelict vessels or their contents may abandon them so effectively as to divest title and ownership. *Thompson v. United States,* 62 Ct. Cl. 516; *Eads v. Brazelton,* 22 Ark. 499, 79 Am. Dec. 88; *Howard v. Sharlin* (Fla.), 61 So. 2d 181; *State by Ervin v. Massachusetts Co.* (Fla.), 95 So. 2d 902, 63 A.L.R. 2d 1360; *Creevy v. Breedlove,* 12 La. Ann. 745; *Steinbraker v. Crouse,* 169 Md. 453, 182 A. 448; *Deklyn v. Davis,*

1 Hopk. Ch. 135, 2 N.Y. Ch. 369; *Williamson v. Mennella*, 248 App. Div. 911, 290 N.Y.S. 645; Annot., 63 A.L.R. 2d 1369, 1372.

"A vessel, cargo, or other property is derelict in the maritime sense of the word when it is abandoned without hope of recovery or without intention of returning." 48 Am. Jur., Shipping § 647 at p. 451. It is manifest from the stipulations and the findings of fact made by the judge, which findings of fact relevant here are unchallenged, that the vessels herein involved were derelicts, and that the one-time owners of these submerged vessels and their contents have abandoned them so effectively that they, and each one of them, have divested themselves of any title and ownership.

Defendants contend the State of North Carolina has no property rights in these sunken vessels or their cargoes either under the early English common law or under the subsequent law of the State of North Carolina prior to the enactment of Chapter 533, Session Laws of 1967 (now codified as G.S. 121-22 through G.S. 121-28). Defendants in their brief contend in essence that these vessels and their cargoes were abandoned by their former owners, and that ownership has vested in defendants because they have lawfully appropriated them to their own use and reduced them to possession with the requisite intent to become the owners.

We will first consider the question of the right of the sovereign at common law to goods found wrecked or derelict at sea, regardless of whether they were "cast upon the land or shore."

The Supreme Court of Florida, *en banc,* dealt with this precise question in *State by Ervin v. Massachusetts Co.* (Fla.), 95 So. 2d 902, 63 A.L.R. 2d 1360. In a very scholarly opinion, Justice Roberts said for the Court:

> "The rule is stated in Carver's Carriage of Goods by Sea, 9th Ed., p. 580, as follows:
>
> " 'So where a ship is derelict, or where goods have been thrown out of a vessel to lighten her (jetsam), or have been sunk but tied to some floating mark to show the place (lagan) or have been washed out of the ship and remain afloat (flotsam), in those cases, also, the property belongs to the Crown in its office of Admiralty, unless the owner establishes his claim to it.'
>
> "This statement is supported by the English cases on the subject. '. . . the common law gave as well wreck, *jetsam, flotsam,* and *lagan* upon the sea, as estray. . . ., treasure-trove, and the like to the King, because by the rule of the common law, when no man can claim property in any goods, the King shall have them by his prerogative.' *Sir Henry Constable's Case,* 5

Coke's Report 108b, 77 Eng. Repr. 218, 223. 'By the general law, all goods found afloat and derelict on the high seas belong, as droits, to the Crown, in its office of Admiralty.' *The King v. Forty-Nine Casks of Brandy* (1836), 3 Hagg Adm. 292, 166 Eng. Repr. 414. A wrecked vessel and its cargo, lying at the bottom of the sea, is a 'derelict' which, if not claimed by the owner, at the end of a year, becomes a *droit* of the Crown in its office of Admiralty. H. M. S. Thetis (1835), 3 Hagg 228, 166 Eng. Repr. 390, 391. See also the Tubantia (1924), P. 78, 91; *The King v. Two Casks of Tallow* (1837), 3 Hagg Adm. 292, 166 Eng. Repr. 414; and *The Aquila* (1798), 1 C. Rob. 37, 165 Eng. Repr. 87, 91.

"The difficulty which the Chancellor — and apparently the parties, also — has had with this question stems from a misunderstanding of the meaning and effect of the two English statutes cited above. The statute of 3 Edward I, Ch. 4, (enacted in 1275) provides that:

"'Concerning Wrecks of the Sea, it is agreed, that where a Man, a Dog, or a Cat escape quick out of the Ship, that such Ship nor Barge, nor any Thing within them, shall be adjudged Wreck; (2) but the goods shall be saved and kept by View of the Sheriff, Coroner, or the King's Bailiff, and delivered into the Hands of such as are of the Crown, where the Goods were found; (3) so that if any sue for those Goods, and after prove that they were his, or perished in his keeping, within a Year and a Day, they shall be restored to him without Delay; and if not, they shall remain to the King, and be seized by the Sheriffs, Coroners, and Bailiffs, and shall be delivered to them of the Town, which shall answer before the Justices of the wrecks belonging to the King.'

"The statute of 17 Edward II, Ch. 11 (enacted in 1324) provides that:

"'Also the King shall have Wreck of the Sea throughout the Realm; (2) Whales and great Sturgeons taken in the Sea or elsewhere within the Realm, (3) except in certain Places privileged by the King.'

"These two statutes did not confer any new right upon the Crown. By the ancient Roman law and the early common law of England, the right of the sovereign to wrecked and derelict property on the seas was absolute, to the exclusion of the owner. See the note to *The Aquila, supra,* 165 Eng. Repr. 87, 91. But by the time of Edward I, this harsh rule had been softened and the owner could reclaim his property within a year and a day.

> The statute of 3 Edward I, Ch. 4, 'was but a declaration of the common law against the opinion in Dr. and Stud. lib. 2 fo. 118, and if the owner dies, his executors or administrators may make their proofs.' *Constable's Case, supra,* 77 Eng. Repr. 218, 222. Similarly, the declaration of the statute of 17 Edward II, *supra,* that 'wreck of the sea' belonged to the King 'except in certain places Privileged by the King' was 'but a declaration and an affirmation of the common law. For notwithstanding that stat. being made within time of memory, a man may prescribe to have wreck, * * *' *Constable's Case, supra.* And, of course, the King could grant the right to 'wreck of the sea' to a subject, generally to the lord of a manor bordering on the sea. In fact, most of the cases in which 'wreck of the sea' or *wreccum Maris,* has been defined were concerned with the question of ownership of shipwrecked goods, as between the Crown and the lord of the manor, where the lord is claiming ownership of the goods either under a grant of wreck or by prescription.
>
> "In short, the statute of 3 Edward I, *supra,* was simply a declaration of the right of an owner to assert his ownership to shipwrecked goods within a year and a day — a right which already existed under the common law, not only as to technical 'wreck of the sea' but also to goods of the character of *flotsam, jetsam,* and *lagan.* And the statute of 17 Edward II, *supra,* was merely a declaration of the privilege of acquiring a right to 'wreck of the sea,' in its technical sense, by prescription or usage, already existing under the common law. *Constable's Case, supra.*"

A rehearing was granted by the Supreme Court of Florida in this case on 12 June 1957 and, upon further consideration, it adhered to its former opinion and judgment. 95 So. 2d 908, 63 A.L.R. 2d 1369. Thereupon, defendant Massachusetts Co. petitioned the United States Supreme Court for *certiorari,* which was denied 25 November 1957, 355 U.S. 881, 2 L. Ed. 2d 112.

This is said in 1 Blackstone's Commentaries on the Laws of England, Ch. 8, p. 280 (Reprint of the First Edition, Dawsons of Pall Mall, London, 1966):

> "Another maritime revenue, and founded partly upon the same reason [that is, grounded on the consideration of the King's guarding and protecting the seas from pirates and robbers], is that of shipwrecks; which are also declared to be the king's property by the same prerogative statute 17 Edw. II, c. 11. and were so, long before, at the common law."

In *Hetfield v. Baum,* 35 N.C. 394, Justice Pearson said for the Court:

> "The sovereign has a right to wrecks and all property stranded on the sea beach, and in many countries this right is exercised so as to be a source of considerable revenue.
>
> "North Carolina has a sea-coast great in extent and very dangerous, and there are probably more wrecks upon her coast during the year than upon that of any five of the other states. . . ."

In 80 C.J.S. Shipping § 258, it is said:

> " 'Wreck' has been defined to be such goods as after a shipwreck are cast on land by the sea and left there, and as the ruins of a ship which has been stranded or dashed on a shelf, rock, or lee shore by tempestuous weather, . . ."

"In England, by the early common law, all wreck or wrecks (in the technical sense) became the property of the Crown or its grantee after a year and a day, if no owner appeared within that time to claim it." 48 Am. Jur. Shipping § 648. To the same effect, 80 C.J.S. Shipping § 259.

The General Assembly in 1778, Ch. 133, P. R., enacted this statute:

> "*Be it enacted, &c.* That all such statutes, and such parts of the common law, as were heretofore in force and use within this territory, (b) and all the acts of the late general assemblies thereof, or so much of the said statutes, common law, and acts of assembly, as are not destructive of, repugnant to, or inconsistent with the freedom and independence of this State, and the form of government therein established, and which have not been otherwise provided for, in the whole or in part, not abrogated, repealed, expired, or become obsolete, are hereby declared to be in full force within this state."

This statute in its present form is codified in G.S. 4-1 as follows:

> "Common law declared to be in force. — All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in

whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State."

This Court said in *Development Co. v. Parmele,* 235 N.C. 689, 71 S.E. 2d 474:

> "Previously the General Assembly of North Carolina, beginning in 1711, had enacted statutes declaring that 'the common law is, and shall be in force in this government.' See Laws of N. C. 1711, Chap. 1, Sec. III (Published in Vol. 25 The State Records of North Carolina by Clark), Laws of N. C. 1715, Chap. 31, Sec. VI, Laws of N. C. 1715, Chap. 66, Sec. VIII, Laws of N. C. 1749, Chap. 1, Sec. VI, Laws of 1777 (First Session) Chap. 25, Laws of 1777 (Second Session) Chap. XIV, Sec. II, Laws of N. C. 1778 (First Session) Chap. V, Sec. II."

The term "Common Law" refers to the common law of England and not of any particular state. *Eidman v. Martinez,* 184 U.S. 578, 46 L. Ed. 694.

Defendants rely strongly upon the case of *Murphy v. Dunham* (1889, D. C. Mich.), 38 F. 503. The concept of the sovereign's prerogative as to a derelict ship or cargo apparently has been rejected expressly in this case. The Federal District Court in Michigan held, in the absence of statute, that the ownership of a cargo of coal in a vessel sunk in Lake Michigan did not pass to the State of Illinois as sovereign. The Court reasoned as follows: The Statute of Westminster (3 Edw. I. c. 4), which it held to be expressive of the common law upon the subject, applied only to "wreck of the sea" consisting of goods cast upon the shore, and goods known as *flotsam, jetsam, and lagan; flotsam* being goods cast upon the water, *jetsam* being goods cast overboard to save a laboring ship, and *lagan* being goods cast overboard attached to a line and buoy to mark their presence. The Court held that under these definitions coal lying at the bottom of the lake could not be considered "wreck of the sea" such as would be a prerogative of the sovereign. In the annotation in 63 A.L.R. 2d 1377, it is said:

> "It should be noted, however, that the decision in this case can be rested on the ground that the cargo of coal had never been abandoned by its purchaser. The court also disposed of the contention that ownership of the coal had passed to the United States by noting that the sovereignty of the State of Illinois extended to the waters in which the ship had sunk, the United States at that time having only rights of control over commerce and navigation."

Defendants contend as follows:

"At the dates of the sinking and abandonment, the Merchant Shipping Act of 1854 (17 & 18 Vict. c. 104) was in effect in England, and it was not until the enactment of the Merchant Shipping Act of 1894 (57 & 58 Vict. c. 60) that the term 'wreck' at common law was extended to apply to any vessel or its cargo not thrown upon the shore."

In the case of *H. M. S. "Thetis"* (1835), 3 Hagg. 228, 166 Eng. Repr. 390, 393, the Court said:

"Now derelicts are *prima facie* droits; they are so till a claim is allowed; they do not become actual droits until a year has expired without such a claim, and until then they are only derelicts. This treasure, though it never becomes a droit, was a derelict; it was out of the possession of any person in right of the owner — *it was at the bottom of the sea and fished up from it;* and there was no doubt in the mind of anyone who sat in the Court of Appeal that it was a derelict; but within the time prescribed by law, the owners or their representatives appeared and claimed the property, and upon proof of ownership it was restored to them, — but subject to salvage, and the salvage is in respect of monies arising out of derelict." (Emphasis supplied.)

As long ago as the year 1798, in *The "Aquila,"* 1 C. Rob. 37, 165 Eng. Repr. 87, we find the salvor attempting to claim title by right of occupancy to the cargo carried in a ship found derelict at sea, where the ship was reclaimed and restored by the owner and the cargo remained unchanged. The learned and distinguished Admiralty Judge, Sir W. Scott, in this case said:

"It is certainly very true that property may be so acquired: but the question is, to whom is it acquired? By the law of nature, to the individual finder or occupant: But in a state of civil society, although property may be acquired by occupancy, it is not necessarily acquired to the occupant himself; for the positive regulations of the State may have made alterations on the subject; and may, for reasons of public peace and policy, have appropriated it to other persons, as, for instance, to the State itself, or to its grantees.

"It will depend, therefore, on the law of each country to determine, whether property so acquired by occupancy, shall accrue to the individual finder, or to the Sovereign and his representa-

tives? And I consider it to be the general rule of civilized countries, that what is found derelict on the seas, is acquired beneficially for the Sovereign, if no owner shall appear. Selden (*De Dom. Maris,* lib. i, c. 24) lays it down as a right annexed to sovereignty, and acknowledged amongst all nations ancient and modern. Loccenius (Lib. i, c. 7, 10) mentions it as an incontestable right of sovereignty in the north of Europe. Valin (Lib. iv, tit. 9, art. 26) ascribes the same right to the crown of France; and speaking of the rule in France, that a third shall be given to salvors, in cases of shipwreck, expressly applies the same rule to derelicts, as standing on the same footing. In England this right is as firmly established as any one prerogative of the crown. . . ."

We do not accept the statement in *Murphy v. Dunham, supra,* as a correct statement of applicable common law, nor do we agree with the contention of defendants that "it was not until the enactment of the Merchant Shipping Act of 1894 (57 & 58 Vict. c. 60) that the term 'wreck' at common law was extended to apply to any vessel or its cargo not thrown upon the shore." *State by Ervin v. Massachusetts Co., supra.*

We conclude that the hulks or vessels and the cargoes therein involved in the instant case were "derelicts" which, at common law, would belong to the Crown in its office of Admiralty at the end of a year and a day under the authority of the English cases we have quoted above from the Supreme Court of Florida, and of *The "Aquila," supra.* The North Carolina statutes which we have quoted above declaring the common law to be in force in this State since 1776 show the intention of the State to pre-empt for itself those fiscal prerequisites which, at common law, had been the prerogative right of the Crown. Consequently, since these hulks or vessels and the cargoes therein were resting in territorial waters of the State of North Carolina and within the boundaries of the State of North Carolina, they are within the purview of the common law and belong to the State in its sovereign capacity.

The parties stipulated as follows:

"That during March, 1962, the plaintiff State of North Carolina, through its Department of Archives and History, supervised diving upon the hulks of the *Modern Greece,* the *Phantom,* and the *Ranger,* and further, undertook and conducted recovery and restoration of portions of the cargo, furniture, tackle and apparel from the *Modern Greece,* as appears by an inventory

> of relics recovered from sunken Confederate blockade runners, a copy of which is attached. (Labeled Appendix One, pages one through seven.) (Appendix One listed various items removed from the *Modern Greece, Ranger, Venus, Ella Beauregard, Phantom,* and *Condor.*) And that the State undertook and conducted recovery and restoration of certain articles from the *Phantom* and from the *Ranger,* which articles are also described in the appendix attached to these stipulations; and that the plaintiff has opened and is presently maintaining a restoration center and laboratory at Fort Fisher, New Hanover County, North Carolina, in which the plaintiff has gathered, preserved, identified, studied and maintained parts and parcels of these hulks, their cargoes, furniture, apparel, fixtures and appliances."

According to the stipulation of facts and the facts found by the judge, which are unchallenged in respect to this point, it is our opinion, and we so hold, that the sovereign State of North Carolina has never abandoned the hulks or sunken vessels herein involved, nor the property in or upon them.

The two assignments of error above mentioned are overruled.

Defendants assign as error the court's finding that the diving and salvaging operations conducted and performed by defendants on the wrecks of the S/S *Modern Greece,* the Spanish privateer *Fortune,* the S/S *Ranger,* and the S/S *Phantom* constitute unlawful trespasses by them, jointly and severally. This assignment of error is overruled. For the reason stated above, we hold that the State of North Carolina, in its sovereign capacity, has a possessory right or title to these hulks or vessels and their cargoes; and, consequently, the defendants, in going upon them and removing objects therefrom, were trespassers. It is hornbook law that to trespass is a wrongful invasion of the possession of another. 4 Strong, N. C. Index, Trespass, § 1.

Defendants assign as error that the court erred in its finding of fact that a continuation of defendants' activities in and upon the hulks of these sunken vessels will result in irreparable loss and damage to the State of North Carolina. Defendants also assign as error the granting of the State's request for injunctive relief.

According to the stipulated facts, these old derelict vessels, with the exception of the Spanish privateer *Fortune,* were once Confederate blockade runners, sunk over a century ago during the War Between the States; and, since that time, they have lain at the bottom of the sea within the territorial waters of the sovereign State of North Carolina abandoned by their one-time owners. These sunken vessels contain articles of unique historical significance and value which cannot be replaced. No reasonable redress at law can be af-

forded for defendants' taking of these artifacts, and the sovereign State of North Carolina, in equity and good conscience, should not be required to submit to the defendants' unlawfully going upon its property and removing therefrom such articles. Under the facts stipulated and found, defendants are not engaged in any legitimate enterprise with respect to these old derelicts.

The Honorable James Sprunt, a distinguished citizen of this State, one of its more prominent businessmen and a longtime resident of New Hanover County, at the age of 17½ years, sailed on the blockade runners *Advance, Eugenie, Northheath, Lillian, Susan, Beirne,* and the *Alonzo* in the capacity of purser. The historical value and rare interest which these old derelict vessels may have for future generations who are interested in days long past have been expressed by Mr. Sprunt in his accurate and most interesting volumes, *Chronicles of the Cape Fear River,* 1660 - 1916, and *Derelicts,* 1920. We quote from page 396 of the Second Edition of *Chronicles of the Cape Fear River,* speaking of these blockade runners:

> "Some of the steamers which were run ashore by the blockaders may still be seen: the *Ella* on Baldhead, the *Spunky* and the *Georgiana McCall* on Caswell Beach, the *Hebe* and the *Dee* between Wrightsville and Masonboro. The *Beauregard* and the *Venus* lie stranded on Carolina Beach; the *Modern Greece,* near New Inlet; the *Antonica,* on Frying Pan Shoals. Two others lie near Lockwood's Folly Bar; and others whose names are forgotten, lie half-buried in sands, where they may remain for centuries to come."

And at page 461 of the same book, Mr. Sprunt goes on to say:

> "After a heavy storm on the coast, the summer residents at Carolina Beach and Masonboro Sound have occasionally picked up along the shore some interesting relics of blockade times which the heaving ocean has broken from the buried cargoes of the *Beauregard, Venus, Hebe,* and *Dee.* Tallow candles, Nassau bacon, soldiers' shoes, and other wreckage comprise in part this flotsam yielded up by Neptune after nearly fifty years' soaking in the sea."

Mr. Sprunt, in his book *Derelicts,* 1920, in speaking of blockade runners, has this to say on page 51:

> "For many years the summer visitors on Wrightsville Beach have looked out upon the hurrying swell of the broad Atlantic and have felt the fascination of the long lines of crested breakers

like Neptune's racers charging and reforming for the never-ending fray; and, when the unresting tide receded, they have seen the battered hulks of some of the most beautiful ships that ever shaped a course for Wilmington in the days of the Southern Confederacy. They represented an epoch that is unique in our country's history, for, in the modern art of war the conditions which then prevailed can never occur again."

The "wrecks" statutes of North Carolina, G.S. 82-1 through 82-18, both inclusive, do not refer in any way to the ownership of the hulks or sunken vessels here and the cargoes therein contained. These statutes are concerned with the protection and sale of stranded vessels or a vessel's cargo or material or any property cast ashore, and the application of the proceeds. According to all the facts stipulated and found, these hulks or sunken vessels and their cargoes have lain unattended and abandoned for more than one hundred years beneath the surface of the Atlantic Ocean within the territorial limits of the State of North Carolina, except for the Spanish privateer *Fortune* which has lain for more than two hundred fifty years beneath the surface of the Atlantic Ocean in the territorial limits of the State of North Carolina. In this case we are not concerned with property which Blackstone says is distinguished "by the barbarous and uncouth appellations of *jetsam, flotsam,* and *ligan.*" It is manifest that no attempt has been made or will be made to salvage these sunken vessels, and it is equally manifest that the sunken vessels here have little, if any, value for salvage. In recent years since the advent of skin divers and oxygen tanks which may be strapped to the backs of skin divers, it is possible to explore such sunken vessels with no great difficulty and carry to shore articles of unique historical value found therein. It is manifest that the activities of the defendants here were solely for their own personal gain. Upon the facts stipulated and found, we do not think that our "wrecks" statutes divested this State of a prerogative right of the Crown to which it succeeded when it became a sovereign State and adopted the common law of England as it existed in 1776. In our opinion, and we so hold, our "wrecks" statutes have no application to the facts in the present case.

Upon the stipulated facts and facts found, which are not challenged except in one respect heretofore stated, the trial court correctly entered an order permanently enjoining defendants from diving upon, going on, molesting, or in anywise interfering with the hulks or sunken vessels here and their cargoes, and the court also was correct in issuing a mandatory injunction that defendants shall forthwith return to the sovereign State of North Carolina the articles

specified above which were taken from these hulks or sunken vessels. All defendants' assignments of error are overruled.

The judgment below is

Affirmed.

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

FRANCES D. KANOY v. EMORY RAY HINSHAW AND SECURITY MILLS OF GREENSBORO, INC.

AND

CONNIE REID KANOY, BY HIS NEXT FRIEND, FRANCIS V. KANOY, v. EMORY RAY HINSHAW AND SECURITY MILLS OF GREENSBORO, INC.

(Filed 10 April 1968.)

1. **Trial § 8—**

A trial court has the discretionary power to consolidate for trial actions which involve the same parties and subject matter if no prejudice or harmful complications will result therefrom.

2. **Same—**

A discretionary order consolidating actions for trial will not be disturbed on appeal in the absence of a showing of injury or prejudice to the appealing party.

3. **Automobiles § 43— Actions for injuries arising out of same accident are properly consolidated.**

An order consolidating actions for personal injuries by the driver and guest passenger of an automobile against the driver and owner of a truck which collided with the automobile *is held* not prejudicial to plaintiffs even though there was a counterclaim and an issue of contributory negligence in the driver's action, since the actions grew out of the same accident, separate issues were submitted to the jury in each case, plaintiffs' witnesses and evidence were the same, and since both defendants relied on the same acts of the plaintiff driver to sustain defenses of contributory negligence in the driver's action and that plaintiff guest passenger's injuries resulted solely from plaintiff driver's negligence.

4. **Trial § 11—**

Although two independent actions are consolidated for trial, they remain separate suits throughout the trial and appellate proceedings.

5. **Negligence § 7—**

Proximate cause is that cause which produces the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all of the facts then existing.

6. Trial § 10—

A litigant has the right to have his cause tried before an impartial judge without expressions from the bench which intimate an opinion as to the weight, importance or effect of any facts pertinent to the issues to be decided by the jury, but such expressions of opinion must be prejudicial to appellant to result in a new trial.

7. Same—

In explaining rulings on the admissibility of evidence, comments by the court in the jury's presence to the effect that there was no evidence that the manner in which the body of defendant's truck was attached to the chassis caused the collision, which comments were obviously true, *are held* not to be an expression of opinion as to facts pertinent to the issues being considered by the jury so as to be prejudicial to plaintiffs.

8. Trial § 39—

An instruction of the court that the jury must continue to deliberate until they indicate to the court that they are hopelessly deadlocked, together with further instructions reminding the jurors of their duty and of the result of their failure to reach a unanimous verdict, *held* not to support the contention that the verdict was coerced.

9. Automobiles § 90—

Failure of the court to charge upon the requirements of G.S. 20-154 and G.S. 20-141 *is held* not to be error under the circumstances of this case.

BOBBITT, J., concurring in part and dissenting in part.

SHARP and HUSKINS, JJ., join in concurring and dissenting opinion.

APPEAL by plaintiffs and defendant Security Mills of Greensboro, Inc. from *Gambill, J.*, September 1967 Session of DAVIDSON.

These actions were instituted by plaintiffs to recover damages for personal injuries allegedly resulting from defendants' negligence. Plaintiff Frances D. Kanoy was the operator of a vehicle which was owned by her husband and in which plaintiff Connie Reid Kanoy, her son, was a guest passenger when the vehicle was involved in a collision with a truck driven by defendant Emory Ray Hinshaw and owned by defendant Security Mills of Greensboro, Inc. Plaintiffs instituted separate actions against defendants which, on defendants' motion, were consolidated for trial. Plaintiffs objected and excepted to the consolidation. Defendant Security Mills of Greensboro, Inc., in its answer to plaintiff Frances D. Kanoy's complaint, counterclaimed against *feme* plaintiff for damages to its truck and feed, and for loss of use of the truck.

The collision occurred at about 5:45 a.m. on 24 June 1966 at the intersection of Interstate Highway 85 and rural road 2023 intersecting from the south and rural paved road 1873 intersecting from the

north and directly across I-85 from rural road 2023. A paved cross-over interrupted the grass median dividing the east- and west-bound traffic on I-85 at the intersection. The weather was clear and the road was dry at the time of the collision. The truck operated by defendant Hinshaw was being driven in a westerly or southerly direction on I-85 in the outside or northernmost lane and the automobile was being driven from rural road 2023 north across I-85 onto rural road 1873. The collision occurred at the intersection, in or north of the outside lane of I-85. At the time of the collision plaintiff Frances D. Kanoy was driving the automobile for the purpose of transporting plaintiff Connie Reid Kanoy on his newspaper route.

The plaintiffs' evidence, in pertinent part, was as follows:

Frances D. Kanoy testified that she approached I-85 from the south on rural road 2023 and stopped about 5 feet from I-85. She waited for three trucks, traveling east on I-85, to pass; she then proceeded to the median between the east- and west-bound traffic on I-85 and again stopped; she observed the truck driven by defendant Hinshaw approaching from the east on I-85 at a distance of over 800 feet. She explained her estimate on the basis that a cedar tree was located over 800 feet from the intersection and the truck had not yet reached the tree; she then proceeded across the two west-bound lanes of I-85 and was about 10 feet off I-85 and onto rural road 1873 when the truck struck her right rear fender and passed to her right. She heard a noise and the car began to shake and the next thing she remembered, she was lying on the ground.

The testimony of plaintiff Connie Reid Kanoy tended to corroborate the testimony of Frances D. Kanoy. Connie Reid Kanoy was 16 years of age and was riding on the right side of the front seat at the time of the collision.

Evidence was introduced as to the personal injuries sustained by both plaintiffs.

At the conclusion of plaintiffs' evidence, defendants' motion for nonsuit was denied.

Defendants' evidence, in substance, was as follows:

Richard Sigman, State Highway Patrolman, testified that he investigated the collision, arriving at the scene at about 6:20 a.m. He observed black marks leading from the edge of the pavement on to rural road 1873. That morning, Hinshaw stated to Sigman that he was traveling at a speed of about 45 to 50 miles per hour when he observed the vehicle plaintiffs were in come across in front of him from his left and he tried to avoid hitting the car. Sigman testified that the car was "torn all to pieces." The trailer, which was loaded with about 12 tons of feed, became disconnected from the tractor

portion of the truck and came to rest on the northern shoulder of I-85, at and west of the intersection with rural road 1873. The car came to rest near the trailer. The tractor continued on about 44 feet beyond the trailer before coming to a stop. The skid marks of the tractor extended 150 feet. Sigman testified that he visited Frances D. Kanoy in the hospital about two days after the collision and that she stated to him that she did not see the truck at any time.

Defendant Emory Ray Hinshaw testified that he was employed by Security Mills of Greensboro and was driving the truck involved in the collision. He stated that at a distance of about 900 feet, he saw a car waiting at the intersection of rural road 2023 and I-85 for trucks traveling on I-85, opposite to Hinshaw's direction of travel, to pass. A tractor-trailer passed Hinshaw, traveling in the same direction. After the trucks traveling toward Hinshaw had passed the car, it then came straight across in front of Hinshaw. Hinshaw applied his brakes and turned to his right in an effort to avoid a collision. The collision occurred in the right southbound lane of I-85. The bed of the truck became disconnected after the impact with the car. He estimated that he was about 200 feet away when the car started across the highway and about 40 feet away when the car entered the left southbound lane of I-85.

Other eyewitnesses to the collision testified that the automobile plaintiffs were in did not stop at the median and that the automobile was partially in the right southbound lane of I-85 and partially on the shoulder of the highway at the time of the collision.

Evidence was introduced as to the value of the truck before and after the collision.

At the conclusion of all the evidence, defendants renewed their motions for nonsuit. The motions were denied.

Issues were submitted to and answered by the jury as follows:

ISSUES AND VERDICT (FRANCES D. KANOY Case):

1. Was the plaintiff, Frances D. Kanoy, injured and damaged by the negligence of the defendants, as alleged in the complaint?

ANSWER: No.

2. Did the plaintiff Frances D. Kanoy, by her own negligence, contribute to her injuries and damages, as alleged in the Answer?

ANSWER: ....

3. What amount, if any, is the plaintiff, Frances D. Kanoy, entitled to recover of the defendants?

ANSWER: ....

4. Was the property of Security Mills of Greensboro, Inc., damaged by the negligence of the plaintiff, Frances D. Kanoy, as alleged in its counterclaim?
ANSWER: No.

5. What amount, if any, is the defendant Security Mills of Greensboro, Inc. entitled to recover of the plaintiff, Frances D. Kanoy?
ANSWER: ....

ISSUES AND VERDICT (CONNIE REID KANOY/bnf/FRANCIS V. KANOY Case)

1. Was the plaintiff, Connie Reid Kanoy, injured and damaged by the negligence of the defendants, as alleged in the complaint?
ANSWER: No.

2. What amount, if any, is the plaintiff, Connie Reid Kanoy, entitled to recover of the defendants?
ANSWER: ....

Judgments were entered on the verdicts allowing no recovery for personal injuries to either plaintiff and no recovery for property damage to defendant Security Mills of Greensboro on its counterclaim. Plaintiffs and defendant Security Mills of Greensboro, Inc. appealed.

W. H. Steed and Walser, Brinkley, Walser & McGirt for plaintiffs.
Sapp & Sapp and Rollins & Rollins for defendants.

BRANCH, J. Plaintiffs assign as error the trial court's action in consolidating the two cases for trial. This assignment of error is based on an exception duly taken. *Fleming v. Holleman,* 190 N.C. 449, 130 S.E. 171.

Appellants rely on the language contained in the case of *Dixon v. Brockwell,* 227 N.C. 567, 42 S.E. 2d 680, where Winborne, J., (later C.J.) stated:

"It is appropriate to say that consideration of this appeal leads to the conclusion that it would be better to try the actions brought by these plaintiffs, passengers in the Frank N. Martin car, separately from the action brought by Frank N. Martin. This is so even though these plaintiffs make no allegation of negligence against Frank N. Martin, They elect to allege a

cause of action for actionable negligence only against the defendant, and may recover only if they make good on these allegations, even if Frank N. Martin were negligent also, and that his negligence were a proximate cause of, and concurred in bringing about the collision in question. Hence the issue in their actions is one of negligence of defendant, and proximate cause, and concurring negligence of Frank N. Martin has no place in the trial of their causes. While, on the other hand, in the Frank N. Martin case, there are issues of negligence and contributory negligence which require appropriate instructions."

The trial court possesses the power to order consolidation of actions for trial when the actions involve the same parties and the same subject matter, if no prejudice or harmful complications will result therefrom. This power is vested in the trial judge so as to avoid multiplicity of suits, unnecessary costs, delays, and to afford protection from oppression and abuse. To sustain an exception to the court's discretionary consolidation of the actions, injury or prejudice to the appealing party arising from such consolidation must be shown. *Peeples v. R. R.*, 228 N.C. 590, 46 S.E. 2d 649.

In the case of *Davis v. Jessup,* 257 N.C. 215, 125 S.E. 2d 440, Denny, C.J., speaking for the Court, stated:

> "The plaintiffs' first assignment of error is to the consolidation of these actions for trial. The trial court possesses the discretionary power in proper cases to order the consolidation of actions for trial. McIntosh, North Carolina Practice and Procedure, 2nd Ed., Vol. I, Section 1342; *Peeples v. R. R.,* 228 N.C. 590, 46 S.E. 2d 649, and cited cases. Moreover, when the consolidation of actions for the purpose of trial is assigned as error, the appellant must show injury or prejudice arising therefrom. Here, both actions grew out of the same accident, and in essence the complaints are identical, and so are the answers. The same defenses are interposed, the plaintiffs used the same witnesses, and the evidence was the same except on the question of damages. Both actions were against the same defendant, and both plaintiffs were represented by the same attorneys. Furthermore, it has not been shown on this record that the appellants were injured or prejudiced by the order of consolidation. This assignment of error is overruled."

It should be noted that the *Davis v. Jessup* case differs from the instant case in that the issue of contributory negligence was submitted as to both plaintiffs and there was no counterclaim against either of the plaintiffs.

Robinson v. Transportation Co., 214 N.C. 489, 199 S.E. 725, is a case in which the driver of an automobile and four of his guest passengers brought separate actions against the same defendants, in which each plaintiff sought recovery for personal injuries, and one plaintiff, in addition, sought recovery for property damage. The original record shows that an issue of contributory negligence was submitted as to one plaintiff only. The Court, holding that there was no error in the consolidation of these cases for trial, stated:

> "(1) The exception to consolidation of the cases for the purpose of trial is without merit. In this State the power of the trial court to consolidate cases for convenience of trial is not confined to cases between the same parties, but extends to cases by the same plaintiff against several defendants and cases by different plaintiffs against the same defendant, where the causes of action grow out of the same transaction and the defense is the same. *Abbitt v. Gregory,* 201 N.C. 577, 593, 594; McIntosh, Practice and Procedure, 536, 539. The liability of the defendants, if any, to the several plaintiffs in this action grew out of the same alleged negligent acts and the defense is the same. There is no apparent prejudice to the defendants in the consolidation of these actions which might interfere with the discretion of the court in making the order."

In analyzing *Robinson v. Transportation Co., supra,* we conclude that the court reasoned that "the defenses were the same" in the sense that no confusion would result in the trial from the consolidation since defendants relied on the same negligent acts of the plaintiff driver as their defense in the plea of contributory negligence and in their contention that the sole negligence of the same driver barred recovery by the other plaintiffs.

An examination of the case law of other jurisdictions indicates a strong trend towards approval of consolidation in actions for injuries whenever possible, on the premise that, generally, the applicable rules of law are not complicated and may be explained to the modern jury so that it may understand and apply the legal rules to the factual situation. See 68 A.L.R. 2d 1372, for an exhaustive note on Consolidation — Actions for Injuries.

In this connection we observe it is the rule in this jurisdiction that when cases are consolidated for trial, although it becomes necessary to make only one record, the cases remain separate suits and retain their distinctiveness throughout the trial and appellate proceedings. *Pack v. Newman,* 232 N.C. 397, 61 S.E. 2d 90; *Horton v. Perry,* 229 N.C. 319, 49 S.E. 2d 734.

Here, the court submitted separate issues as to both cases and the written issues were in the possession of the jury during its deliberations. Any contention that confusion resulted from consolidation of the actions because of the submission of the defense of contributory negligence and the inclusion of a counterclaim against the plaintiff driver is further dispelled by the fact that the jury considered only the first and fourth issues in the Frances D. Kanoy case and only the first issue in Connie Reid Kanoy case. The actions grew out of the same accident, the same evidence was related by the same witnesses (except as to damages), both defendants relied on the same acts of negligence of the plaintiff Frances D. Kanoy to sustain their defense of contributory negligence and their defense that the sole negligence of Frances D. Kanoy caused the injuries received by the passenger Connie Reid Kanoy. Plaintiffs brought forward no assignment of error as to the admission or exclusion of evidence or as to any other specific ruling of the court which they contended was caused by consolidation of the actions for trial.

The record in the instant case does not reveal apparent prejudice to either plaintiff which justifies interference with the court's discretionary order of consolidation. We do wish to stress, however, that in considering consolidation of actions for trial, the trial court should carefully weigh the possibilities of confusion, misunderstanding or prejudice to the parties which might arise from such consolidation.

Plaintiffs assign as error comments of the trial judge made in the presence of the jury as being prejudicial in expressing an opinion as to the evidence.

The court, in explanation of his ruling on the admissibility of evidence, stated in the presence of the jury:

> "The position of the body and truck has nothing to do with the wreck; in other words, you are alleging a faulty truck but it has nothing to do with the cause of the wreck, what happened after is another matter, what caused the wreck — whether bolted on solid or not; there is no evidence that had anything to do with the wreck.
>
> How the body is constructed has nothing to do with whether it caused the wreck or didn't.
>
> If the feed came off or tilted sideways and caused him to lose control of the truck, it would be different; there is no evidence the body had anything to do with causing the collision, how it was attached to the truck or what — that's not material; the fact that it hit the car if it did is material but how it is bolted on has nothing to do with whether the wreck was caused by it or not. The evidence will tend to show it came loose after the

> collision; that has nothing to do with whether it caused the collision — that's another matter."

On three or four other occasions he made statements of like import.

Proximate cause is that cause which produces the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all of the facts then existing. *Jenkins v. Electric Co.*, 254 N.C. 553, 119 S.E. 2d 767.

It is well recognized in this jurisdiction that a litigant has a right by law to have his cause tried before an impartial judge without any expressions from the trial judge which would intimate an opinion by him as to weight, importance or effect of the evidence. *Upchurch v. Funeral Home,* 263 N.C. 560, 140 S.E. 2d 17. However, this prohibition applies only to an expression of opinion related to facts which are pertinent to the issues to be decided by the jury, and it is incumbent upon the appellant to show that the expression of opinion was prejudicial to him. *McDonald v. MacArthur,* 154 N.C. 11, 49 S.E. 684. See also *Upchurch v. Funeral Home, supra.*

The lengthy comments by the trial judge were unnecessary. However, there was no evidence that the manner in which the truck body was attached to the chassis *caused* the collision. The statements made by the court were obviously true and did not express an opinion as to facts pertinent to the issues being considered by the jury so as to be prejudicial to plaintiffs. This assignment of error is overruled.

Plaintiffs contend that there was error in the time when and manner in which the trial judge submitted the case to the jury. In this connection the record shows the following:

> "After the Jury deliberated for some time, it now being 7:40 P.M., the following ensued:
>
> COURT: Members of the jury, have you agreed on a verdict?
> JURY: No.
> COURT: Do you want to come back tonight and still deliberate?
> JURY: Yes.
> COURT: Do you want to go out or do you want something brought in?
> JURY: Any way is all right.
> COURT: Can we send out for something?
> (JURY: If we don't agree, how long do we have to stay?
> COURT: You have to stay until you indicate to the Court

that you are hopelessly deadlocked. A verdict of the Jury is a unanimous verdict of 12 people reasoning together and not a verdict of six or eleven, but a verdict of twelve reasoning together and unanimous. If you can't reach a verdict, it will be necessary for the Court to withdraw a juror and declare a mistrial and try these cases all over again; the next Jury will have about the same evidence and same law and won't be any more intelligent than you are and it will have to be done all over again.)

Plaintiffs except to above portions of the charge in parentheses.

JURY: I would like to ask for one part of the testimony not saying which one certain part —

COURT: I charged you at the time and again charge you that it is your responsibility to remember all the evidence and weigh it as you recall it in arriving at your verdict whether the Court calls it to your attention or not and take your recollection; that is your responsibility. I can't have it read to you as she is not under oath; the evidence was presented to you under oath by the witnesses; you will have to take it as you recall it.

I summarized in effect what the testimony was; what the testimony was, it's for you the jury, and that is your province and nobody can invade it; what you say the facts are stands and nobody can reverse it and nobody can question it. Do you want to go eat and come back, or do you want us to send out and get something for you while you deliberate further?

(NOTE: Jury given supper recess until 8:30 P.M. and given the usual cautions.)"

When the jury returned, the court then gave further instructions on the issues and the order in which the jury should answer them.

In re Will of Hall, 252 N.C. 70, 113 S.E. 2d 1, contains the following pertinent statements:

" 'The trial judges have no right to coerce verdicts or in any manner, either directly or indirectly, intimidate a jury.' *Trantham v. Furniture Co.,* 194 N.C. 615, 616, 140 S.E. 300. . . . 'The law anticipates a verdict in every case after the jury have had a reasonable time for consideration.' *Osborne v. Wilkes,* 108 N.C. 651, 666, 13 S.E. 285. . . . Certainly it is not error for the trial court to remind the jury of the gravity and importance of their position and the duty imposed on them to discuss and

consider the evidence with deliberation, compose their differences and return a verdict if they can conscientiously do so."

Without indicating any opinion as to the weight of the evidence or what the verdict should be, the trial judge courteously and considerately reminded the jury of its duty and of the result if it failed to reach a unanimous verdict. The record fails to show that the verdict was coerced or that the jury was intimidated by the actions or words of the trial judge.

Further, upon reading the charge as a whole, it appears that the trial judge so explained the law applicable to the facts of the case that we are unable to find any reasonable ground to believe that the jury was misled or misinformed. *Phillips v. R. R.*, 257 N.C. 239, 125 S.E. 2d 603.

Plaintiff appellants have failed to carry the burden of showing sufficient prejudicial error to warrant a new trial.

APPEAL BY SECURITY MILLS OF GREENSBORO, INC.

Defendant Security Mills of Greensboro, Inc., assigns as error the failure of the trial court to apply the law, as set out in G.S. 20-154 and G.S. 20-141, to the facts on this case.

These statutes, in pertinent part, provide:

> G.S. 20-154: "The driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, . . ."
>
> G.S. 20-141(a): "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing."
>
> G.S. 20-141(c): "The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection . . . or when special hazards exist with respect to pedestrians or other traffic . . . and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway, and to avoid causing injury to any person or property either on or off the highway, in compliance with legal requirements and the duty of all persons to use due care."

G.S. 20-158 not only requires the driver on a servient highway to stop, but such driver is further required to exercise due care to see that he may enter or cross the dominant highway or street in safety

before entering thereon. *Jordan v. Blackwelder*, 250 N.C. 189, 108 S.E. 2d 429. The court's interpretation of G.S. 20-158 incorporates the requirements contained in G.S. 20-154, that the motorist must see "that such movement can be made in safety," and under the factual situation here presented, an instruction as to G.S. 20-154 is unnecessary. Here the court charged as to G.S. 20-158 and applied the law contained therein to the facts of instant case.

Further, the theory of defendant's counterclaim is so clearly based on provisions of G.S. 20-158 that prejudicial error is not shown by failure to charge on G.S. 20-141 in relation to the fourth issue. Defendant Security Mills of Greensboro, Inc., has failed to show prejudicial error on its appeal.

As to appeal of plaintiffs:

No error.

As to appeal of defendant Security Mills of Greensboro, Inc.:

No error.

BOBBITT, J., concurring in part and dissenting in part.

In my opinion, the order of consolidation did not prejudice plaintiff Frances D. Kanoy. In her case, I agree the verdict and judgment should stand.

In my opinion, the minor plaintiff, Connie Reid Kanoy, was prejudiced by the order of consolidation, particularly so in view of the fact the court did not give positive instructions to the effect the negligence issue in his case should be answered, "Yes," if the jury found that the collision and his injuries were caused by the *joint and concurrent negligence* of Frances D. Kanoy and of defendants. In Connie Reid Kanoy's case, my vote is for a new trial.

SHARP and HUSKINS, JJ., join in this opinion.

WILLIAM T. ZOPFI AND WIFE, AUDREY N. ZOPFI, RICHARD B. GRUELLE AND WIFE, CAROLYN L. GRUELLE, LOWELL C. BRITTON AND WIFE, ELIZABETH T. BRITTON, FLETCHER M. GREEN, II, AND WIFE, JULIA HALL GREEN, ON BEHALF OF THEMSELVES AND OTHER OWNERS OF LOTS AND RESIDENCES IN LONG LEAF HILLS SUBDIVISION, SECTION 7, v. CITY OF WILMINGTON, NORTH CAROLINA, MAYOR O. O. ALLSBROOK, COUNCILMEN JOHN SYMMES, L. M. CROMARTIE, C. H. HARRINGTON, W. ALEX FONVIELLE, JR., HUGH MORTON, AGNES M. MORTON AND AGNES M. COCKE.

(Filed 10 April 1968.)

1. Municipal Corporations § 30—

In the absence of a valid zoning ordinance prohibiting the use of property for a shopping center or for multiple-family apartment houses, the owner of land may use it for such purpose even though he thereby makes the adjoining property less desirable, neither of such uses being a nuisance *per se* or an encroachment, and in such instance the diminution in the value of the adjoining property is *damnum absque injuria.*

2. Same—

Zoning laws are an exercise of the police power of the sovereign reasonably to regulate or restrict the use of private property to promote the public health, safety, morals or welfare.

3. Same; Constitutional Law § 15—

The original zoning power of the State rests in the General Assembly and is subject to the constitutional limitations against arbitrary and unduly discriminatory interference with the rights of property owners.

4. Same—

A municipal corporation has no inherent zoning power, and municipalities can exercise such power only to the extent and within the limitations of statutes delegating this legislative power. G.S. 160-172 *et seq.*

5. Municipal Corporations § 30—

The enactment of a zoning ordinance is not a contract with the property owners of the city, and such legislation may be repealed or amended by the municipality from time to time. G.S. 160-176.

6. Same—

There is a presumption in favor of the validity of a zoning ordinance adopted pursuant to prescribed procedures, and the mere fact that the ordinance depreciates the value of the complainant's property is insufficient to establish its invalidity.

7. Municipal Corporations § 31; Courts § 1—

Upon review of the amendment of a zoning ordinance by a municipal legislative body, the courts may not substitute their opinion for that of the legislative body so long as there is some plausible basis for the conclusion reached by that body.

8. Municipal Corporations § 30—

Amendment to a zoning ordinance reclassifying a forty-acre area from

a residential zone to zones for commercial use and for multiple-family apartment use will not be held invalid on the ground that it is arbitrary or capricious or that it constitutes "spot zoning" when the evidence discloses that this particular area, lying at the apex of the triangle formed by two intersecting and heavily traveled highways, is inappropriate for single family residential use.

9. Municipal Corporations § 31—

In an action under the Declaratory Judgment Act to review the authority of a municipality to adopt a rezoning ordinance, trial by jury is properly refused where the controverted facts to be determined by the court present questions of fact and not issues of fact.

APPEAL by plaintiffs from *Mintz, J.*, at the August 1967 Session of NEW HANOVER.

Mrs. Morton and Mrs. Cocke are the owners of a tract of land containing approximately sixty acres, a small part of which is within the city of Wilmington and all of which lies within the territorial zoning jurisdiction of the city. The land lies at the intersection of Shipyard Boulevard and N. C. Highway 132, forming a triangle bounded by these two major arteries of traffic and the Long Leaf Hills subdivision. Prior to 3 March 1967 the entire tract was subject to a comprehensive zoning ordinance of the city, the validity of which is not in question. By that ordinance, a small portion of the tract at the apex of the triangle, *i.e.*, nearest the intersection of the highway, was in Zone C-1, permitting use for commercial activities. The remainder was in Zone R-1AA, permitting use for single family residences only.

The base of the triangle, *i.e.*, the portion furthest removed from the highway intersection, adjoins the Long Leaf Hills subdivision, all of which is zoned for single family residences only. The named plaintiffs are the owners of homes in the Long Leaf Hills subdivision adjoining or in close proximity to such base line of the Morton-Cocke triangular tract. Other properties lying across the two highways from the Morton-Cocke triangular tract include the grounds of a public high school and areas which, except for a small area near the intersection of the highways, are zoned for residential use only.

On 18 January 1967, Mrs. Morton and Mrs. Cocke applied to the Planning Commission for a recommendation to the City Council that their property be rezoned so as to transfer to Zone C-1 (commercial use) the twenty-seven and one-half acres nearest to the apex of the triangle, transfer to Zone R-3 (multiple family apartment use) the next twelve acres and leave in Zone R-1AA (residential use only) the remainder of the tract. The proposed use contemplates

the construction of a shopping center on the twenty-seven and one-half acre tract, the construction of multiple family apartment houses on the twelve acre tract and the establishment of two new streets and three rows of lots for single family residences on the remainder. If this plan is carried out the three rows of single family residential lots will roughly parallel the base line of the triangle so as to lie between the Long Leaf Hills subdivision, in which the homes of the plaintiffs are located, and the strip where the multiple family apartments are to be constructed, these apartments then being between the single family residential lots and the proposed shopping center and its parking area. Under this plan the multiple family apartment buildings will be approximately 600 feet from the homes of the plaintiffs and the boundary of the shopping center area will be 800 feet from their homes.

Following a public hearing the Planning Commission declined to make such recommendation to the City Council. Mrs. Morton and Mrs. Cocke then appealed to the Council and following a further public hearing the Council adopted two ordinances declaring the said portions of the Morton-Cocke property so rezoned for C-1 and R-3 uses.

The named plaintiffs, on behalf of themselves and other property owners in the Long Leaf Hills subdivision, thereupon instituted this action seeking a declaratory judgment to determine the validity of the said ordinances so rezoning the Morton-Cocke property and determining the prospective rights of the plaintiffs and defendants with reference to such zoning. The matter came on to be heard before Mintz, J., who, after denying a motion by the plaintiffs for a trial by jury, heard evidence, found the facts to be as above stated, in substance, and concluded therefrom, as matters of law, that the rezoning ordinances were duly adopted and valid, that in adopting them the City Council did not act arbitrarily or capriciously, but in good faith and in a reasonable manner consistent with its comprehensive zoning plan. He further concluded that the zoning ordinances bear a reasonable and substantial relation to the public safety, health, morals, comfort and general welfare. Upon such findings of fact and conclusions of law he adjudged the zoning ordinances to be valid and the plaintiffs to be not entitled to the relief for which they pray, taxing the costs of the action against the plaintiffs.

From such judgment the plaintiffs have appealed, assigning as error the denial of their request for a jury trial, numerous rulings upon the admission of evidence, the denial of their motions to strike certain allegations from the answers of the defendants and the court's

findings of fact, in their totality, as not being supported by the evidence.

Aaron Goldberg and James L. Nelson for plaintiff appellants.
Yow and Yow and Hogue, Hill & Rowe for defendant appellees.

LAKE, J. The plaintiffs do not complain of any restriction imposed by the zoning ordinances upon their rights to use their own properties as they wish to use them. The ordinances in question leave the plaintiffs free to do that. What the plaintiffs seek is an adjudication that Mrs. Morton and Mrs. Cocke are not entitled to make the uses of their property which they wish to make of it and which the ordinances in question purport to permit.

To arrive at this result the plaintiffs seek an adjudication that the amending ordinances permitting such uses of the Morton-Cocke land are void, so as to leave in force the original comprehensive ordinance under which the proposed uses of that property were prohibited. If the original comprehensive ordinance is still applicable to the Morton-Cocke property, the plaintiffs, adjoining property owners, would be proper parties to maintain an action to enjoin a use of the Morton-Cocke property in violation of that ordinance for, in that event, the proposed use would be unlawful and the plaintiffs would be, according to their allegations, injured by it. *Harrington & Co. v. Renner,* 236 N.C. 321, 72 S.E. 2d 838.

In the absence of a valid zoning law prohibiting the use of one's property for a shopping center, or for the construction thereon of multiple-family apartment houses, the owner of land may use it for such purpose even though he thereby makes the adjoining property of his neighbor less desirable, neither of such uses being a nuisance *per se* or an encroachment upon the property rights of the neighbor. In such instance the diminution in the value of the neighbor's land is *damnum absque injuria.* See: *Marren v. Gamble,* 237 N.C. 680, 75 S.E. 2d 880; *Harrington & Co. v. Renner, supra.* Thus, the owners of the Morton-Cocke property have the present right to use it as they propose to do, unless there is in effect a valid zoning ordinance of the city of Wilmington forbidding such use. There is no such ordinance in effect if the two ordinances adopted by the City Council 3 March 1967 were adopted pursuant to proper procedures and were within the authority of the City Council.

Zoning laws, when valid, are an exercise of the police power of the sovereign reasonably to regulate or restrict the use of private property to promote the public health, the public safety, the public morals or the public welfare. Thus, the power to zone is the power

of the State and rests in the General Assembly originally. *Schloss v. Jamison,* 262 N.C. 108, 136 S.E. 2d 691. There, it is subject to the limitations imposed by the Constitution upon the legislative power forbidding arbitrary and unduly discriminatory interference with the rights of property owners.

A municipal corporation has no inherent power to zone its territory and restrict to specified purposes the use of private property in each such zone. Such power has, however, been delegated to the cities and incorporated towns of this State by the General Assembly. G.S. 160-172, *et seq.* Obviously, the General Assembly cannot delegate to a municipal corporation more extensive power to regulate the use of private property than the General Assembly, itself, possesses. Consequently, the authority of a city or town to enact zoning ordinances is subject both to the above mentioned limitations imposed by the Constitution and to the limitations of the enabling statute. *Schloss v. Jamison, supra; State v. Owen,* 242 N.C. 525, 88 S.E. 2d 832; *In Re Appeal of Parker,* 214 N.C. 51, 197 S.E. 706, app. dism., 305 U.S. 568. The grant of such power to a municipal corporation imposes no duty upon the city or town to exercise it and the courts may not require the city or town to enact zoning legislation. *In Re Markham,* 259 N.C. 566, 131 S.E. 2d 329. This, within the above limits, is a matter within the discretion of the legislative body of the city or town.

The adoption of a zoning ordinance in exercise of the police power, thus delegated to a municipal corporation, does not exhaust that power. *McKinney v. High Point,* 239 N.C. 232, 79 S.E. 2d 730. The enactment of a zoning ordinance is not a contract with the property owners of the city and confers upon them no vested right to have the ordinance remain forever in force, or to demand that the boundaries of each zone or the uses to be made of property in each zone remain as declared in the original ordinance. *McKinney v. High Point, supra; Marren v. Gamble, supra.* Such legislation by the city may be repealed in its entirety, or amended as the city's legislative body determines from time to time to be in the best interests of the public, subject only to the limitations of the enabling statute and the above mentioned limitations of the Constitution. *In Re Markham, supra; Walker v. Elkin,* 254 N.C. 85, 118 S.E. 2d 1; *McKinney v. High Point, supra; Marren v. Gamble, supra.*

The power to amend its zoning legislation is expressly conferred upon a municipal corporation by G.S. 160-176, which provides:

> "*Changes* * * * Such regulations, restrictions and boundaries may from time to time be amended, supplemented, changed,

modified or repealed. In case, however, of a protest against such change signed by the owners of twenty per cent or more either of the area of the lots included in such proposed change, or of those immediately adjacent thereto either in the rear thereof or on either side thereof, extending one hundred feet therefrom, or of those directly opposite thereto extending one hundred feet from the street frontage of such opposite lots, such amendment shall not become effective except by favorable vote of three-fourths of all the members of the legislative body of such municipality. The provisions of the previous section relative to public hearings and official notice shall apply equally to all changes or amendments. * * *"

The named plaintiffs and the remaining owners of property in the Long Leaf Hills subdivision, on whose behalf the named plaintiffs purport to sue, do not own property adjacent to those portions of the Morton-Cocke tracts as to which zoning restrictions are purported to be changed by the amending ordinances here in question. There is no showing of a protest against such changes in the original zoning ordinance by owners of property across the streets or highways bounding the Morton-Cocke tract. Consequently, the above statute does not require the adoption of the amending ordinance by a three-fourths vote of the members of the City Council. The evidence in the record is ample to show, and it does not appear to be contested, that prior to the adoption of the amending ordinances the City Council conducted a full public hearing upon the matter and the required notice of its meeting was given. Therefore, the procedural requirements for the adoption of the amending ordinances were met.

The plaintiffs contend, however, that the amending ordinances constitute what is called "spot zoning" and, as such, do not fall within the zoning power granted to the city by G.S. 160-172, *et seq.* That statute provides:

> "*Grant of Power.* — For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of cities and incorporated towns is hereby empowered to regulate and restrict the * * * use of buildings, structures and land for trade, industry, residence or other purposes. * * *"

G.S. 160-174 provides further with reference to the purposes of such municipal legislation:

> "*Purposes in View.* — Such regulations shall be made in ac-

cordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality."

In *Walker v. Elkin, supra,* this Court, speaking through Rodman, J., said:

"The term 'spot zoning' has frequently been used by the courts and text writers when referring to changes limited to small areas. Different conclusions have been reached on seemingly similar factual situations. We think the basic rule to determine the validity of an amending ordinance is the same rule used to determine the validity of the original ordinance. *Elizabeth City v. Aydlett,* 201 N.C. 602, 161 S.E. 78. The legislative body must act in good faith. It cannot act arbitrarily or capriciously. If the conditions existing at the time of the proposed change are such as would have originally justified the proposed action, the legislative body has the power to act."

There is a presumption that a zoning ordinance, adopted pursuant to the prescribed procedures, is valid and the mere fact that it depreciates the value of the complainant's property is not enough to establish its invalidity. *Helms v. Charlotte,* 255 N.C. 647, 122 S.E. 2d 817, 96 A.L.R. 2d 439. "When the most that can be said against such ordinances is that whether it [*sic*] was an unreasonable, arbitrary or unequal exercise of power is fairly debatable the courts will not interfere." *In Re Appeal of Parker, supra.* Under such circumstances the courts may not substitute their judgment for that of the legislative body of the municipality as to the wisdom of the legislation. *Schloss v. Jamison, supra; In Re Markham, supra.* It is not required that an amendment to the zoning ordinance in question accomplish or contribute specifically to the accomplishment of all of the purposes specified in the enabling act. It is sufficient that the legislative body of the city had reasonable ground upon which to

conclude that one or more of those purposes would be accomplished or aided by the amending ordinance. When the action of the legislative body is reviewed by the courts, the latter are not free to substitute their opinion for that of the legislative body so long as there is some plausible basis for the conclusion reached by that body. *In Re Markham, supra.*

The evidence before the superior court was ample to show that the City Council had reasonable ground to believe the establishment of a shopping center upon the twenty-seven acres constituting the apex of the Morton-Cocke triangular tract would "facilitate * * * public requirements" and would be in keeping with the comprehensive plan to encourage "the most appropriate use of land" throughout the city. We find nothing in the record to suggest a refusal by the City Council to permit such use of other property similarly situated. Obviously, there is basis for the conclusion that property forming a triangle between two heavily traveled highways is not best suited for construction of single family residences. Whether this, in fact, is true of the Morton-Cocke property was for determination by the City Council.

Spot zoning arises where a small area, usually a single lot or a few lots, surrounded by other property of similar nature, is placed arbitrarily in a different use zone from that to which the surrounding property is made subject. Where such small area is subjected to a more burdensome restriction than that applicable to the surrounding property of like kind, the weight of authority is that the owner of the property so subjected to discriminatory regulation, may successfully attack the validity of the ordinance. See: *Higbee v. Chicago, B. & Q. R. Co.,* 235 Wis. 91, 292 N.W. 320, 128 A.L.R. 734; *Marshall v. Salt Lake City,* 105 Utah 111, 141 P. 2d 704, 149 A.L.R. 282. The rule denying the validity of spot zoning ordinances has also been applied where a small area previously in a residential zone has been removed, by an amending ordinance, from such zone and reclassified to permit business or commercial use over the objection of adjoining owners of residential property. 58 Am. Jur., Zoning, § 39; 101 C.J.S., Zoning § 91; Yokley, Zoning Law and Practice, § 8-3, 3rd ed.

If the amending ordinance is beyond the legislative power of the city, whether for the reason that it constitutes spot zoning or on some other ground, its adoption does not remove the designated area from the effect of the comprehensive zoning ordinance previously enacted. In that event, the proposed use remains unlawful and the right of owners of adjoining property to enjoin such use is not affected by the amending ordinance. However, the amending ordinances before

us do not fall into the category of spot zoning. They apply to approximately forty acres constituting a triangle lying between two heavily traveled highways and separated from the property of the plaintiffs by a buffer strip of twenty acres of the Morton-Cocke tract still zoned for single family residences. There is ample support in the record for the conclusion that the rezoning of the Morton-Cocke tract was not arbitrary or discriminatory, may reasonably be deemed related to the public welfare and is not inconsistent with the purpose for which the city is authorized by the statute to enact zoning regulations. The conclusion of the trial judge that the City Council, in adopting the amending ordinances, did not act arbitrarily or capriciously but acted in good faith, reasonably and consistent with its comprehensive zoning plan, is supported by the court's findings of fact, which, in turn, are supported by competent evidence in the record.

We find no error in the denial of the motion for a trial by jury. The Declaratory Judgment Act provides for trial by jury of issues of fact where jury trial is not waived by the parties. G.S. 1-261. However, the issue in the present case is as to the authority of the City Council to adopt the amending ordinances, not as to the advisability or wisdom of the rezoning. The controversies between the parties as to the facts, which were to be determined by the superior court, presented questions of fact and not issues of fact. *Armstrong v. McInnis*, 264 N.C. 616, 142 S.E. 2d 672. Consequently, a jury trial was not required.

The findings of fact made by the superior court are supported by competent evidence and are binding upon us. Indeed, there appears to be no substantial controversy as to the facts so found. The plaintiffs' exceptions thereto are overruled.

The assignments of error relating to the admission or exclusion of evidence do not comply with Rules 19 and 21 of The Rules of Practice in the Supreme Court, for the reason that each requires a voyage of discovery through the record to determine the question of law intended to be presented. A mere reference in the assignment of error to the page of the record where the asserted error may be discovered is not a compliance with these rules. *Douglas v. Mallison*, 265 N.C. 362, 144 S.E. 2d 138; *Hunt v. Davis*, 248 N.C. 69, 102 S.E. 2d 405. However, we have made the requested voyages through the record and find no reversible error in any of the rulings of the court upon the admission of evidence. Much of that excluded would have been appropriate for presentation to the City Council in an effort to persuade it that the rezoning of the Morton-Cocke land was unwise. However, had it all been admitted, it would not have supported a

finding that the City Council acted arbitrarily in reaching the contrary conclusion. This was the question before the superior court. The burden rested upon the plaintiffs so to show. *Schloss v. Jamison, supra.* It would serve no useful purpose to discuss each of these assignments of error in detail. We have considered all of them and find no reversible error therein. There was no error in admitting in evidence in the superior court the exhibits presented to and considered by the City Council. These were material upon the question of the nature, extent and sufficiency of the investigation by and hearing before the City Council. They were not received as evidence of the correctness of its determination as to the desirability of the rezoning.

We have carefully considered each assignment of error brought forward by the plaintiffs into their brief. We find no reversible error. It was not for the superior court, and it is not for this Court, to review the action of the City Council for the purpose of substituting the judgment of the court for that of the Council concerning the wisdom of permitting the proposed use of the Morton-Cocke tract. That is a matter of legislative discretion committed by the statute to the City Council.

Affirmed.

PATRICIA KEKELIS v. WHITIN MACHINE WORKS.

(Filed 10 April 1968.)

1. Negligence § 21—

Negligence may not be inferred from the mere fact of an occurrence which injures a plaintiff.

2. Negligence § 5—

The doctrine of *res ipsa loquitur* applies to make an occurrence itself some evidence that it arose from want of care when an instrumentality causing an injury to the plaintiff is shown to be under the control and operation of the defendant, and the accident is one which, in the ordinary course of events, does not happen if those who have the management of it use the proper care.

3. Same—

Res ipsa loquitur does not apply when more than one inference can be drawn from the evidence as to whose negligence caused the injury or when the instrument causing the injury is not under the exclusive control and management of the defendant.

4. Negligence § 24c—

Negligence and causation may be proved by circumstantial evidence.

5. Negligence §§ 1, 5—

Ordinarily, a plaintiff must prove circumstances tending to show some fault of omission or commission on the part of defendant in addition to those which indicate the physical cause of an accident, but where the doctrine of *res ipsa loquitur* applies, it is distinctive in permitting negligence to be inferred by the jury from the physical cause of an accident, without the aid of circumstances as to the responsible human cause.

6. Negligence §§ 24b, 24c—

The rule of *res ipsa loquitur* does not apply when the facts of the occurrence merely indicate negligence by some person and do not point to defendant as the only probable tortfeasor, and in such case the action must be nonsuited unless additional evidence is introduced which eliminates negligence on the part of all others who had control of the instrument causing plaintiff's injury.

7. Same—

Evidence of plaintiff that defendant installed a textile machine for plaintiff's employer, that other employees checked the machine and prepared it for operation, that the machine was not working properly when plaintiff began operating it, and that plaintiff received an electric shock from the machine, *is held* insufficient to go to the jury on the issue of defendant's negligence in installing the machine, the doctrine of *res ipsa loquitur* being inapplicable because the machine was not under defendant's control when plaintiff was injured, and plaintiff having failed to produce evidence that the other employees who worked with the machine were free from fault.

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

APPEAL by plaintiff from *Crissman, J.*, 17 April 1967 Civil Session of GUILFORD, docketed and argued at the Fall Term as Case No. 684.

Action for personal injuries.

The material allegations of the complaint, except when quoted, are summarized as follows: In September 1964, defendant company was in the process of installing and wiring new machinery at the Burlington Throwing Company in High Point (Burlington), where plaintiff was employed. On 22 September 1964, plaintiff's supervisor assigned her to work on one of the new machines (ARCT FT-3, Model #788), which had been "approved by defendant's agent as ready for operation." This machine had not been operated before. While instructing another employee in the operation of the machine, plaintiff activated one of the spindles by pushing it with her right hand. In doing so, "she received into her body a powerful current of electricity." In consequence, her arm turned black and blue, and she was hospitalized for approximately two weeks. The arm has continued to incapacitate and pain her. Plaintiff's injuries were proxi-

mately caused by the negligence of defendant's agents in that they (1) wired the machine improperly and carelessly; (2) pronounced the machine ready for service when it was so defective that voltage became exposed at several points where operators were likely to receive electric shock; (3) placed the machine in service without having adequately tested and inspected it to ascertain if it could be safely operated; and (4) failed to warn plaintiff of the dangerous condition of the machine about which it knew or should have known.

Answering, defendant admitted that it had installed the machine upon which plaintiff was working. It denied all other material allegations in the complaint and pleaded contributory negligence on the part of both plaintiff and her employer.

At the trial, defendant offered no evidence. Plaintiff's evidence tended to show the following facts: For two or three months prior to 22 September 1964, the date of the occurrence in question, defendant had been in the process of installing and wiring new machinery for Burlington. Seven of the new machines, which are of French manufacture, were in operation on that date. The machines are long and six feet high. An aisle, one and a half feet wide, runs through the center of the machine and allows the operator to get to its inner portions. At the back of the aisle is a metal ramp which enables the operators to reach the higher parts of the machine. In operating the machine, fibres must be tied together at different points around the machine. These fibres, or yarn, pass through two heater blocks, which — when properly heated — "fluff" the yarn and give it a certain "spring." The yarn is drawn through the heater blocks by a fine wire which is then attached to a rotor. Thereafter, each rotor is placed in a spindle; the operator pushes in the spindle and thus starts the yarn running. The machine carries a large number of spindles in a row together. The evidence contains no picture or other information about the machine which would enable us to describe it more definitely.

On 21 September 1964, plaintiff reported to work on the "third shift" at 11:00 p.m. Her job was to instruct new girls how to operate the new machines, and the shift supervisor assigned her and Linda Lunsford to one of the machines. This machine never had been operated before; defendant had completed its installation during the "first shift." Employees on "the second shift had got the heat leveled and creeled the yarn in." On the third shift, a "fixer," who worked for Burlington, "had checked the machine out." When it was "started up," plaintiff and Mrs. Lunsford began tying "certain ends that the operators have to tie up at different points around the machine." They had trouble getting the "pilot tubes" going, and the yarn kept

breaking. Such breaking is generally caused by too much heat. Because of the continuous breaking, they had tied very few ends. Shortly after 12:00, plaintiff was standing on the ramp with her right hand on one of the spindles; no other part of her body was in contact with the machine. She pushed in the spindle and, at that moment, she received a large electric shock. For a few minutes, plaintiff was unable to move; she "just hung there" in a daze. When the yarn had burned out through the heater block, she jumped back and walked out of the machine. Her arm was white and cold! her fist balled up, and little streaks appeared in her arm. Plaintiff's supervisor took her to the hospital, where she remained until 6 October 1964. Since her discharge, the arm has continued to get "cold," and the muscles have, on occasion, "knotted up."

At the close of plaintiff's evidence, the court allowed defendant's motion for nonsuit. From the judgment dismissing the action, plaintiff appeals.

Harold I. Spainhour for plaintiff appellant.
Smith, Moore, Smith, Schell & Hunter for defendant appellee.

SHARP, J. Taken in the light most favorable to plaintiff, the evidence tends to show: On 21 September 1964, during "the first shift," defendant completed the installation of a yarn-processing machine for plaintiff's employer, Burlington. Second-shift employees got "the heat leveled and creeled the yarn in." On the third shift, which began at 11:00 p.m., Burlington's fixer "checked out" the machine, and it was started. The machine did not work properly; the yarn broke continuously, a condition ordinarily caused by excessive heat. About an hour later, as plaintiff went about teaching another employee to operate the machine, she received an electric shock, which injured her arm.

Ordinarily, a defendant's negligence may not be inferred from the mere fact of an occurrence which injures a plaintiff. On the contrary, in the absence of evidence on the subject, freedom from negligence will be presumed. *Etheridge v. Etheridge,* 222 N.C. 616, 24 S.E. 2d 477. In this case, plaintiff's evidence is sufficient to allow the jury to find that she received an electric shock from a machine which defendant had installed between 9 and 18 hours earlier, and that the shock injured her. She has, however, offered no evidence tending to show any fault on the part of defendant. Therefore, unless — as plaintiff contends — the mere fact of injury, under the circumstances here disclosed, is evidence from which the jury may infer

defendant's lack of due care, the judgment of nonsuit must be sustained. 3 Strong, N. C. Index, Negligence § 24b and c (1960).

The principle of *res ipsa loquitur,* as generally stated in our decisions, is this: When an instrumentality which caused an injury to plaintiff is shown to be under the control and operation of the defendant, and the accident is one which, in the ordinary course of events, does not happen if those who have the management of it use the proper care, the occurrence itself is some evidence that it arose from want of care. *Young v. Anchor Co.,* 239 N.C. 288, 79 S.E. 2d 785; *Etheridge v. Etheridge, supra; Springs v. Doll,* 197 N.C. 240, 148 S.E. 251; *Ridge v. R. R.,* 167 N.C. 510, 83 S.E. 762; 3 Strong, N. C. Index, Negligence § 5 (1960); Stansbury, N. C. Evidence § 227 (2d ed. 1963) and cases cited therein. The principle does not apply, *inter alia,* when more than one inference can be drawn from the evidence as to whose negligence caused the injury, *Springs v. Doll, supra,* or when the instrumentality causing the injury is not under the exclusive control or management of the defendant, *Wyatt v. Equipment Co.,* 253 N.C. 355, 117 S.E. 2d 21.

Negligence and causation, like other facts, may, of course, be proved by circumstantial evidence. *Drum v. Bisaner,* 252 N.C. 305, 113 S.E. 2d 560; 3 Strong, N. C. Index, Negligence § 24c (1960). As pointed out in Restatement (Second) of Torts § 328 D (1965), "Without resort to Latin the jury may be permitted to infer, when a runaway horse is found in the street, that its owner has been negligent in looking after it; or when a driver runs down a visible pedestrian, that he has failed to keep a proper lookout. When the Latin phrase is used in such cases, nothing is added. A *res ipsa loquitur* case is ordinarily merely one kind of case of circumstantial evidence, in which the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant's relation to it." *Id.* at p. 157.

Res ipsa loquitur (the thing speaks for itself) simply means that the facts of the occurrence itself *warrant an inference of defendant's negligence, i.e.,* that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking. *Ridge v. R. R.,* 167 N.C. 510, 83 S.E. 762; *Sweeney v. Erving,* 228 U.S. 233, 57 L. ed. 815, 33 S. Ct. 416.

In *Harris v. Mangum,* 183 N.C. 235, 237, 111 S.E. 177, 178, Adams, J., drew the following distinction "between circumstantial evidence and the technical definition of *res ipsa loquitur":*

"Res ipsa loquitur, in its distinctive sense, permits negligence to be inferred from the physical cause of an accident, without the aid of circumstances pointing to the responsible human cause. Where

this rule applies, evidence of the physical cause or causes of the accident is sufficient to carry the case to the jury on the bare question of negligence. But where the rule does not apply, the plaintiff must prove circumstances tending to show some fault of omission or commission on the part of the defendant *in addition to* those which indicate the physical cause of the accident." (Emphasis added.)

The rule of *res ipsa loquitur* never applies when the facts of the occurrence, although indicating negligence on the part of some person, do not point to the defendant as the *only* probable tortfeasor. In such a case, unless *additional evidence,* which eliminates negligence on the part of all others who have had control of the instrument causing the plaintiff's injury, is introduced, the court must nonsuit the case. When such evidence is introduced and the only inference remaining is that the fault was the defendant's, the plaintiff has produced sufficient circumstantial evidence to take his case to the jury.

The foregoing rule was applied in *Plunkett v. United Electric Service,* 214 La. 145, 36 So. 2d 704, 3 A.L.R. 2d 1437. There the defendant installed a gas heater in the attic of the plaintiff's home on December 22nd. About 10:00 p.m. on December 24th, electricity was cut off when an ice storm caused wires to break. About 6:00 a.m. on December 25th, a fire started from the heating unit and caused extensive damage to the house. The plaintiff sued for damages and relied upon the doctrine of *res ipsa loquitur* even though, "at the time of the fire, the heating unit was in plaintiff's home and under their control and management." The trial court found that the plaintiff had not tampered with the furnace since the defendant left the premises 39 hours earlier. In awarding damages, the court said that the only logical inference was that some fault on the defendant's part had caused the fire. After the plaintiff had shown freedom of fault on the part of all through whose hands the instrumentality had passed after it left the defendant, the doctrine of *res ipsa loquitur* then became applicable because — the court said — it was "reasonably evident that the damage would not have been caused if the device had been free from defect and had been properly installed." *Id.* at 167, 36 So. 2d at 711, 3 A.L.R. 2d at 1446.

Although in *Plunkett v. United Electric Service, supra,* the Louisiana court did not *ipsissimis verbis* make the distinction between circumstantial evidence in general and the technical rule of *res ipsa loquitur,* it did so in effect. The decision was that the plaintiff, by negating the responsibility of all others, had established by circumstantial evidence, in addition to the physical cause of the fire, that

the negligence of the defendant alone was responsible for it. The court said:

"It must be remembered that, in cases like this, (unlike most instances where *res ipsa loquitur* is invoked) the plaintiff does not obtain the benefit of the doctrine by merely showing the unusual accident and the resulting injury. On the contrary, plaintiff is required to establish with certainty that the instrumentality installed by defendant is the source of the damage; that he was without fault and that the time elapsing between the installation and the damage was such as to make it reasonably evident that the damage would not have been caused if the device had been free from defect and had been properly installed." *Id.* at 167, 36 So. 2d at 711, 3 A.L.R. 2d at 1446.

In *Peterson v. Power Co.,* 183 N.C. 243, 111 S.E. 8, plaintiff's cottage was destroyed by fire "an hour or two" after defendant's employees had connected gas fixtures inside with the main outside. In sustaining a verdict for the plaintiff, this Court said: "There is evidence from which the jury could reasonably infer that all other causes for the fire had been eliminated, leaving none but those attributable to defendant's want of care, or that of its employees, which is the same thing." *Id.* at 246-47, 111 S.E. at 11.

In automobile accident cases, we hold that "[t]he mere fact that an automobile veers off the highway is not enough to give rise to an inference of negligence." *Yates v. Chappell,* 263 N.C. 461, 465, 139 S.E. 2d 728, 731. When, however, a plaintiff's evidence "tends to remove everything that might have influenced the movement of the car, causing it to leave the road, save and except the hands of the man at the wheel," the plaintiff has offered circumstantial evidence sufficient to take his case to the jury on the question of the driver's actionable negligence. *Lane v. Dorney,* 252 N.C. 90, 94, 113 S.E. 2d 33, 36; *accord, Trust Co. v. Snowden,* 267 N.C. 749, 148 S.E. 2d 833; *Yates v. Chappell, supra.*

In the instant case, the machine from which plaintiff received an electric shock was not under the control of defendant at the time plaintiff was injured. Sometime during the first shift, defendant had turned it over to Burlington, which had had its fixer to "check out" the machine, and its second-shift employees to get the "heat leveled" and the yarn "creeled in." The fact that plaintiff received a shock from the machine undoubtedly allows an inference of negligence on the part of some person, but her evidence leaves unanswered the question, whose was the fault. It is a fair inference from plaintiff's testimony that she, an instructor in the use of the machine, was operating it in a proper and customary manner. She did not, however,

offer any evidence tending to negate negligence on the part of those who manipulated or worked with the machine during the few hours which elapsed between the time defendant turned the machine over to Burlington and the time plaintiff was injured. Neither the "fixer" who checked out the machine and started it nor the employees who "got the heat leveled and creeled the yarn in" testified. Plaintiff's evidence does not disclose what these operations entailed or how they were performed.

Since defendant had delivered the machine which caused plaintiff's injury into the hands of Burlington's employees who had thereafter exercised control over it — even though for a relatively short period —, plaintiff could not rely upon *res ipsa loquitur*. Having failed to produce evidence that those employees were free from fault, she was not entitled to go to the jury.

The judgment of nonsuit is

Affirmed.

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

ODES REDMOND, TRADING AS ODES REDMOND COMPANY, v. THOMAS LILLY, JOE L. ANDERSON AND SLOSMAN CORPORATION.

(Filed 10 April 1968.)

1. **Sales § 10—**

   Where the seller accepts the purchaser's check in payment of a cash sale and the check is thereafter dishonored, the seller has the election to treat the transaction as void, leaving title to the chattel in himself, or to treat it as a sale, thereby transferring title to the buyer so as to make the buyer liable to him for the agreed purchase price.

2. **Election of Remedies § 1—**

   One who makes an election between two inconsistent rights with full knowledge of the facts giving rise to such rights may not subsequently proceed upon the contrary alternative.

3. **Sales § 10—**

   The institution of an action by the seller against the buyer of goods to recover the purchase price is an election by the seller to treat the transaction as a sale, and title to the goods is thereby vested in the buyer, and plaintiff is thereafter precluded from maintaining an action for the recovery of the goods or for their conversion by a purchaser from his vendee.

APPEAL by defendant Slosman Corporation from *Clarkson, J.*, at the 4 September 1967 Schedule B Civil Session of MECKLENBURG.

The plaintiff alleges in his complaint: He is engaged in the business of buying and selling textile waste. On 17 August 1965 the individual defendants, after inspecting a quantity of textile waste in the plaintiff's place of business, contracted with the plaintiff, he agreeing to sell the waste to the individual defendants for a total price to be computed on the basis of certain prices for the varying grades, the grading to take place when the goods were loaded. On 20 August the waste was loaded upon a truck, which the individual defendants had caused to be brought to the plaintiff's place of business, being graded as loaded. The grading was completed after the end of the normal work day, at which time the parties were not in a position to calculate the total sale price. At that time, the individual defendants delivered to the plaintiff a check for $4,000, which he was to hold until the total sale price could be accurately computed. On 24 August the individual defendants returned to the plaintiff's place of business and the total sale price of the waste was computed to be $4,509.21. Thereupon, the individual defendants delivered to the plaintiff $1,000 in cash and a check for $3,509.21. Two or three days later, the plaintiff inquired of the drawee bank and was informed that the drawer did not have sufficient funds on deposit in the bank to pay the check. Thereafter, the plaintiff forwarded the check through the normal banking channels for presentment. Payment was refused by the drawee as the result of a stop-payment order. Thereafter, the plaintiff ascertained that the waste had been transported to the corporate defendant's place of business and notified it that the waste had been obtained from the plaintiff by false pretense and fraud. At that time, the corporate defendant had not made any payment to the individual defendants on account of these goods, but thereafter did pay them $3,713.30. The corporate defendant is not a purchaser in good faith, did not acquire title to the goods and is liable to the plaintiff for the return of the goods or the fair value thereof, which value is $3,509.21 (the unpaid balance of the purchase price agreed upon between the plaintiff and the individual defendants). The individual defendants have failed and refused to pay the balance of the purchase price which was due "on August 24, 1965," and "the plaintiff is entitled to interest thereon from that date from the individual defendants." Wherefore, the plaintiff prays judgment against the individual defendants for $3-509.21, plus interest, and against the corporate defendant for "the return of the goods to which the corporate defendant did not acquire title or for $3,509.21, "the value thereof."

The corporate defendant demurred to the complaint for failure to state a cause of action against it. This demurrer was overruled.

The corporate defendant then filed answer denying the allegations of the complaint with reference to it and denying, for lack of information, those relating to the individual defendants. The answer pleads, as affirmative defenses, that the corporate defendant is a *bona fide* purchaser for value without notice of any defect in the title of the individual defendants and that the plaintiff is estopped for the reason that the corporate defendant paid the individual defendants for the goods in reliance upon a statement of the plaintiff that he had no objection to its so doing.

The individual defendants filed no answer and a judgment by default final for the unpaid balance of the purchase price under their contract with the plaintiff was entered against them. There is nothing in the record to indicate that any portion of this judgment has been paid.

Upon the trial of the matter as between the plaintiff and the corporate defendant, the jury found that the plaintiff is the owner and entitled to the immediate possession of the waste, the plaintiff is not estopped to claim such ownership and the fair market value of the waste on 23 May 1966 (the date the complaint was filed in this action) was $4,509.21 (the agreed purchase price as between the plaintiff and the individual defendants), less $1,000 paid in cash to the plaintiff by the individual defendants. From a judgment in accordance with the verdict, the corporate defendant appeals.

The plaintiff testified that the goods, previously weighed, were loaded at and hauled away from his place of business on Friday, 20 August 1965, the grading and loading being completed after nightfall. He further testified: "At that time, we had not computed what the grand total was going to be for the sale of these goods. We were to be paid for the goods when they took the goods out. It was supposed to have been a cash sale and that night it was so late we didn't tally up the figures and Mr. Lilly gave me a $4,000 check and he was to take his figures and I was to take mine and which we did and we tallied them up and he came back Tuesday and picked up the $4,000 check and gave me $1,000 cash and $3,509.21 check to cover the total."

The plaintiff further testified that prior to 15 September, and after the check had been returned to him by the drawee bank, he telephoned the corporate defendant, informed it what had happened and requested it to "hold up" its payment to the individual defendants. Subsequently, he received from the corporate defendant a letter showing payments made by it to the individual defendants, the first of which was on 15 September, the total of such payments being $3,713.30. Nothing has been paid to the plaintiff on account of this

transaction except the $1,000 in cash paid by the individual defendants on 24 August.

The evidence for the defendant was to the following effect:

The defendant purchased the waste from the individual defendants at a price subject to its own customer's grading and report, unloaded it into its own warehouses and, on or about 26 August, resold and reshipped the entire lot to its own customer. Most of it was returned to it by that customer and was of negligible value, the part retained by the customer being worth about $4,000. Upon the receipt of its customer's reports, the corporate defendant computed the amounts to be paid by it to the individual defendants and issued its checks to them therefor on 15 September, 7 October and 13 November.

The corporate defendant had no communication with the plaintiff until 7 October when it telephoned the plaintiff. At that time, Anderson, one of the individual defendants, was in the office of the corporate defendant to receive a further payment from it and, for the first time, the corporate defendant learned that the individual defendants had purchased the goods from the plaintiff, who was "impatient about getting paid for it." Thereupon, the president of the corporate defendant telephoned the plaintiff and explained that the corporate defendant had to wait for the final report from its customer concerning the waste before it could make its final payment to the individual defendants. At that time, he asked the plaintiff if the plaintiff wanted the corporate defendant to make payments to him. The plaintiff replied that the corporate defendant was "dealing with Mr. Anderson" and should make its payments to him, which it did.

The assignments of error relate to the overruling of the demurrer by the corporate defendant to the complaint, the denial of its motions for judgment of nonsuit, and to alleged errors in and omissions from the charge of the court to the jury.

Grier, Parker, Poe & Thompson by Gaston H. Gage for defendant appellant.

Haynes, Graham and Baucom for plaintiff appellee.

LAKE, J. The rights of the parties must be determined in accordance with the law of this State as it was prior to the adoption of the Uniform Commercial Code, the transactions out of which this action arises having occurred prior to 30 June 1967. G.S. 25-10-101.

Under the law of this State prior to 30 June 1967, if the owner of a chattel contracted to sell it to a buyer for cash and delivered

it to him in exchange for a check, believed by the seller to be good at the time it was accepted, the seller could, upon the dishonor of the check, recover the chattel from the buyer on the ground that the legal title had not passed from the seller to the buyer. *Carrow v. Weston,* 247 N.C. 735, 102 S.E. 2d 134; *Wilson v. Finance Co.,* 239 N.C. 349, 79 S.E. 2d 908. See also 46 Am. Jur., Sales, §§ 447, 563. Legal title to the chattel not having passed to the buyer, a subsequent purchaser from the buyer, even though a purchaser for value and in good faith, could acquire no better title than the first buyer (his seller) had. Consequently, upon the dishonor of the check, the original seller, being still the owner of the chattel, could recover it from such subsequent purchaser, whether *bona fide* or not, or could treat such subsequent purchaser as a converter of his property and recover from him its value. *Wilson v. Finance Co., supra.* If, however, such seller elected to treat the transaction as a sale and to recover judgment from the buyer for the agreed purchase price, he could do so. *Carrow v. Weston, supra.* See also 46 Am. Jur., Sales, § 448. That is, the seller, to whom a bad check was given for the purchase price, had an election to treat the transaction as no sale, leaving title to the chattel in himself, or to treat it as a sale transferring the title to the buyer so as to make the buyer liable to him for the agreed purchase price. These alternatives are, obviously, inconsistent. The seller could not exercise both of these rights against the buyer. "A party may not ratify a sale by suing for the sale price and at the same time attack the validity of the sale." Strong, N. C. Index, 2d ed., Election of Remedies, § 1.

One, who has an election between two inconsistent rights and, with full knowledge of the facts giving rise to such rights, makes such election, may not subsequently proceed upon the contrary alternative. *Carrow v. Weston, supra; Irvin v. Harris,* 182 N.C. 647, 109 S.E. 867; 25 Am. Jur. 2d, Election of Remedies, § 7. The institution of an action by the seller against the buyer for the collection of the agreed purchase price, with full knowledge of the facts giving the seller the right to treat the transaction as no sale, is an election by the seller which he may not thereafter reverse so as to deny the title of the buyer to the goods. Williston on Sales, rev. ed., § 648b; 46 Am. Jur., Sales, § 658. See also *Bruton v. Bland,* 260 N.C. 429, 132 S.E. 2d 910, holding that an election once made by a defrauded buyer to treat the transaction as a sale is final so as to preclude the buyer thereafter from maintaining an action for recision.

In the present action, the plaintiff has elected to sue the individual defendants (his vendees) to recover from them the balance due him upon the agreed purchase price of the goods. Having so

elected, he may not, in this action, or in one subsequently brought, proceed against the individual defendants upon the theory that the sale was void and passed no title to them. As between the plaintiff and the individual defendants, his filing suit against them for the contract price vests title to the goods in them as of the time it would have vested in them had no fraud been perpetrated. The effect of the transaction, plus such election by the plaintiff, is the same as if the goods had been sold by the plaintiff to the individual defendants on credit, free from fraud. Having elected to sue the individual defendants (its vendees) for the agreed price of the goods, the plaintiff may not now maintain an action against the individual defendants to recover the possession of the goods or to recover damages on the theory of conversion. 46 Am. Jur., Sales, §§ 565, 657, 658.

Having thus elected to treat the transaction between him and the individual defendants as a sale to the latter, the plaintiff may not now maintain an action for the recovery of the goods or for their conversion by a purchaser from his vendee. Such purchaser would acquire the title and right of the individual defendants (the plaintiff's vendee) and would not, by receiving, using or disposing of the goods, become liable to the plaintiff for conversion of his property, for it is not his. Obviously, such subsequent purchaser would not be liable to the plaintiff for any balance due the plaintiff from his vendee on account of the contract between him and his vendee, nor would he be under any duty, nothing else appearing, to pay over to the plaintiff any balance owing from such subsequent purchaser to his vendor (the plaintiff's vendee-debtor).

In the present action, the plaintiff has filed one complaint seeking recovery from his vendees of the balance of the purchase price and seeking recovery from the subsequent purchaser from those vendees of the value of the goods on the theory that such subsequent purchaser is a converter of them. It thus appears upon the face of his complaint against the corporate defendant that he has made an irreversible election to treat the transaction between him and the individual defendants as a sale of the goods. This being true, there appears upon the face of the complaint not merely a failure to allege some fact which is an element of a right of action against the corporate defendant, but an affirmative allegation of a fact which establishes that the plaintiff has no right of action against the corporate defendant. Consequently, the demurrer should have been sustained and the action dismissed as to the corporate defendant. This being true, it is unnecessary to consider the remaining assignments of error.

Reversed.

JOHN S. FREELAND, SR. AND WIFE, JESSIE S. FREELAND; JOHN T. CHILDS, RUSSELL G. WRIGHT, C. A. MELLOTT, JOHN C. BLACKWOOD, NANCY D. BLACKWOOD, ERNEST R. MAUER, ROSA C. MAUER, PAUL SNYDER, JR., THOMAS McANN, WADE E. PARRISH, CHESTER C. IRVIN, B. V. PEARSON, ERVIN YATES AND CURTIS BANE, v. ORANGE COUNTY; BOARD OF ORANGE COUNTY COMMISSIONERS, HARVEY BENNETT, CHAIRMAN; BILL RAY, MEMBER; IRA WARD, MEMBER; HENRY WALKER, MEMBER; CARL SMITH, MEMBER; TYSON CLAYTON, A. H. GRAHAM, AND C. D. KNIGHT, SHERIFF OF ORANGE COUNTY.

(Filed 10 April 1968.)

1. Statutes § 5—

A statute must be construed to effectuate the legislative intent.

2. Same—

Where a literal interpretation of a statute would lead to absurd results and contravene the manifest purpose of the statute, the reason and purpose of the law will be given effect and the strict letter thereof disregarded.

3. Municipal Corporations § 30—

The board of county commissioners may prescribe an orderly procedure for conducting the public hearing required by G.S. 153-266.15 to be held upon a proposed county zoning ordinance.

4. Same—

The provision of G.S. 153-266.16 that "all parties in interest and other citizens shall be given an opportunity to be heard" at the public hearing upon a proposed county zoning ordinance does not require that all persons attending the meeting be heard without limitation as to number and time, but the statute is complied with where both the proponents and opponents of the proposed ordinance are given equal time and a fair opportunity to present their views.

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

APPEAL by plaintiffs from *Bone, E.J.*, June 20, 1967 Civil Session of ORANGE, docketed and argued as No. 850 at Fall Term 1967.

On February 6, 1967, the Board of County Commissioners of Orange County, relying upon authority conferred by G.S. Chapter 153, Article 20B, adopted, by unanimous vote, a comprehensive zoning ordinance applicable to all portions of Chapel Hill Township, Orange County, North Carolina, outside the zoning jurisdiction of the Towns of Carrboro and Chapel Hill.

Plaintiffs instituted this action to enjoin enforcement of said zoning ordinance. They asserted defendants failed to comply with statutory requirements prerequisite to valid adoption thereof and on this ground attacked the purported ordinance as void.

Jury trial was waived. No testimony was offered. The case was submitted on the facts established by admissions in the pleadings and

by the stipulations. The stipulations, which include all facts admitted in the pleadings, are as follows:

"(T)hat the plaintiffs are citizens and residents of Orange County and own properties within Orange County; that the defendant Orange County is a body politic, a political and geographical subdivision of the State of North Carolina whose powers are exercised by the Board of Commissioners; that the defendants Bennett, Ray, Ward, Walker and Smith are duly elected and acting members of the Orange County Board of Commissioners; that the defendant Tyson Clayton has been designated the Orange County Zoning Officer by the said Board of Commissioners; that the defendant C. D. (Buck) Knight is the duly elected and acting Sheriff of Orange County; that the defendant A. H. Graham was the acting Chairman at the meeting which was held on January 25, 1967, by the said Board of County Commissioners; that the five County Commissioners of Orange County, on February 6, 1967, voted unanimously to adopt a zoning ordinance for Chapel Hill Township; that the document attached to the plaintiffs' complaint marked Exhibit 'A' is an accurate copy of said zoning regulations; that the document attached to plaintiffs' complaint and marked Exhibit 'B' is a true and accurate copy of the notice published; that the notice was published in The Chapel Hill Weekly, which is a newspaper which meets the requirements of the statute, on January 8, 15, and 22, 1967; that at the time, place and hour set forth in the aforementioned notice a meeting was held and that approximately 500 persons were present at such meeting; that the defendant A. H. Graham acted as Chairman of said meeting and announced at the beginning of said meeting that one hour would be allocated to those who proposed the adoption of a zoning ordinance, that one hour would be allocated to those who opposed the adoption of a zoning ordinance and that at the close of said period an additional fifteen minutes would be allocated to each of the proponents and opponents for rebuttal; that at said meeting 16 proponents spoke in favor of the adoption of said ordinance and 15 opponents spoke in opposition to the adoption of said ordinance; that the proponents spoke for an hour, the opponents spoke for an hour; and the proponents and opponents each consumed fifteen additional minutes thereafter in rebuttal; that at such public hearing no questions were allowed to be directed to the five County Commissioners; that the citizens and residents of Orange County in attendance at such meeting were not allowed to hear any comment or answer given by any of the defendant Commissioners; that at the conclusion of said public hearing Mr. A. B. Coleman, Jr. asked those assembled if there were any persons there who had wished to be heard and had not spoken and

that in response to such inquiry approximately 200 persons, including some of the plaintiffs, indicated that they had not spoken but would like to have been heard if time had been allotted to them; that at such public meeting a ratio of four-to-one in attendance at said meeting indicated that they were opposed to the adoption of said ordinance; that the plaintiffs John S. Freeland, Sr. and his wife, Jessie S. Freeland, own approximately seven acres of land on N. C. Highway #86, said land lying in Chapel Hill Township but outside the zoning areas of Chapel Hill and Carrboro; that John S. Freeland has a small income from his present employment and Jessie S. Freeland is a severely handicapped arthritic patient who has been confined to a wheel chair for approximately five years; that, placed on their seven acres of land, are nine mobile home spaces put there by John S. Freeland, who dug all the ditches, and performed all plumbing and carpentry work himself in order to be able to have such spaces for rent; that at the present time both John S. Freeland, Sr. and Jessie S. Freeland are under constant doctor care; that they have no other means of income when Mr. Freeland retires other than rent from their nine spaces; that, according to the terms of plaintiffs' Exhibit 'A', the plaintiffs Freeland are operating contrary to law in that their nine spaces have not been included in a Mobile Home Park District; that the plaintiff John T. Childs, since the institution of this action, has sought relief through administrative remedies and has been granted the relief which he sought; that the plaintiff Russell G. Wright is the owner of a mobile park in Chapel Hill Township, but outside the planning areas of Chapel Hill and Carrboro; that he has invested substantial sums in the development of said mobile home park and that he was cautious and diligent in such development; that both the plaintiff and his wife, Wright, suffer from poor health; that if the ordinance is enforced in accordance with its terms without variance, it will be necessary for the plaintiff Russell G. Wright to remove eight mobile homes from his park plus oil tanks, etc., and that this would seriously impair his ability to earn an adequate income; that the adoption of plaintiffs' Exhibit 'A' has reduced the value of Russell G. Wright's property."

The agreed case on appeal states: "It was agreed by counsel for plaintiffs and defendants that in determining whether or not the zoning ordinance in question had been adopted by the Board of County Commissioners of Orange County in compliance with applicable law the Court would only consider (a) the sufficiency of the notice of the public hearing and (b) the sufficiency of the public hearing conducted pursuant to such notice."

The court, being of the opinion "the zoning ordinance, and regu-

lations, under attack were adopted by the Board of County Commissioners of Orange County in substantial compliance with applicable law, especially G.S. 153-266.16, and are valid," entered judgment: (1) That said zoning ordinance and regulations are valid; (2) that plaintiffs are not entitled to the relief sought; and (3) that the action be dismissed and the costs taxed against plaintiffs.

Plaintiffs excepted to the judgment and appealed therefrom, assigning as error "that the evidence does not show, as a matter of law, the requisite compliance with the law in the adoption of the ordinance by the Commissioners, and for the reason that it is contrary to the relevant statutory law."

Alonzo B. Coleman, Jr., for plaintiff appellants.
Graham, Levings & Cheshire for defendant appellees.

BOBBITT, J. The record indicates plaintiffs, when the case was heard in the superior court, contended the published notice (Exhibit "B") was insufficient. However, this contention is not brought forward in plaintiffs' brief and is deemed abandoned. The sole contention now presented by plaintiffs is that the public hearing on January 25, 1967, did not meet the requirements of G.S. 153-266.16.

This is not an action in which some specific provision of a zoning ordinance is under attack. Plaintiffs attack the ordinance as void in its entirety. They contend that, because of the asserted failure of the county commissioners to comply strictly with statutory provisions, the purported ordinance was not legally adopted, should be treated as nonexistent and enforcement thereof should be enjoined.

Plaintiffs alleged enforcement of certain provisions of the ordinance will cause hardship and loss to plaintiffs Freeland, Childs and Wright. The stipulated facts disclose that Childs has obtained the relief he sought through administrative procedures. Presumably, the Freelands and Wright have not sought relief through administrative procedures. The portion of the stipulated facts relating to the plight of the Freelands and of the Wrights is not germane to the question plaintiffs pose for decision on this appeal.

After proper notice, the well-attended public hearing of January 25, 1967, was held, all five county commissioners being present, in accordance with the following provision of G.S. 153-266.15: "On receipt of a zoning plan from the county planning board, the board of commissioners shall hold a public hearing thereon, after which it may adopt the zoning ordinance and map as recommended, adopt it with modifications, or reject it."

G.S. 153-266.16 provides: "Whenever in this article a public hear-

ing is required, all parties in interest and other citizens shall be given an opportunity to be heard. A notice of such public hearing shall be given once a week for two successive calendar weeks in a newspaper published in the county, or, if there be no newspaper published in the county, by posting such notice at four public places in the county, said notice to be published the first time or posted not less than fifteen days prior to the date fixed for said hearing."

The complaint alleged the Freelands, Childs and Wright owned property in the portion of Chapel Hill Township covered by the ordinance. It was stipulated the Freelands and Wright owned property in this portion of Chapel Hill Township. As to all other plaintiffs, the allegations and stipulations are that they own property "within Orange County." It would seem plaintiffs Freeland and Wright should be regarded as "parties in interest" and all other plaintiffs as "other citizens" as those terms are used in G.S. 153-266.16. It does not appear that any of the "approximately 200 persons" referred to in the stipulations who, in response to Mr. Coleman's inquiry, "indicated that they had not spoken but would like to have been heard if time had been allotted to them," were persons who owned property in the portion of Chapel Hill Township covered by the ordinance. Hence, such persons would seem to fall into the category of "other citizens" as that term is used in G.S. 153-266.16.

In the construction of G.S. 153-266.16, our chief concern is to ascertain the legislative intent. As stated by Stacy, C.J., in *Trust Co. v. Hood, Comr. of Banks,* 206 N.C. 268, 270, 173 S.E. 601, 602: "The heart of a statute is the intention of the law-making body."

It is "fully established that where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." Hoke, J. (later C.J.), in *State v. Barksdale,* 181 N.C. 621, 625, 107 S.E. 505, 507; 4 Strong, N. C. Index, Statutes § 5, pp. 177-178.

In *Haggar Co. v. Helvering,* 308 U.S. 389, 60 S. Ct. 337, 84 L. Ed. 340, it is stated: "All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose."

The manifest intention of the General Assembly was that a public hearing be conducted at which those who opposed and those who favored adoption of the ordinance would have a fair opportunity to present their respective views. The requirement that such a public hearing be conducted is mandatory. Subject thereto, it is permissible

for the county commissioners to prescribe an orderly procedure.

The orderly procedure adopted afforded equal time to opponents and proponents. Fifteen persons spoke in opposition to the ordinance and sixteen persons spoke in favor of it. Mr. Coleman was present and apparently was acting as counsel for all or certain of the plaintiffs. Nothing in the record suggests the opponents failed to present every fact and argument then and now constituting the basis for their opposition.

The contention that the county commissioners were required to hear all persons in attendance without limitation as to number and time is untenable. The opponents as well as the proponents were at liberty to select those whom they regarded as their best advocates to speak for them. The General Assembly did not contemplate that all persons entertaining the same views would have an unqualified right to iterate and reiterate these views in endless repetition. We agree with Judge Bone that the hearing conducted on January 25, 1967, was in substantial compliance with G.S. 153-266.16.

It is noted that G.S. 153-266.16 does not require the county commissioners to answer questions asked by those in attendance at such public meeting.

It is also noted that two weeks elapsed between the public hearing on January 25, 1967, and the adoption of the ordinance on February 6, 1967.

For the reasons stated, the judgment of the court below is affirmed.

Affirmed.

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

ROBERT WARREN v. FREAL M. LEWIS.

(Filed 10 April 1968.)

1. **Negligence § 11—**

Contributory negligence is an affirmative defense which must be pleaded and established by proof.

2. **Negligence § 26—**

Ordinarily, contributory negligence is an issue of fact to be decided by the jury, but when plaintiff's own evidence so clearly establishes defendant's plea of contributory negligence that no reasonable inference to the

contrary may be drawn therefrom, the court, in the absence of a last clear chance issue, is required to grant defendant's motion for nonsuit.

3. Automobiles § 18—

The driver of a vehicle is required to remain on a private road until he ascertains, by proper lookout, that he can enter the main highway in safety to himself and to others on the highway. G.S. 20-158.

4. Negligence § 1—

The law imposes upon a person *sui juris* the duty to use due care to protect himself from injury, and the degree of such care should be commensurate with the danger to be avoided.

5. Automobiles § 74—

Evidence tending to show that a motorist entered a highway from a private road and that he had traveled a distance of only 15 to 16 feet from the road when his automobile was struck by defendant's car, and that the motorist's view of the highway in the direction from which defendant was traveling was unobstructed for a distance of more than 600 feet, is sufficient to disclose contributory negligence on the part of the motorist, barring recovery as a matter of law.

BOBBITT, J., concurring.

SHARP, J., joins in concurring opinion.

APPEAL by plaintiff from *Martin, S.J.*, September 4, 1966 Civil Session, FORSYTH Superior Court.

The plaintiff, Robert Warren, instituted this civil action against the defendant, Freal M. Lewis, to recover $25,000 for personal injury and $500 for property damage he sustained in a collision between his 1958 Chevrolet and the defendant's 1962 Dodge.

The verified pleadings, consisting of complaint, answer, counterclaim and reply, raised issues of negligence, contributory negligence and the personal injury and property damage sustained by each of the parties. By counterclaim, the defendant demanded $20,000 for his personal injury and $1,250 for the damage to his automobile.

The plaintiff's evidence disclosed the collision occurred at 5:45 on the afternoon of June 15, 1966 as the plaintiff attempted to enter the main highway (Shattalon Drive) from the north over a private road, intending to turn east on Shattalon. The north lane of Shattalon was marked for westbound traffic and the south lane for eastbound traffic. A white line separated the two lanes, each of which was 10 feet wide. Viewed from the private road, the highway was straight for a considerable distance in each direction. To the west there was a slight elevation, the crest of which was 400 to 600 feet from the private entrance. An automobile could be seen for at least 50 feet beyond the crest.

The plaintiff testified he stopped in the private entrance 5 or 6 feet from the surface of Shattalon, looked in both directions, and failing to see any approaching traffic, he undertook to cross to the south lane, intending to turn eastward. The defendant, driving his Dodge eastward, crashed into the rear of plaintiff's Chevrolet before the plaintiff completed his intended movement.

On cross examination, the plaintiff admitted he had been tried and convicted on five charges of traffic violations. "I have been involved in two wrecks and this makes the third one". However, these violations all occurred more than two years before the accident here involved. The plaintiff admitted to the officer, and testified, that he did not see the defendant's vehicle until after the accident. The plaintiff further testified that he had crossed the center line and had turned eastward at the time of the collision; that his vehicle had traveled 25 to 35 feet, at 10 to 25 miles per hour, from his stopped position. However, the physical evidence as given by his own witness, the investigating officer, disclosed the center of the debris was on the white line, indicating the plaintiff's vehicle had traveled only a distance of 15 to 16 feet from the position where the plaintiff had stopped. The point of impact was directly opposite the stop sign.

Patrolman Peeler testified the crest of the hill was 500 to 600 feet west of the intersection. Skidmarks extended westward 168 feet from the debris. The defendant admitted he was driving 60 to 65 miles per hour at the top of the hill, slowed down to 55, and was making about 50 at the time of the impact. The posted speed limit was 55 miles per hour. The defendant admitted to officer Peeler that when he saw the plaintiff's vehicle suddenly appear before him, he cut to the left in an unsuccessful effort to avoid a collision. The Lewis vehicle came to rest on the north side of the highway, and the plaintiff's on the south side. The right rear of the Lewis Dodge was damaged ("from the door backwards").

On cross examination, officer Peeler testified the plaintiff ". . . has a restricted driver's license, the restriction being that he wear glasses at all times that he is operating an automobile". He was not wearing glasses at the time the officer arrived on the scene of the accident. However, the plaintiff testified he was wearing glasses, but lost them in the accident.

The plaintiff offered medical and other evidence of his injuries. At the close of the plaintiffs evidence, the Court sustained the defendant's motion for nonsuit of the plaintiff's cause of action. The defendant took a voluntary nonsuit on his counterclaim. From the Court's judgment dismissing the action, the plaintiff appealed.

Randolph and Drum by Clyde C. Randolph, Jr., for plaintiff appellant.

Harold R. Wilson and Wesley Bailey by Wesley Bailey for defendant appellee.

HIGGINS, J. The plaintiff's evidence was sufficient to go to the jury on the issue of the defendant's negligence. Consequently, the judgment of nonsuit may be sustained only if the plaintiff's evidence discloses his contributory negligence as a matter of law. Contributory negligence is an affirmative defense which must be pleaded and established by proof. Ordinarily, the issue is one of fact to be decided by the jury. However, when the plaintiff's own evidence so clearly establishes the defendant's plea of contributory negligence that no reasonable inference to the contrary may be drawn from that evidence, the court, in the absence of a last clear chance issue, is required to grant defendant's motion for nonsuit. *Rouse v. Snead,* 271 N.C. 565, 157 S.E. 2d 124.

Justice Lake, in *Douglas v. W. C. Mallison & Son,* 265 N.C. 362, 144 S.E. 2d 138, has accurately and concisely stated the rule governing nonsuit on the ground of plaintiff's contributory negligence. "A judgment of nonsuit on the ground of contributory negligence may be entered only when the plaintiff's evidence, considered alone and taken in the light most favorable to him, so clearly establishes the defense that no other reasonable inference or conclusion can be drawn therefrom. *Cowan v. Transfer Co.,* 262 N.C. 550, 138 S.E. 2d 228; *Waters v. Harris,* 250 N.C. 701, 110 S.E. 2d 283; Strong, N. C. Index, Negligence, § 26. For such a ruling to be proper, it is also necessary that the answer has alleged the negligent act or omission on the part of the plaintiff which is so shown by the evidence. *Maynor v. Pressley,* 256 N.C. 483, 124 S.E. 2d 162; *Rodgers v. Thompson,* 256 N.C. 265, 123 S.E. 2d 785; *Messick v. Turnage,* 240 N.C. 625, 83 S.E. 2d 654; *Hunt v. Wooten,* 238 N.C. 42, 76 S.E. 2d 326; G.S. 1-139."

In the case at bar, the plaintiff's evidence paints this picture: The plaintiff had a limited operator's license which required him to wear glasses. He had been convicted in court for five traffic violations. These incidents may help to explain plaintiff's failure to see and appreciate the danger confronting him as he entered the main highway. His view from the intersection to his right was unobstructed to the top of a hill 400 to 600 feet west of the intersection. An automobile could be seen an additional 50 feet beyond the crest. In clear weather, and in broad daylight, he entered the main highway, without discovering the vehicle approaching from the west. The phy-

sical evidence indicated the plaintiff had moved only a distance of approximately 16 feet — 6 to and 10 across the north lane before the collision. The plaintiff testified he never saw the defendant's Dodge before this ". . . his third wreck".

The law required the plaintiff to remain in the private road until he ascertained, by proper lookout, that he could enter the main highway in safety to himself and to others on the highway. G.S. 20-158; *Raper v. Byrum,* 265 N.C. 269, 144 S.E. 2d 38; *Howard v. Melvin,* 262 N.C. 569, 138 S.E. 2d 238. By admitting he entered without seeing the defendant's approach from the west, he negligently failed to see a danger, to himself and to the defendant, which was or should have been obvious to him. Not once did he see the defendant's Dodge until after the actual collision. The law imposes upon a person *sui juris* the duty to use due care to protect himself from injury. The degree of such care should be commensurate with the danger to be avoided. *Rosser v. Smith,* 260 N.C. 647, 133 S.E. 2d 499; *Basnight v. Wilson,* 245 N.C. 548, 96 S.E. 2d 699; *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 251; Strong, N. C. Index, Negligence, § 11. The conclusion is inescapable that the plaintiff failed to look, or failed to see the approach of the defendant's automobile, which had the right of way. This right of way the plaintiff's negligent movement occluded.

The judgment of nonsuit on the ground of contributory negligence is

Affirmed.

BOBBITT, J., concurring:

On cross-examination, plaintiff testified, *without objection,* he had been previously convicted of five charges of traffic violations. If objections had been interposed, this testimony would have been admissible for the purpose of impeachment, *Ingle v. Transfer Corp.,* 271 N.C. 276, 156 S.E. 2d 265, and cases cited, but it would not have been admissible as substantive evidence, *Mason v. Gilliken,* 256 N.C. 527, 532, 124 S.E. 2d 537, 540, and cases cited.

Since the opinion of the Court treats the testimony relating to plaintiff's convictions for unrelated traffic violations as substantive evidence, I deem it appropriate to emphasize that this testimony was admitted without objection.

Independent of the testimony relating to plaintiff's convictions for unrelated traffic violations, I concur in the view that plaintiff's evidence discloses contributory negligence as a matter of law.

SHARP, J., joins in this opinion.

CLAUDIA W. COMBS v. J. RODNEY COMBS AND MARGARET R. COMBS.

(Filed 10 April 1968.)

1. Deeds § 11—

All deeds constituting a simultaneous transaction may be construed together in determining the intent and effect of one of the deeds.

2. Husband and Wife § 14—

A joint tenancy exists when there is unity of time, title, interest and possession, and a tenancy by the entirety is created with the addition of unity of person.

3. Same—

A conveyance of land to a husband and wife, nothing else appearing, creates an estate by the entirety.

4. Husband and Wife § 15—

An estate by the entirety is based on the common law doctrine of the unity of persons resulting from marriage, so that a conveyance to a husband and wife is a conveyance in law to but one person, and upon the death of one spouse, the whole estate belongs to the other, not solely by right of survivorship but also by virtue of the grant which vested the entire estate in each grantee.

5. Husband and Wife § 14—

The common law doctrine of tenancy by the entirety remains unchanged by statute in this State.

6. Same; Partition § 12—

Where tenants in common exchange deeds for the purpose of partitioning land, the deeds employed merely sever the unity of possession and create no new title, and therefore if any one of such deeds names the tenant and his spouse as grantees, no estate by the entirety is thereby created, even though the tenant consents thereto, since the grantees must be jointly named and jointly entitled to create an estate by the entirety.

7. Partition § 12—

A partition deed creates no new or different title even though it is in the form of a deed of bargain and sale with covenants of title, seisin and warranty.

8. Husband and Wife §§ 4, 14—

In a partition of land held as tenants in common by two wives through an exchange of deeds, neither of which contained the certificate of examination pursuant to G.S. 52-6, a deed naming one tenant and her husband as grantees cannot create an estate by the entirety since a wife may not convey her realty to her husband, either directly or indirectly, without complying with the requirements of G.S. 52-6.

9. Husband and Wife § 4—

A conveyance of land by a husband to equalize the partition of land held by his wife as a tenant in common does not create a resulting trust in his favor to that extent, for, nothing else appearing, the law presumes that he intended it as a gift to his wife.

APPEAL by petitioner from *Cowper, J.*, at the August 1967 Civil Session, WAYNE Superior Court.

Special Proceeding commenced by Claudia W. Combs to partition a 90.5-acre tract of land between herself and respondent J. Rodney Combs, share and share alike (Margaret R. Combs is Rodney's wife). Defendants filed answer denying plaintiff owned any interest or estate in said tract. The facts are not in dispute and may be summarized as follows:

1. By deed dated 1 May 1933, from the Atlantic Joint Stock Land Bank of Raleigh to Dora S. Combs and Mary L. Sullivan, they became the owners in fee, as tenants in common, of a tract of land in Wayne County containing 163 acres.

2. Dora S. Combs and Dora W. Combs are one and the same person.

3. On 10 May 1935 J. E. Combs became the owner in fee simple of a 40-acre tract of land in Wayne County which was allotted to him as Lot No. 3 in the division of the lands of his ancestors.

4. On 22 December 1936 J. E. Combs and wife Dora Combs executed and delivered a warranty deed to Mary L. Sullivan and husband C. E. Sullivan describing (1) a 73.1-acre tract of land, same being a portion of the 163-acre tract referred to in Paragraph 1 above, *and* (2) the J. E. Combs 40-acre tract referred to in Paragraph 3 above, "in consideration of five dollars and other values." This deed is not acknowledged in compliance with G.S. 52-6 in that there is no finding that the conveyance is not unreasonable or injurious to the wife.

5. On 22 December 1936, Mary L. Sullivan and husband C. E. Sullivan executed and delivered a warranty deed to J. E. Combs and wife Dora W. Combs describing the remaining 90.5-acre portion of the 163-acre tract referred to in Paragraph 1 above, "in consideration of five dollars and other values." This deed is not acknowledged in compliance with G.S. 52-6 in that there is no finding that the conveyance is not unreasonable or injurious to the wife.

6. The two deeds listed in Paragraphs 4 and 5 above were apparently executed and delivered simultaneously. Both deeds were filed for registration on 22 December 1936 at 10:45 A.M.

7. Dora Combs died intestate on 26 March 1950 and left surviving her husband J. E. Combs and one child J. Rodney Combs.

8. J. E. Combs married petitioner Claudia W. Combs on 28 October 1951, and they lived together until his death on 5 July 1964.

9. J. E. Combs left a will dated 15 May 1952 disposing of his personal property. Realty is mentioned only as follows: "It is my understanding that the real estate now in my possession will descend to my son, J. Rodney Combs, after my death, the title to which was held by my former wife, Dora S. Combs."

10. J. E. Combs left surviving as sole next of kin his widow Claudia W. Combs, petitioner herein, and J. Rodney Combs, his son by Dora Combs.

Claudia W. Combs contends that the deed mentioned in Paragraph 5 above from Mary L. Sullivan and husband C. E. Sullivan to J. E. Combs and wife Dora Combs created an estate by the entirety in the 90.5-acre tract described therein; that upon the death of Dora Combs, her husband J. E. Combs took it as survivor, and on the death of J. E. Combs, she and J. Rodney Combs took it as tenants in common, share and share alike.

J. Rodney Combs contends that an estate by the entirety was not created by the Sullivan deed; that Dora Combs and Mary L. Sullivan owned the 163-acre tract as tenants in common, and the exchange of deeds between the Combs and the Sullivans merely effected a partition between Dora Combs and Mary L. Sullivan and conferred no title whatsoever on J. E. Combs; that J. E. Combs had no interest in the 90.5-acre tract except such marital rights as the law vested in him; that, in consequence, when Dora Combs died intestate, title to the 90.5-acre tract descended to and vested in her son J. Rodney Combs, subject only to the curtesy rights of her surviving husband, J. E. Combs.

Jury trial was waived. The trial judge held that petitioner owned no interest in the 90.5-acre tract described in the petition and dismissed the proceeding. Petitioner appealed.

Braswell & Strickland by Thomas E. Strickland, Attorneys for petitioner appellant.

Sasser, Duke and Brown by J. Thomas Brown, Jr.; Dees, Dees, Smith & Powell by William L. Powell, Jr., Attorneys for respondent appellees.

HUSKINS, J. The determinative question here is whether or not the deed from Mary L. Sullivan and husband C. E. Sullivan to J. E. Combs and wife Dora Combs vested in the grantees an estate by the entireties. If so, petitioner Claudia W. Combs was a tenant in common with J. Rodney Combs at the time of the institution of this proceeding. If not, petitioner owned no interest in the 90.5-acre tract described in her petition.

It is noted at the outset that the deed from the Sullivans to J. E. Combs and wife Dora Combs and the deed from J. E. Combs and wife Dora to the Sullivans were dated, executed and filed for recordation simultaneously. Both are recorded in Book 200, one at page 406 and the other at page 407, Wayne County Registry. Determination of the intent and effect of the deed from the Sullivans to J. E. Combs and wife Dora Combs requires consideration of both deeds. "These deeds together constitute a 'simultaneous transaction.' All instruments executed at the same time and relating to the same subject may be construed together in order to effectuate the intention. *Sandlin v. Weaver,* 240 N.C. 703, 83 S.E. 2d 806; *Howell v. Howell,* 29 N.C. 491." *Smith v. Smith,* 249 N.C. 669, 675, 107 S.E. 2d 530, 534.

The four common-law unities essential to a joint tenancy are unities of time, title, interest and possession. *Davis v. Bass,* 188 N.C. 200, 124 S.E. 566. A tenancy by the entirety is created when a fifth unity, to wit, unity of person, is added to the four. *Topping v. Sadler,* 50 N.C. 357. Thus, "[w]hen land is conveyed or devised to a husband and wife as such, they take the estate so conveyed, or devised, as tenants by the entirety, and not as joint tenants or tenants in common. *Harrison v. Ray,* 108 N.C. 215 [12 S.E. 993]. This tenancy by the entirety takes its origin from the common law when husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person. The estate rests upon the doctrine of the unity of person, and, upon the death of one, the whole belongs to the other, not solely by right of survivorship, but also by virtue of the grant which vested the entire estate in each grantee. . . . and the estate thus created has never been destroyed or changed by statute in North Carolina." *Davis v. Bass,* 188 N.C. 200 at 203, 124 S.E. 566 at 567. See also *Edwards v. Batts,* 245 N.C. 693, 97 S.E. 2d 101; *Bowling v. Bowling,* 252 N.C. 527, 114 S.E. 2d 228; 41 N.C.L. Rev. 67.

Even so, if the deeds under consideration in this case were exchanged solely for the purpose of partitioning the 163-acre tract owned by Dora Combs and Mary L. Sullivan as tenants in common, the deed from the Sullivans to J. E. Combs and wife Dora had the effect only of severing the unity of possession and created no new estate by the entirety. In dividing the common land by an exchange of deeds, ". . . if any of such deeds names the tenant and his wife or the tenant and her husband as grantees, no estate by the entireties is thereby created, even if they are so named with the consent of the tenant. The grantees must be both jointly named and jointly entitled." *Smith v. Smith,* 249 N.C. 669, 677, 107 S.E. 2d 530, 536,

and cases cited. In such case, there is no unity of time and title because the cotenant already has his title by inheritance from the ancestor or by the deed of conveyance to the tenants in common, whereas the spouse must claim title under the partitioned deed. 132 A.L.R. 630; 173 A.L.R. 1216; *Duckett v. Lyda,* 223 N.C. 356, 26 S.E. 2d 918; *Wood v. Wilder,* 222 N.C. 622, 24 S.E. 2d 474; *Garris v. Tripp,* 192 N.C. 211, 134 S.E. 461.

We are of the opinion that the deed from Mary L. Sullivan and husband to J. E. Combs and wife Dora W. Combs, recorded in Book 200, page 407, Wayne County Registry, was a partition deed and lacked the mandatory unities of time and title required to create an estate by the entirety. This is true because Dora Combs owned a one-half undivided interest in the 165-acre tract by virtue of the deed from Atlantic Joint Stock Land Bank of Raleigh dated 1 May 1933, to her and Mary L. Sullivan. The exchange of deeds by these cotenants merely assigned to each what was already hers and fixed the boundaries of each share to be held thereafter in severalty. The deed from the Sullivans to J. E. Combs and wife Dora was incapable of passing a new title or creating a new estate in the 90.5-acre portion of the common land. It merely divested Mary L. Sullivan from her undivided interest in said portion. "And the fact that deeds exchanged between tenants in common in effecting partition may be regular form deeds of bargain and sale, with the usual covenants of title, seizen [*sic*], and warranty, ordinarily does not affect the operation of the rule that a partition deed creates no new, different, or additional title." *Elledge v. Welch,* 238 N.C. 61, 67, 76 S.E. 2d 340, 344, and cases cited.

This view is strengthened by the fact that a wife cannot convey her real property to her husband, either directly or indirectly, without complying with the privy examination provisions of G.S. 52-6 which requires the certifying officer who examines the wife to incorporate in his certificate a finding that the transaction is not unreasonable or injurious to her. *Brinson v. Kirby,* 251 N.C. 73, 110 S.E. 2d 482; *Pilkington v. West,* 246 N.C. 575, 99 S.E. 2d 798; *Davis v. Vaughn,* 243 N.C. 486, 91 S.E. 2d 165; *McCullen v. Durham,* 229 N.C. 418, 50 S.E. 2d 511; *Ingram v. Easley,* 227 N.C. 442, 42 S.E. 2d 624. Absent a certificate by the examining officer containing a finding to that effect, such purported conveyance is void. *Davis v. Vaughn, supra; Honeycutt v. Bank,* 242 N.C. 734, 89 S.E. 2d 598; *Davis v. Bass, supra* [188 N.C. 200, 124 S.E. 566]; *Wallin v. Rice,* 170 N.C. 417, 87 S.E. 239.

Neither of the deeds involved in this exchange contain such a finding by the examining officer. Hence, Dora Combs could not have,

directly or indirectly, conveyed her interest in any portion of the 163-acre tract to her husband by the deeds under consideration. An estate by the entirety cannot be created by a void deed. *Ingram v. Easley, supra; Deese v. Deese,* 176 N.C. 527, 97 S.E. 475; *Speas v. Woodhouse,* 162 N.C. 66, 77 S.E. 1000; *Sprinkle v. Spainhour,* 149 N.C. 223, 62 S.E. 910. But the deeds suffice in every respect to effectuate the partition obviously intended by the parties because, in such case, no conveyance from wife to husband is involved and G.S. 52-6 is not applicable.

Finally, oblique support for the view we have taken is found in the will of J. E. Combs. "It is my understanding," he said, "that the real estate now in my possession will descend to my son, J. Rodney Combs, after my death, the title to which was held by my former wife, Dora S. Combs." He therefore made no testamentary disposition of the 90.5-acre tract. This is some evidence that the parties never intended to create a new estate by the exchange of deeds but did intend to effectuate a partition by deed of the 163-acre tract.

In *Sprinkle v. Spainhour, supra,* the husband paid some of the owelty money for his wife to equalize the partition, and the court held "this would not create a resulting trust in his favor to that extent, because the law presumes he intended it as a benefit or gift to his wife, nothing else appearing." So it is with the 40 acres belonging to J. E. Combs. It was included in the deed to the Sullivans apparently as boot or in the nature of owelty to equalize the partition between his wife and Mary L. Sullivan. The law presumes it a gift to his wife. His will strengthens that presumption. Nothing else appears to the contrary.

For the reasons stated, we hold that petitioner owns no interest in the 90.5-acre tract of land described in her petition, and the proceeding was properly dismissed.

The judgment of the Court below is

Affirmed.

OVER-LOOK CEMETERY, INC. v. ROCKINGHAM COUNTY.

(Filed 10 April 1968.)

1. Taxation § 23—

Statutes exempting specific property from taxation because of the purposes for which such property is held and used are to be strictly construed, when there is room for construction, against exemption and in favor of taxation, but this rule of strict construction does not require that the statute be stintingly or even narrowly construed.

2. Statutes § 5—

The words of a statute must be given their natural or ordinary meaning.

3. Taxation §§ 19, 25; Cemeteries § 1—

Property owned by a nonprofit cemetery association for sale to purchasers for their burial purposes is not exempt from *ad valorem* taxation, since the exemption contemplated by G.S. 105-296(2) refers only to real property presently in use for burial purposes or to real property owned and held by persons for burial purposes and not for the purpose of sale or rental to others.

4. Appeal and Error § 68—

Language in a prior decision which is but an expression of opinion upon an incidental question not presented in the appeal does not have the force of adjudication.

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

APPEAL by plaintiff from *Lupton, J.,* April 10, 1967 Civil Session of ROCKINGHAM, docketed and argued as No. 767 at Fall Term 1967.

Plaintiff, a North Carolina corporation, under authority of G.S. 105-267, instituted this action in the Recorder's Court for Leaksville Township, Rockingham County, N. C., against Rockingham County for a refund of $188.78 (plus interest and costs) paid as 1964 taxes on its property in Overlook Cemetery, Leaksville Township, Rockingham County, N. C., alleging its said property is exempt from *ad valorem* taxation under G.S. 105-296(2).

Upon trial in said Recorder's Court, judgment for plaintiff was entered and defendant appealed. When the case came on for trial *de novo* in the superior court, the parties waived a jury trial and submitted the case on the stipulated facts summarized below.

Plaintiff's property in Overlook Cemetery consists of: (1) 880 grave spaces (originally 5,016) in the old portion; (2) 1,234 spaces (originally 1,456) in the Price addition; and (3) an unmapped and undeveloped section containing 6.328 acres.

Plaintiff has no capital stock. Its (1929) charter, in addition to prescribing the qualifications for membership, sets forth, *inter alia,* (1) that no member shall have any beneficial interest in plaintiff's assets, and (2) that plaintiff's assets are to be administered for the beautification and perpetual care of Overlook Cemetery. A Board of Directors, which has charge of its affairs, is elected by the members.

No officer or director received any compensation except one director. He was compensated for his services as caretaker. Two funeral directors act as selling agents. Plaintiff pays a commission of ten dollars per grave. It pays to Gar Price the sum of ten dollars whenever it sells a grave in the Price addition.

Proceeds from the sale of grave spaces and income from investments constitute plaintiff's sources of income. Prior to August, 1965, a grave space sold for sixty dollars. Since then a grave space has sold for one hundred dollars, the purchaser receiving a discount of ten percent if payment is made within ninety days. Twenty-five percent of the receipts are paid to Wachovia Bank and Trust Company, trustee, pursuant to a trust agreement. Other funds are deposited in plaintiff's savings account(s). Plaintiff complies with the statutory requirements for a perpetual care cemetery.

Exhibits showing plaintiff's sales, receipts, disbursements, investments, etc., are included in the record.

Plaintiff's real property was not assessed for *ad valorem* taxes for the years 1929-1962. "(I)n 1963, a tax re-evaluation year," it was assessed; but plaintiff "was relieved of the payment" of the taxes by the Board of County Commissioners. In 1964, the year directly involved in this action, and in subsequent years, it has been assessed and taxed.

The court entered judgment that plaintiff have and recover nothing of defendant and that plaintiff be taxed with the costs. Plaintiff excepted and appealed.

Fagg, Fagg & Nooe for plaintiff appellant.

McMichael & Griffin and David M. Blackwell for defendant appellee.

BOBBITT, J. G.S. 105-296, in pertinent part, provides: "The following real property, and no other, shall be exempted from taxation: . . . (2) Real property, tombs, vaults, and mausoleums set apart for burial purposes, except such as are owned and held for purposes of sale or rental. . . ." Unless exempted by this statute, plaintiff's real property is subject to *ad valorem* taxation by defendant.

"Statutes exempting specific property from taxation because of the purposes for which such property is held and used, are and should be construed strictly, when there is room for construction, against exemption and in favor of taxation." *Harrison v. Guilford County*, 218 N.C. 718, 721, 12 S.E. 2d 269, 272, and cases cited. However, the rule of strict construction does not require that the statute "be stintingly or even narrowly construed." *State v. Whitehurst*, 212 N.C. 300, 303, 193 S.E. 657, 659. In *Seminary, Inc., v. Wake County*, 251 N.C. 775, 782, 112 S.E. 2d 528, 533, Winborne, C.J., referring to G.S. 105-296(4), said: "The words used in the statute must be given their natural or ordinary meaning."

The words used in G.S. 105-296(2), when given their ordinary

meaning, are clear and require no construction. The statute distinguishes between real property "set apart for burial purposes," which is exempt, and that "owned and held for purposes of sale or rental," which is not exempt. Obviously, plaintiff's property will not be used by plaintiff for burial purposes. It is owned and held by plaintiff for sale to purchasers who in turn will use it for burial purposes. When the words, "set apart for burial purposes," and the words, "owned and held for purposes of sale or rental," are considered contextually, we are of opinion, and so decide, that the exemption contemplated by G.S. 105-296(2) refers only to real property presently in use for burial purposes and property owned and held by persons for their use for burial purposes. Since plaintiff's property is not held for its use for burial purposes but solely for the purpose of sale to others, the conclusion is inescapable that plaintiff's said property does not fall within the statutory exemption.

Since plaintiff relies largely on an excerpt (quoted below) from the opinion in *Cemetery Association v. Raleigh*, 235 N.C. 509, 70 S.E. 2d 506, it is appropriate to draw into sharp focus the question there presented and decided.

The (1869) charter of the Raleigh Cemetery Association contained this provision: "That the real estate of said corporation, and the burial plots conveyed by said corporation to individual proprietors, shall be exempt from assessment and taxation, . . ." The property involved consisted of 31.3 acres of land (with frontage on two streets) owned and held by the plaintiff for cemetery purposes. The plaintiff, relying on said charter provision, sought to restrain the defendant "from making a local improvement assessment against its property . . ." A judgment restraining the defendant, in accordance with the plaintiff's prayer, was reversed by this Court.

Our opinion states: "The question posed for determination is simply this: Does the above provision in the plaintiff's charter exempt its real property, held for burial purposes, from local improvement assessments? The answer must be in the negative." The charter provision expressly exempted *the real estate of the plaintiff* from liability for *ad valorem* taxes. The only question was whether it exempted the plaintiff's real estate "from local improvement assessments."

Plaintiff quotes this excerpt from the opinion: *"Real property set apart for burial purposes, in this State, is exempt from taxation, unless the property is held for personal or private gain.* G.S. 105-296(2). *Hence, the property of the plaintiff is exempt from ad valorem taxes both under the provision contained in its charter and the general law.* But, neither the provision in its charter nor the general law au-

thorizes its exemption from a local improvement assessment made pursuant to and in conformity with the law authorizing such assessment. No land in a municipality is exempt from assessment for local improvements." Plaintiff stresses the italicized portion.

Decision in *Cemetery Association v. Raleigh, supra,* was not based upon and did not involve an interpretation of G.S. 105-296(2). Reference thereto was incidental. Apparently, through inadvertence, the opinion uses the clause, "unless the property is held for personal or private gain," instead of the clause in G.S. 105-296(2), namely "except such as are owned and held for purposes of sale or rental." In any event, "(i)t is but an expression of opinion upon an incidental question not presented in the appeal, and has not the force of an adjudication upon the point." *Miller v. Lash,* 85 N.C. 51, 56. Accord: *Muncie v. Insurance Co.,* 253 N.C. 74, 79, 116 S.E. 2d 474, 477; *Hayes v. Wilmington,* 243 N.C. 525, 536, 91 S.E. 2d 673, 681.

Whether G.S. 105-296(2) should be amended by substituting the words, "unless the property is held for personal or private gain," or words of similar import, for the words, "except such as are owned and held for purposes of sale or rental," is a matter for determination by the General Assembly. As now written, G.S. 105-296(2) does not exempt plaintiff's property from *ad valorem* taxation. Hence, the judgment is affirmed.

Affirmed.

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

STATE v. RODNEY ORDELL MOBLEY.

(Filed 10 April 1968.)

1. Criminal Law § 19—

Where a prosecution is transferred from a municipal-county court to the Superior Court upon the defendant's demand for a jury trial, Session Laws of 1945, Chapter 509, the jurisdiction of the inferior court is thereby ousted, and the Superior Court having acquired original jurisdiction, the defendant must be tried upon indictment.

2. Criminal Law § 13—

Defendant's contentions as to the illegality of the warrant upon which he was arrested is rendered moot and immaterial by his trial upon a valid indictment in the Superior Court upon demand for trial by jury.

3. Automobiles § 126; Criminal Law § 64—

Evidence in this case *is held* insufficient to show that the person admin-

istering the Breathalyzer test was qualified as an expert so as to meet the requirement of G.S. 20-139.1, and his testimony as to the results of a Breathalyzer test made on defendant is thereby rendered incompetent.

4. **Same—**

Statement of the arresting officer to defendant that if he does not take the Breathalyzer test "it will be used as an assumption of guilt in court" exceeds the scope of G.S. 20-16.2(b) and is deemed objectionable as coercing defendant to submit to the test, and a motion to strike the officer's testimony as to the result of the test is proper.

APPEAL by defendant from *Cowper, J.*, 21 August 1967 Session of LENOIR.

This is a criminal prosecution on an indictment charging defendant with unlawfully and wilfully operating an automobile upon the public highways of North Carolina while under the influence of intoxicating liquor.

Defendant was first arrested on a warrant sworn out by J. S. Irving, a deck officer of the Police Department of the City of Kinston, and issued by J. A. Krauss, who is merely designated as "Issuing Official," charging him with the identical offense charged in the indictment, and made returnable before the Municipal-County Court of the City of Kinston and County of Lenoir. In the said Municipal-County Court defendant requested a jury trial, and, pursuant to his request, the case was transferred to the Superior Court of Lenoir County for trial by jury.

Defendant was tried in the superior court on an indictment charging him with the identical offense charged in the warrant.

When the case was called for trial, defendant, who was present with his counsel of record, entered a plea of Not Guilty. Verdict: Guilty as charged.

From a sentence of imprisonment for sixty days, suspended upon payment of a fine of $100 and the costs, defendant appealed.

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

Mercer & Thigpen by Ella Rose Thigpen for defendant appellant.

PARKER, C.J. When defendant made a request for trial by jury in the Municipal-County Court of the City of Kinston and County of Lenoir, the case was transferred to the superior court for trial by jury, pursuant to the mandatory provisions of Chapter 509 of the 1945 Session Laws of the State of North Carolina. This local statute, applicable to Lenoir County, is constitutional. *S. v. Register,* 244 N.C. 480, 94 S.E. 2d 323; *S. v Owens,* 243 N.C. 673, 91 S.E. 2d 900.

On the transfer of the case to the superior court for jury trial, the jurisdiction of the Municipal-County Court of the City of Kinston and County of Lenoir was ousted; and, upon the transfer of this case to the Superior Court of Lenoir County, the jurisdiction of the Superior Court of Lenoir County was not derivative but original, and it was necessary for the defendant to be tried on an indictment. *S. v. Smith,* 264 N.C. 575, 142 S.E. 2d 149; *S. v. Hollingsworth,* 263 N.C. 158, 139 S.E. 2d 235; *S. v. Peede,* 256 N.C. 460, 124 S.E. 2d 134; *S. v. Davis,* 253 N.C. 224, 116 S.E. 2d 381; *S v. Norman,* 237 N.C. 205, 74 S.E. 2d 602.

Defendant's first assignment of error is to the denial of his motion to quash or dismiss the prosecution against him on the ground that the warrant was issued by an improper official. Defendant's contention is that the warrant on which he was arrested was illegal because it was not issued by a judicial officer. This assignment of error is overruled.

Defendant was tried on an indictment. He was not tried on the warrant on which he was arrested. This was done at his request as above stated. In the trial in the superior court, the court had jurisdiction over the person of the defendant and the offense charged. 22 C.J.S., Criminal Law, § 108. Defendant does not challenge the validity of the indictment on which he was tried, convicted, and sentenced. This is stated in 21 Am. Jur. 2d, Criminal Law § 380: ". . . (T)he rule is generally recognized that if a defendant is physically before the court on an accusatory pleading, . . . the invalidity of the original arrest is immaterial, even though seasonably raised, as regards the jurisdiction of the court to proceed with the case." To support its text Am. Jur. cites cases from many jurisdictions, including *State v. McClung,* 104 W.Va. 330, 140 S.E. 55, 56 A.L.R. 257, which we have cited with approval in *S. v. Sutton,* 244 N.C. 679, 94 S.E. 2d 797. This is said in 22 C.J.S., Criminal Law, § 144, page 383 *et seq.:* "Unless the offense is one for which accused must be arrested during its commission, the illegal arrest of one charged with crime is no bar to his prosecution if all other elements necessary to give a court jurisdiction to try accused are present, a conviction in such a case being unaffected by such unlawful arrest." Even if we concede that defendant was arrested on an illegal warrant, the fact that he was tried on an indictment makes the question of the validity of the warrant on which he was arrested moot.

James Krauss, a police officer of the City of Kinston, testified, so far as relevant on the precise point we are considering, as follows:

> ". . . (T)hat he had a permit to administer the breathalyzer test from the State Board of Health and further that he saw the

> defendant on February 18th and administered the test to the defendant. . . . Tester graduated from Dept. of Community College and had administered tests for two years prior to this time."

Upon this fragmentary testimony, the court found that Officer Krauss was an expert in administering the breathalyzer test. The record states as follows: "Results of Test were introduced over objection and motion to strike by the defendant." The officer testified that the results of the test were 29/100 percent. Defendant assigns as error the admission of this testimony over his objection. The officer testified that he had administered tests for two years prior to this time. We assume that he means breathalyzer tests. However, the officer gave no testimony as to his training with the exception that he graduated from the Department of Community College. There is nothing in his testimony to show what he studied in the Community College. The record is bare of any evidence that he attended any school or course of instruction on making breathalyzer tests. There is nothing in his testimony to show that he is qualified to make a test for alcoholic content in human blood and to testify as to results obtained from such a test of defendant's blood. Officer Krauss may be thoroughly qualified as an expert witness to administer the breathalyzer test, but if so, his qualifications do not appear from the meager evidence before us. So far as the present record discloses, the witness Krauss had no such qualifications to make a breathalyzer test as did the witness in *S. v. Cummings,* 267 N.C. 300, 148 S.E. 2d 97, and *S. v. Powell,* 264 N.C. 73, 140 S.E. 2d 705. In our opinion, and we so hold, on the meager record before us, the witness Krauss did not meet the requirements of G.S. 20-139.1 so as to make his evidence competent in a criminal prosecution. We find no competent evidence to support the trial judge's finding of fact that Krauss was an expert in administering a breathalyzer test. The court erred in admitting this testimony.

The record discloses the following testimony on cross examination of Officer Krauss by counsel for defendant.

> "Q. What did you tell him? State your exact words to him.
> "A. I told him that he has a right to refuse to take this test, that he doesn't have to take the test; that if he doesn't take it it will be used as an assumption of guilt in court."

When this answer was given, the defendant did not move for the court to strike the answer of the witness as to the results of the breathalyzer test, as he well might have done. Nor did counsel for defendant, before Officer Krauss testified as to the results of his

test, request permission to examine the witness as to what he told defendant as to the breathalyzer test before the witness testified as to the results of the test. Perhaps the question is not raised, but we think what Officer Krauss told defendant weighed the scales too heavily against the defendant. G.S. 20-16.2, subsection (b), reads:

> "If a person under arrest refuses to submit to a chemical test under the provisions of G.S. 20-16.2, evidence of refusal shall be admissible in any criminal action growing out of an alleged violation of driving a motor vehicle upon the public highways of this State or any area enumerated in G.S. 20-139 while under the influence of intoxicating liquor. Provided: That before evidence of refusal shall be admissible in evidence in any such criminal action the court, upon motion duly made in apt time by the defendant, shall make due inquiry in the absence of the jury as to the character of the alleged refusal and the circumstances under which the alleged refusal occurred; and both the State and the accused shall be entitled to offer evidence upon the question of whether or not the accused actually refused to submit to the chemical test provided in G.S. 20-139.1."

The statute does not say that if a person refuses to submit to the test "it will be used as an assumption of guilt in court." The record does not disclose if defendant at any time refused to take the test, and it would seem that the statement of Officer Krauss to the defendant that if he did not take the test it would be used as an assumption of guilt in court coerced him to take the test.

Defendant assigns as error the court's refusal to dismiss or nonsuit the case at the close of the State's evidence. The defendant introduced no evidence. A consideration of the evidence in the record shows that it was sufficient to overrule the motion to dismiss or nonsuit unaided by the results of the breathalyzer test.

For error in the admission of evidence, defendant is entitled to a

New trial.

STATE v. ROGER SHOEMAKER.

(Filed 10 April 1968.)

1. Escape § 1—

Sentence of imprisonment for 18 to 36 months, imposed upon defendant's plea of *nolo contendere* to the charge of felonious escape, is within the statutory maximum provided by G.S. 148-45 and does not constitute cruel and unusual punishment in the constitutional sense.

2. Same; Criminal Law §§ 26, 138—

Sentence of imprisonment imposed upon defendant's conviction of felonious escape does not constitute double jeopardy or double punishment in that he had already been punished under prison regulations, since the application of the prison rules authorized by G.S. 148-11 is an administrative act, not a judicial act, and cannot affect sentences imposed by the courts.

3. Escape § 1—

Indictment in this case *held* sufficient to charge and support a conviction of the felony of third offense of escape.

APPEAL by defendant from *May, S.J.*, September 25, 1967 Mixed Session of DAVIDSON.

Defendant was tried on a bill of indictment which charged that Roger Shoemaker "on the 1st day of July, A.D. 1967, with force and arms, at and in the County aforesaid, did unlawfully, wilfully and feloniously escape from the lawful custody of Capt. G. B. Edwards, Supt. of State Prison Camp #061, Davidson County, he, the said Roger Shoemaker, being lawfully confined therein and serving a sentence, having been convicted and sentenced in Randolph County Superior Court, Asheboro, North Carolina, on June 21, 1966, for the crimes of temporary larceny and felonious breaking and entering, this being the third offense of escape committed by the said Roger Shoemaker, he having been convicted of the first offense of escape on July 7, 1966, in the Davidson County Court, Lexington, North Carolina, and he, the said Roger Shoemaker, having been convicted of the second offense of escape at the Davidson County Superior Court on September 25, 1966, . . ."

When the case was called for trial, defendant through his court-appointed counsel entered a plea of *nolo contendere* to third offense of escape. Before accepting the plea, the trial judge inquired of defendant if he had authorized his counsel to enter the plea with the knowledge that the maximum punishment was three years. Defendant answered in the affirmative, whereupon the judge ordered the plea to be entered.

The State offered evidence which tended to show that on July 1, 1967 defendant was in the lawful custody at Camp 061 of the North Carolina Prison Department. On that date, without lawful permission, he left a brick mason school which was being conducted outside the prison compound. He was under the influence of liquor, and was returned to custody about ten hours later. Upon return, pursuant to prison regulations, he was placed in a segregation unit.

Defendant offered no evidence.

The judge imposed judgment that defendant be confined to the

State Prison Department for not less than 18 months and no more than 36 months. Defendant appealed.

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

PER CURIAM. The sentence imposed does not exceed the maximum prescribed by the applicable statute so as to constitute cruel and unusual punishment and be violative of defendant's constitutional rights. *State v. LePard,* 270 N.C. 157, 153 S.E. 2d 875; G.S. 148-45. Neither is there merit in defendant's contention that the sentence imposed by the trial court constituted double punishment or double jeopardy, in violation of his constitutional rights, in that he had already been punished under prison regulations by being denied certain privileges and by being subjected to segregated confinement. The prison rules authorized by G.S. 148-11 are administrative and not judicial. The courts are not authorized to deal with the giving or withholding of privileges or rewards under these rules. *State v. Garris,* 265 N.C. 711, 144 S.E. 2d 901. It follows that the administrative application of these rules by the prison authorities cannot affect sentences imposed by the courts.

The allegations contained in the bill of indictment are sufficient to charge and support a conviction of the felony of third offense of escape. *State v. Worley,* 268 N.C. 687, 151 S.E. 2d 618.

An examination of the record and all assignments of error reveals no error prejudicial to defendant.

No error.

STATE OF NORTH CAROLINA v. CHARLES K. PARRISH.

(Filed 10 April 1968.)

Burglary and Unlawful Breakings § 8—

Sentence of imprisonment of three to five years, imposed upon defendant's plea of guilty to the charge of felonious breaking and entering of a store building, is within the statutory maximum provided by G.S. 14-54 and is not excessive nor cruel and unusual in the constitutional sense.

APPEAL by defendant from *Johnston, J.,* 4 September 1967 Criminal Session of FORSYTH.

On 10 June 1967, defendant was arrested upon a warrant issued

by the Municipal Court of Winston-Salem, which charged him with store breaking and larceny. He waived preliminary hearing and was bound over to the Superior Court. Upon defendant's affidavit of indigency, on 26 June 1967, J. F. Montsinger, Attorney-at-Law, was appointed to represent him. Thereafter, defendant's mother made an affidavit in which she averred that he was mentally incompetent. Upon motion of his attorney on 29 June 1967, defendant was committed to a State hospital for observation as provided by G.S. 122-91. Forty-five days later, the assistant superintendent and the clinical director of Cherry Hospital certified to the court that defendant was of average intelligence with more than the usual amount of manual dexterity; that he did not deny the charges pending against him and was aware of their probable consequences; that he knew right from wrong; and that he was able to plead to the bill of indictment and to consult with counsel in the preparation of his defense.

At the 24 July 1967 Session of the Superior Court, the grand jury returned a true bill of indictment which charged (1) that defendant feloniously broke and entered the building occupied by Clinton E. Smith, trading as C. E. Smith Service and Grocery, with the intent to steal merchandise and property located therein; and (2) that defendant, by breaking and entering said store building, did feloniously steal and carry away one transistor radio, the property of C. E. Smith and having a value of $6.00.

At the following September Session, defendant, in open court, entered a plea of guilty to store breaking and larceny as charged in the bill of indictment. Before passing judgment, Judge Johnston heard the testimony of the arresting officer, R. E. Pierce, who said in substance: After observing two broken windows in Smith's Grocery, he saw defendant in the store. When he ordered defendant to come out the way he went in, defendant climbed out through one of the broken windows. At the time defendant had in his pocket a transistor radio, valued at $10.00-$15.00, which belonged to Mr. Clinton Smith.

The record discloses that defendant, aged 34, had served four previous sentences for breaking and entering and two for larceny. In 1951, while he was in the Army, defendant was convicted of grand larceny and sentenced to three years. As a result, he received a dishonorable discharge. He had been out of prison only eight days when he committed the crime charged in the bill of indictment.

His Honor consolidated the two counts in the bill of indictment for judgment and sentenced defendant to the common jail for a term of not less than three nor more than five years to be assigned to work under the supervision of the North Carolina Department

of Correction. After defendant had been committed to the custody of the department, he himself gave notice of appeal by letter to the Clerk of the Superior Court. The court directed Mr. Motsinger to perfect and prosecute his appeal at the expense of the State of North Carolina.

T. W. Bruton, Attorney General and Harry W. McGalliard, Deputy Attorney General for the State.
J. F. Motsinger for defendant.

PER CURIAM. Defendant's only contention is that his sentence of 3-5 years is "excessive and unconstitutional." The punishment for feloniously breaking and entering a store building containing personal property is imprisonment in the State's prison or county jail for not less than 4 months nor more than 10 years. G.S. 14-54. Defendant's sentence, being within the statutory limits, is not excessive; nor is it cruel and unusual punishment. *State v. Robinson,* 271 N.C. 448, 156 S.E. 2d 854; *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216.
No error.

STATE v. CALVIN COLLINS.

(Filed 10 April 1968.)

APPEAL by defendant from *May, S.J.,* at the 25 September 1967 Mixed Session of DAVIDSON.

The defendant was charged in an indictment, proper in form, with felonious escape from State Prison Camp #061 while he was confined therein serving a former sentence for a misdemeanor escape, the present being the third offense of escape. Counsel was appointed for his defense, he being found unable to employ counsel by reason of indigency. Through his court appointed counsel, the defendant entered a plea of "guilty as charged." Before accepting the plea the court interrogated the defendant as to the authority of his counsel to enter it. The defendant stated in open court that he had so authorized his counsel and understood that upon such plea he could receive a sentence up to three years. The plea of guilty was thereupon recorded by order of the court.

The officer in charge of prisoners at the Davidson County Prison Camp testified that the defendant was confined therein pursuant to sentences for drunk and disorderly conduct and disturbing the peace.

The officer then testified that the defendant and another prisoner, while attending a school of brickmasonry outside the prison camp confines, got drunk and walked away from the school. Three days later he was picked up by the police in Winston-Salem. The officer further testified that the defendant was not a cooperative inmate while at the prison camp.

Judgment was entered that the defendant be confined in the North Carolina Prison for a term of 18 months, to work under the direction and supervision of the North Carolina State Department of Correction. The judgment recommended that the defendant be given a physical and psychiatric examination, with special attention to whether he is an alcoholic and directed that, if he be found to be an alcoholic, he be sent to the appropriate State institution for treatment.

On the day following the entry of judgment, the defendant advised the clerk of the superior court of his desire to appeal from the judgment to the Supreme Court, stating that he had not been given sufficient time prior to trial for conferences with his court appointed counsel and thus had been denied his "rights." Thereupon, the defendant appeared in open court with his court appointed counsel, who requested permission to withdraw from the case. Permission to withdraw was denied. The defendant then contended that he entered the plea of guilty because he thought his case was to be continued and the privilege of bail allowed him. Counsel thereupon moved that a reasonable bond for the appearance of the defendant be set. The court fixed such bond at $5,000.

The superior court entered an order directing that the communication by the defendant to the clerk on 28 September 1967 be treated as a notice of appeal to the Supreme Court, and appointed the same counsel to represent the defendant upon appeal. The order provided that the defendant be supplied with a transcript of the proceedings at the expense of the county and that the county bear the cost of the record and brief for the appellant upon the appeal.

The only assignments of error are the denial of the defendant's motion of arrest of judgment and the denial of his motion to set aside the judgment for unspecified errors committed at the trial. It is stipulated in the record that the court in which the defendant was brought to trial and sentenced was properly organized and that "the case was tried in accordance with the rules and practices of the courts."

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

Ford M. Meyers for defendant appellant.

PER CURIAM. The indictment being in proper form, the court being properly organized, the defendant having entered a plea of guilty through his court appointed counsel, the sentence being less than the maximum provided in the statute for the offense charged, G.S. 148-45, there was no ground upon which the motion in arrest of judgment could properly be allowed. There was, consequently, no error in its denial. It being stipulated in the record that the case "was tried in accordance with the rules and practices of the courts," and no error in the proceedings appearing in the record, there is no basis upon which a new trial may be awarded.

No error.

RONALD WAYNE STRICKLAND, BY HIS NEXT FRIEND, W. H. STEED, v. LESLIE HUGHES, ORIGINAL DEFENDANT AND THE AETNA CASUALTY & SURETY COMPANY, ADDITIONAL DEFENDANT (INTERVENOR).

(Filed 17 April 1968.)

1. **Parties § 1—**

Only parties of record to a suit have a standing therein which will enable them to take part in or control the proceedings.

2. **Parties § 6—**

Intervention is the proceeding by which one not originally a party to an action is permitted, on his own application, to appear therein and join one of the original parties in maintaining the action or defense, or to assert a claim or defense against some or all of the parties to the proceeding as originally instituted.

3. **Same—**

Refusal to permit a necessary party to intervene is error.

4. **Parties § 8—**

The trial court should bring in all parties who have such an interest in the subject matter of the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without their presence. G.S. 1-73.

5. **Parties § 4—**

It is ordinarily within the discretion of the court to permit proper parties to intervene.

6. **Parties § 3—**

Before a third party will be permitted to become a party defendant in a pending action, he must show that he has some legal interest in the subject matter of the litigation.

7. Insurance § 6—

The statutory provisions governing a policy of insurance control over contrary provisions in the policy.

8. Insurance §§ 106, 108—

Provision of an assigned risk policy that no action should lie against the insurer unless as a condition precedent thereto the insured shall have fully complied with all the terms of the policy, although unenforceable insofar as it conflicts with the provisions of G.S. 20-279.21(f)(1), is nonetheless valid when asserted by the insurer as a defense to a judgment obtained against an insured by collusion of the parties.

9. Insurance §§ 100, 106, 109—

The obligation of an automobile liability insurer to defend an action brought by the injured party against the insured becomes absolute when the allegations of the complaint bring the claim within the coverage of the policy, but where the insurer defends under a full reservation of right to deny coverage, the defense of the action in obedience to its contractual obligation does not estop the insurer to assert the defenses of fraud and collusion in any subsequent action against it based upon a judgment obtained against its insured.

10. Judgments § 27—

Whenever the rights of third persons are affected, they may collaterally attack a judgment for fraud committed by one party, or for the collusion of both parties.

11. Parties § 6; Insurance § 104—

In an action by an injured party against an insured under a policy of assigned risk automobile insurance to recover for injuries arising out of an automobile accident, the insurer is neither a necessary nor a proper party to intervene therein on the ground that the parties have conspired to defraud the insurer, since (1) the issue of fraud and collusion raised by the intervenor will be detrimental to the integrity of the issues raised by the original pleadings, and (2) since any judgment procured by fraud or collusion will not be conclusive against the insurer in a subsequent action upon the judgment by the injured party.

APPEAL by plaintiff from *Gambill, J.*, at the September 1967 Civil Session, DAVIDSON Superior Court.

Civil action by plaintiff commenced 9 January 1967 to recover damages for personal injuries allegedly caused by the negligence of defendant in the operation of an automobile.

Plaintiff alleged that on 13 August 1965 he was "riding as a passenger in an automobile operated by the defendant," and that defendant ran off the road and turned over several times permanently injuring plaintiff. Various specific acts of negligence are alleged. Plaintiff seeks damages in the sum of $25,000. The automobile is not further described or identified.

Defendant Hughes filed answer admitting that at the time and

place alleged he "was operating a vehicle in which plaintiff was a passenger, and that they were involved in an accident in which the plaintiff received some injuries." All allegations of negligence, however, are denied. For further answer and defense, defendant Hughes alleged that he was driving in a careful manner when he met another car which forced him off the road; that plaintiff was the actual owner of the car which defendant was driving and was riding on the right front seat; that if defendant was driving in a negligent manner, which is denied, plaintiff as owner had the legal right to control the vehicle and required defendant to drive carefully; that failure to do so was contributory negligence on the part of the plaintiff.

The Aetna Casualty and Surety Company (Aetna) filed a motion to intervene, alleging in summary as follows:

1. The complaint alleges that plaintiff was riding as a passenger in an automobile operated by defendant which was negligently driven off the right side of the road and overturned, injuring plaintiff. It contains no description or allegation of ownership of the automobile involved.

2. The intervenor is informed and believes that the automobile involved in the wreck was a 1963 Chevrolet, North Carolina license No. UJ-3942 (1965), owned by plaintiff Ronald Wayne Strickland who was under the age of 21 years and registered in the name of his mother, Helen Honeycutt Strickland.

3. The automobile was being operated by plaintiff Ronald Wayne Strickland. Defendant Leslie Hughes, who is plaintiff's brother-in-law, was a passenger in said automobile at the time of the wreck.

4. At the time of the accident Aetna had written a policy of liability insurance on said 1963 Chevrolet under the Assigned Risk plan and in compliance with the requirements of the North Carolina Financial Responsibility Laws as contained in Chapter 20 of the General Statutes. This policy obligates Aetna to pay on behalf of the insured, including any person driving the automobile with the permission of the named insured, all sums which the insured becomes legally obligated to pay as damages for bodily injury arising out of the ownership, maintenance or use of the automobile.

5. Aetna's investigation of the wreck "conclusively reveals" that plaintiff Ronald Wayne Strickland was the driver and defendant Leslie Hughes was the passenger. After Strickland brought suit against Hughes, Aetna employed Frank P. Holton, Jr., Attorney at Law, to represent Hughes pursuant to the terms of the policy. Hughes refused to verify an answer denying that he was the driver

and has filed an answer asserting that he was the driver of the automobile. Aetna is defending the suit under a full reservation of rights to deny coverage on the ground that the said Leslie Hughes has fraudulently conspired with Ronald Wayne Strickland in an attempt to perpetrate a fraud upon the court and upon Aetna.

6. Aetna's policy contains a "cooperation clause" which requires the insured to cooperate with the company, attend hearings and trials, secure and give evidence, and obtain the attendance of witnesses. Insured has not only failed to cooperate but has fraudulently conspired to suppress and withhold evidence that plaintiff was the driver of the vehicle. No issue in that respect is raised by the pleadings.

7. In the event this fraudulent conspiracy results in a judgment against Leslie Hughes, Aetna will be required by law and by the terms of its policy to pay said judgment and will be without adequate legal recourse to protect its rights. The trial of this cause under the circumstances set forth will substantially and materially affect the rights of Aetna, and for these reasons Aetna should be permitted to intervene in the cause as a party defendant, file appropriate pleadings and offer evidence showing plaintiff was the driver of the vehicle on the occasion in question.

The motion was heard before Judge Gambill at the 11 September 1967 Civil Session of the Superior Court of Davidson County following which he ordered, in the discretion of the court, that Aetna be made a party defendant and be permitted to file answer to the complaint "alleging that the plaintiff was the operator of the automobile on the occasion alleged in the complaint and such other defenses as are available to the plaintiff's cause of action."

To the rendition and signing of such order, plaintiff objected and appealed. This constitutes his only assignment of error.

Charles F. Lambeth, Jr., Attorney for the plaintiff appellant.

Charles H. McGirt of Walser, Brinkley, Walser & McGirt, Attorney for Additional Defendant, The Aetna Casualty and Surety Company, Intervener.

HUSKINS, J. Only parties of record to a suit have a standing therein which will enable them to take part in or control the proceedings. If they desire to seek relief with respect to the matters involved they must either obtain the status of parties in the suit or, in proper instances, institute an independent action. Thus a person not originally a party may be permitted to become a party by his own intervention. "In legal terminology, 'intervention' is the proceeding by

which one not originally a party to an action is permitted, on his own application, to appear therein and join one of the original parties in maintaining the action or defense, or to assert a claim or defense against some or all of the parties to the proceeding as originally instituted. Stated in another way, 'intervention' is the admission by leave of court of a person not an original party to the pending legal proceeding, by which such person becomes a party thereto for the protection of some right or interest alleged by him to be affected by such proceeding." 39 Am. Jur., Parties § 55. See also *Rocca v. Thompson,* 223 U.S. 317, 56 L. ed. 453, 32 S. Ct. 207, affirming 157 Cal. 552, 108 P. 516; *Gorham v. Hall,* 172 Ark. 744, 290 S.W. 357.

When a complete determination of the controversy cannot be made without the presence of a party, the court must cause it to be brought in because such party is a necessary party and has an absolute right to intervene in a pending action. G.S. 1-73; *Garrett v. Rose,* 236 N.C. 299, 72 S.E. 2d 843. Hence, refusal to permit a necessary party to intervene is error. *Simms v. Sampson,* 221 N.C. 379, 20 S.E. 2d 554; *Temple v. Hay Co.,* 184 N.C. 239, 114 S.E. 162. When a person is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence, such person is a necessary party to the action. *Garrett v. Rose, supra; Colbert v. Collins,* 227 N.C. 395, 42 S.E. 2d 349; *Jones v. Griggs,* 219 N.C. 700, 14 S.E. 2d 836.

The term "proper party" to an action or proceeding means "a party who has an interest in the controversy or subject matter which is separable from the interest of the other parties before the court, so that it may, but will not necessarily, be affected by a decree or judgment which does complete justice between the other parties." 67 C.J.S., Parties § 1. It is ordinarily within the discretion of the court to permit proper parties to intervene. *Childers v. Powell,* 243 N.C. 711, 92 S.E. 2d 65.

Before a third party will be permitted to become a party defendant in a pending action, he must show that he has some legal interest in the subject matter of the litigation. "His interest must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment, and it must be involved in the subject matter of the action. One whose interest in the matter in litigation is not a direct or substantial interest, but is an indirect, inconsequential, or a contingent one cannot claim the right to defend. 39 Am. Jur. 900, 935." *Mullen v. Louisburg,* 225 N.C. 53, 56, 33 S.E. 2d 484, 486. See also, *Griffin & Vose, Inc. v. Minerals Corp.,* 225 N.C. 434, 35 S.E. 2d 247.

Does Aetna presently have such a direct and immediate interest in the subject matter of this litigation that it will either gain or lose by the direct operation and effect of any judgment Strickland might recover against Hughes? Answer to this question requires consideration of the following facts and circumstances and pertinent legal principles applicable to them.

The insuring agreements of Aetna's policy of compulsory liability insurance, issued by it under the assigned risk plan pursuant to G.S. 20-279.34, obligated it "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages" by reason of personal injuries or property damage caused by accident and arising out of the ownership, maintenance or use of the insured automobile.

In obedience to the requirements of G.S. 20-279.21(b)(2), this policy insures the person named therein and any other person, as insured, using the automobile with the permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle.

The policy is also subject to the following provisions contained in G.S. 20-279.21(f)(1):

> "The liability of the insurance carrier with respect to the insurance required by this article shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be cancelled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy."

The policy contained the following "no action" clause:

> "No action shall lie against the Company unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this policy, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the Company.
>
> "Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any

right to join the Company as a co-defendant in any action against the Insured to determine the Insured's liability."

This "no action" clause, insofar as contrary to G.S. 20-279.21(f)(1), quoted above, is unenforceable as to the coverage within compulsory limits provided by assigned risk policies. If the terms of the policy and the statute conflict, the statute controls. *Howell v. Indemnity Co.,* 237 N.C. 227, 74 S.E. 2d 610. Even so, this clause is valid when asserted as a defense to a judgment obtained against an insured by collusion. *Jones v. Insurance Co.,* 270 N.C. 454, 155 S.E. 2d 118. The insurer's liability cannot be predicated on a judgment obtained against the insured by collusion. 4 Strong's N. C. Index 2d, Insurance, § 106; *Jones v. Insurance Co., supra.*

So in this case, plaintiff initially has no right to maintain an action against Aetna. He can do so only after the liability of Hughes to plaintiff has been determined by judgment. *Jones v. Insurance Co., supra.* When such judgment is obtained it will constitute a final adjudication and determination of the legal liability of Hughes to the plaintiff, unless and until it is set aside for fraud, collusion, excusable neglect, or other cause recognized by law as sufficient. *Jones v. Insurance Co., supra; Sanders v. Chavis,* 243 N.C. 380, 90 S.E. 2d 749.

Furthermore, when the insurer is later sued by the injured person, if the insurer had a right to defend the action against the insured, had timely notice of such action, and defends or elects not to defend, the judgment in such case, *in the absence of fraud or collusion,* is generally binding upon the insurer as to issues which were or might have been litigated therein. 7 Am. Jur. 2d, Automobile Insurance § 227, and cases cited. Not so, however, when the judgment is obtained by fraud and collusion. There is authority to the effect that although the insurer defended the action between its insured and an injured person, the result of that suit does not bar the insurer from setting up any matter constituting a defense which was not necessarily determined in the original action. *Sweeney v. Frew,* 318 Mass. 595, 63 N.E. 2d 350; 7 Am. Jur. 2d, *supra.* We emphasize in this connection that, under the terms of its policy, Aetna's obligation to defend this action against the named insured, or any other person using the vehicle with the permission of the named insured, is absolute. It becomes absolute when the allegations of the complaint bring the claim within the coverage of the policy. *Ins. Co. v. Ins. Co.,* 269 N.C. 358, 152 S.E. 2d 513. Aetna allegedly defends under a full reservation of rights to deny coverage. Thus, defense of the action in obedience to its contractual obligations does not estop Aetna to assert fraud and collusion in any subsequent action against

it based upon a judgment thus obtained against its insured. Such defense could not be raised and determined in the original action because defendant refused to raise it in his answer.

Judgments of any court may be impeached for fraud or collusion by strangers to them who, if the judgments were given full faith and credit, would be prejudiced in regard to some pre-existing right. Freeman on Judgments, 5th ed., Vol. 1, §§ 318, 319. ". . . [W]henever a judgment or decree is procured through the fraud of either of the parties, or by the collusion of both, for the purpose of defrauding some third person, he may escape from the injury thus attempted by showing, even in a collateral proceeding, the fraud or collusion by which the judgment or decree was obtained." Freeman on Judgments, 5th ed., Vol. 1, § 318, and cases cited.

"It is a well-settled general rule that whenever the rights of third persons are affected they may collaterally attack a judgment for fraud committed by one party, or for collusion of both parties." 30A Am. Jur., Judgments § 879, where numerous cases are cited in support of the text.

Where the rights of persons not parties or privies to a proceeding are adversely affected by a judgment, it is generally held that such persons are allowed to impeach the judgment whenever its enforcement is attempted against them. 30A Am. Jur., Judgments § 849, citing *Reynolds v. Cotton Mills,* 177 N.C. 412, 99 S.E. 240.

Fraud has been regarded as extrinsic and thus subject to collateral attack "where it operates upon matters pertaining, not to the judgment itself, but to the manner in which it is procured." 30A Am. Jur., Judgments § 784. Thus it was held to be extrinsic fraud where one, alleging injury as a result of negligence, feigned paralysis and by collusion between himself, his physician, and members of his family, deceived the court and jury and received an award of damages on the theory that he was paralyzed. *Chicago Rock Island and P. R. Co. v. Callicotte* (C.A. 8), 267 F. 799, 16 A.L.R. 386, cert. den. 255 U.S. 570, 65 L. ed. 791, 41 S. Ct. 375.

In *Brune v. McDonald (Pacific Indemnity Co. Intervener),* 158 Ore. 364, 75 P. 2d 10, it was held that a liability insurer was not entitled to intervene, in an action by a guest passenger against the driver for personal injuries negligently inflicted, and enjoin prosecution of the case on the ground that plaintiff and defendant were conspiring to defraud the insurer. The court stated that the direct legal operation of the judgment would not cause intervenor to gain or lose anything. The court further observed that intervenor raised an entirely new and different issue and stated: " 'The courts have always striven to maintain the integrity of the issues raised by the

original pleadings, and to keep newly admitted parties within the scope of the original suit. . . . The injection of an independent controversy by intervention is improper.' "

It was held in *Bertinelli, et al. v. Galoni,* 331 Pa. 73, 200 A. 58, that an insured defendant who fraudulently colludes with a plaintiff in obtaining a judgment against himself cannot escape from the judgment which he aided in bringing about; but when claim is asserted against the insurer to collect the amount of such a judgment the trial court must afford the insurer the fullest opportunity to establish the collusion and to establish the failure of the insured to follow the course of conduct which the insurance contract required of him.

In *Renschler v. Pizano,* 329 Pa. 249, 198 A. 33, it was held that a judgment recovered against an insured by an injured party is conclusive only in the absence of fraud in a subsequent action by the injured party against the insurance carrier. ". . . [T]he defense of fraud is always available to the indemnitor, the judgment against the indemnitee being conclusive only in the absence of fraud." Petition by insurer to intervene for the purpose of moving to set aside the fraudulent judgment was denied.

In *Corridan v. Rose,* 137 Cal. App. 2d 524, 290 P. 2d 939, it was held error to permit defendants' liability insurer to intervene and take part in the trial of an action by an infant plaintiff against his uncle and grandfather, the insurer claiming collusion and lack of defense on part of defendants.

In *Bradford v. Kelly,* 260 N.C. 382, 132 S.E. 2d 886, plaintiff's insurer sought to intervene in order to plead a release in favor of its insured which otherwise would not be set up. Held: "It is the rule with us that in an action for damages founded upon the alleged negligence of the insured, his liability insurance carrier is not a proper party defendant," and insurer does not have such an interest in the subject matter of the litigation as to constitute it a necessary party. Motion to intervene was denied. Accord, *Taylor v. Green,* 242 N.C. 156, 87 S.E. 2d 11.

In light of these authorities, we are of the opinion that Aetna is neither a necessary nor a proper party. It does not presently have such a direct and immediate interest in this action that it will either gain or lose by the direct operation and effect of any judgment Strickland might recover against Hughes. Aetna's interest is indirect and contingent. If allowed to intervene, the integrity of the issues raised by the original pleadings cannot be maintained. A new and different issue of fraud and collusion will be raised by intervention. The trial court will be faced with an anomaly wherein Hughes and

his counsel furnished by Aetna admit he was driving the automobile while at the same time Aetna through different counsel denies it. To insure a more orderly trial of cases of this kind and preserve the practice and procedure heretofore followed in North Carolina, the intervention herein sought should be denied. Notwithstanding the provisions of G.S. 20-279.21(f)(1), any judgment recovered against an insured by an injured third party is conclusive in a subsequent action by the injured party against insured's liability carrier *only in the absence of fraud.* Collusion is fraud. This statute was not intended to compensate an insured for injury and damage negligently inflicted upon himself. "The primary purpose of compulsory motor vehicle liability insurance is to compensate *innocent victims* who have been injured by financially irresponsible motorists." (Emphasis ours). *Ins. Co. v. Roberts,* 261 N.C. 285, 134 S.E. 2d 654.

What we have said here is without prejudice to the parties at the trial. The case is still in the pleading stage. The evidence may not support the allegations. We simply hold that under the circumstances here alleged Aetna is not entitled to intervene but may, in a subsequent action against it, plead the defense of fraud and collusion incident to the manner in which judgment is obtained by Strickland against Hughes.

The order allowing Aetna to intervene was improvidently entered and is

Reversed.

WILLIS CANTRELL AND WIFE, CAROLYN CANTRELL, v. WOODHILL ENTERPRISES, INC.

(Filed 17 April 1968.)

1. Contracts § 5—

Preliminary negotiations are merged into the subsequent written contract, and the written agreement is conclusive as to the terms of the bargain.

2. Contracts § 23—

An acceptance of work done under a construction contract ordinarily waives defects which are known to the owner or which are discoverable by inspection, but such acceptance does not waive latent defects of which the owner is ignorant at the time of acceptance or which may appear thereafter.

3. Contracts § 21; Sales § 6—

A contractor or builder impliedly represents that he possesses the skill necessary to perform the job undertaken, and he has a duty to perform the work in a proper and workmanlike manner.

4. Contracts § 25—

In an action for breach of a building or construction contract the complaint must allege the existence of a contract, the specific provisions breached, the facts constituting the breach, and the amount of damages resulting from such breach.

5. Same; Pleadings §§ 19, 24—

A complaint which alleges generally that defendant erected a building "in an unskillful manner" is subject to demurrer for failure to allege facts constituting the faulty workmanship, but when the demurrer is sustained the plaintiff may then move for leave to amend his complaint to allege his cause of action properly.

6. Pleadings §§ 2, 28—

A general allegation of unskillful work is a defective statement of a cause of action, not a statement of a defective cause, and plaintiff's introduction of evidence tending to show latent defects caused by defendant's poor workmanship does not result in a variance between such allegation and proof, since variance occurs when the proof does not conform to the cause pleaded.

7. Waiver § 3; Contracts § 23—

Waiver and estoppel are affirmative defenses which must be pleaded.

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

APPEAL by plaintiffs from *Froneberger, J.*, 17 July 1967 Civil Session of GASTON, docketed and argued as Case No. 205 at the Fall Term 1967.

Action for breach of contract to construct a dwelling.

Summarized, except when quoted, the material allegations of the complaint are:

In December 1962, defendant submitted to plaintiffs a floor plan for a residence containing five rooms, a garage, and partial basement, all of specified dimensions. Thereafter, "defendant agreed to construct" the house in a first-class workmanlike manner on certain described lots owned by defendant, and to convey the property to plaintiffs for a total price of $13,400.00. Plaintiffs secured a loan through the Veterans' Commission, paid defendant the agreed purchase price, and, on 15 July 1963, defendant conveyed the property to plaintiffs by warranty deed. Thereafter, "plaintiffs determined that the residence was not constructed in accordance with the plans as agreed upon between the plaintiffs and defendant" in that (1) the floor space of all the rooms was less than contract specifications; (2) defendant landscaped only one-half of the property; and (3) defendant "erected said residence in an unskillful manner and contrary to the plans agreed upon." Defendant has refused to correct

the defects. In consequence, plaintiffs have been damaged in the amount of $2,427.60.

Answering the complaint, defendant averred: In consideration of $13,400.00, it constructed and conveyed to plaintiffs a house built in a first-class manner "according to plans and specifications which were approved by the plaintiffs, defendant, and the Veterans' Administration." Plaintiffs are entitled to recover nothing from defendant.

At the trial, plaintiffs' evidence tended to show: Sometime in 1962, Willis Cantrell (plaintiff) gave to O. L. Doster, president of defendant corporation, a rough sketch showing the floor plan of a split-level house containing three bedrooms, a living room, kitchen, bath, half-bath, and hall. The sketch (plaintiffs' exhibit 1), which had been drawn by plaintiff himself on a single sheet of paper, showed the dimensions of each room. Plaintiff delivered this sheet to Doster and told him it was "basically" what they wanted. Plaintiffs knew that defendant could not build a house by these plans. Doster told them that defendant would build a house having the desired floor plan on the land described in the complaint, landscape the property, and convey it to them for the sum of $13,400.00. Plaintiff requested Doster to obtain a 100% G. I. loan for him. On 19 September 1962, plaintiffs and defendant signed a contract in which defendant agreed to construct a house, "to be built in accordance with plans and specifications as submitted to the Veterans Administration." On the same day, defendant provided plaintiffs with a set of plans and specifications (defendant's exhibits 2 and 3), which plaintiff approved and signed. Thereafter, the Veterans' Administration approved these plans, and defendant began construction of the house in the latter part of February 1963.

During construction, it was discovered that the garage was not large enough to house plaintiff's Mercury station wagon. On 6 April 1963, plaintiffs signed a "request for acceptance of changes in approved drawings and specifications" to enable defendant to enlarge the garage, change the roof from plywood to boards, to revise the kitchen and living room, and to relocate a closet. The Veterans' Administration approved the requested changes on 19 April 1963, and defendant made them without cost to plaintiffs. Plaintiffs visited the house frequently while it was being constructed and observed that it "was not going to be as large as it was supposed to be." When completed, each room contained from 17 to 39¾ fewer square feet than shown on the original sketch which plaintiff had given Doster; the basement contained 323¼ square feet less.

Plaintiffs moved into the house about a week prior to 18 June

1963. On that date they signed, upon a form provided by the Veterans' Administration, the following declaration of acceptance:

"I — We hereby declare that, in the company of O. L. Doster, the builder or his accredited representative, I — we inspected the residential property at the above address on June 18, 1963, and that without any reservation, I — we hereby accept the property as to condition of the house, other improvements, fixtures, and equipment; decoration; suitability; and readiness for use as my home, which I am purchasing or intend to purchase with loan guaranteed or insured by the Veterans Administration."

Mr. Harry Stroup, a field appraiser and inspector for the Veterans' Administration, also inspected the property. Plaintiff complained to him that the wall beside the basement stairs was rough; that defendant had not closed off a 12-foot shaft above the steps; and that no topsoil had been put in the front yard and the backyard had been seeded to a depth of only 30 feet. The specifications accompanying the blueprints provided for only 30 feet of seeding in the backyard. Mr. Stroup assured plaintiff that "all of that would be corrected and anything within a year that happened to the house would be corrected."

Plaintiff accepted the house of his own free will. When the loan on the house was closed on 15 July 1963, plaintiffs endorsed and delivered to defendant a check (made payable to plaintiffs) in the amount of $13,400.00. This was the first money defendant had received. Thereafter, because defective plywood had been used for the subflooring, the tile floors in the kitchen and living room "bucked up." Defendant took up the flooring, replaced it, and put down new tile which Mrs. Cantrell had selected. Later, the kitchen floor "bucked again." This time, however, defendant refused to replace it, and plaintiff himself corrected the defect at a cost of $50.00 for materials.

Plaintiff also testified to the following defects: The overhead cabinets in the kitchen pulled loose from the ceiling ¼ inch. The hardwood floors in the bedrooms and hall squeaked, and nailheads, which had been driven straight down instead of in the sides of the plank, stuck up in the floor because the filling which had been placed above them came out. (The evidence does not disclose just when the foregoing defects appeared.) The front door, the bathroom door, and the kitchen screened door *have never opened and closed properly.*

In plaintiff's opinion, the house had a value of only $10,500.00 when he moved into it. He sued for $2,427.60 because that was the figure furnished him by another contractor, who had based it "on

the difference in the size of the rooms (the) V. A. plan called for and difference in the sketch that I have here" (plaintiffs' exhibit 1) plus the cost of correcting "faulty workmanship." This figure included $140.70 for correcting defects in all the floors, and $300.00 "for the yard and others" except the size of the rooms.

Defendant's evidence tended to show: In August 1963, plaintiff gave Doster a floor-plan sketch (plaintiffs' exhibit 1) and asked him to figure the cost of building a house with the exterior dimensions shown thereon. Based on the sketch, Doster drew plans and specifications, which plaintiff approved and signed. These documents constituted the contract between the parties. Doster secured for plaintiff a hundred percent G. I. loan on the house in the amount of $13,400.00. After the foundation was laid, it was discovered that if the garage were built to plaintiffs' specifications, it would not contain his car. Defendant, after securing permission from the Veterans' Administration to make the change, lengthened the garage by two feet at his own expense. In an effort to satisfy plaintiff, defendant made certain other changes in the plans and specifications at no expense to plaintiff. The house was a "split-level." Plaintiff had insisted that it have an overhang on three sides, and the Veterans' Administration had approved this construction. As the work progressed, it became apparent that a steel beam was required to support the overhang. "When it (the overhang) bowed he (plaintiff) wanted it fixed." Because the beam was installed after the floors in the bedroom had been laid, it was necessary to do "face nailing." The resulting eighth-of-an-inch-deep nail holes were plugged with wood filler.

The Veterans' Administration made its final inspection of the house in June. From then until July 15th, when defendant conveyed the property to plaintiffs, they occupied it without charge. The first complaint they made was about the floors in the living room and kitchen. Defendant's investigation revealed that defective plywood had been used for the subflooring. The manufacturer replaced it, and these rooms were completely retiled in a pattern selected by plaintiffs. About a month later, plaintiff again complained about the floors. Upon inspection, Doster could find nothing wrong with either the flooring or the cabinets in the kitchen.

Defendant received plaintiffs' first complaint about the dimensions of the rooms in August 1964 by letter from their attorney. The only difference between the area contained in plaintiffs' sketch and the final plans is the width of the walls. "The square footage in this house and the sketch, using the exterior dimensions as shown, would be the same." Rooms are measured from the center of a partition

wall to the outside. The house was built according to the specifications except where better construction was substituted.

In Doster's opinion, plaintiffs' property was worth $14,000.00 when the house was completed. Defendant's profit on the job was $543.36. In the opinion of Mr. Harry Stroup, appraiser and compliance inspector for the Veterans' Administration, the property was worth $13,800.00. Stroup first inspected the construction on 16 March 1963, when he checked the dimensions of the footings. He found no discrepancies whatever in the plans and specifications. He made a second inspection on 10 April 1963. Again he found construction to be in compliance with the plans and specifications. His final inspection was made on 18 May 1963, after the house was completed. Plaintiffs were then on the premises and partially moved in. The only fault he found with the construction was that the windows had not been caulked — a minor detail. Plaintiffs made no complaint to him about the size of the rooms or the landscaping of the lot. He made no record of any complaints whatever and recalls none. During the year after the loan was closed, plaintiffs reported no dissatisfaction with the house to the Veterans' Administration.

At the close of all the evidence, defendant's motion for judgment of nonsuit was allowed, and plaintiffs appealed.

Hollowell, Stott & Hollowell for plaintiff appellants.
Mullen, Holland & Harrell for defendant appellee.

SHARP, J. This appeal involves only the question whether plaintiffs' evidence, together with that of the defendant which is favorable to them, will withstand the motion for nonsuit. 4 Strong, N. C. Index, Trial § 21 (1961). Plaintiff's complaint is (1) that defendant failed to construct the house according to specifications; (2) that the landscaping did not meet the specifications; and (3) that the residence was erected in an unskillful manner.

The express contract upon which plaintiffs sue consists of the plans and specifications, which plaintiff and defendant signed and the Veterans' Administration approved. The sketch which plaintiff gave Mr. Doster, and which he used as the basis for the final blueprints, was merely one facet of the preliminary negotiations which were merged in the subsequent written agreement between the parties. This agreement is conclusive as to the terms of the bargain. *Williams v. McLean,* 220 N.C. 504, 17 S.E. 2d 644; 1 Strong, N. C. Index, Contracts § 5 (1957). The evidence of plaintiffs and defendant shows that the house was constructed in conformity with the plans and specifications signed by the parties and approved by the

Veterans' Administration. Thus, plaintiffs failed to establish their allegation that the residence was not constructed in accordance with the plans and specifications.

With reference to landscaping, the contract provided, *inter alia,* that topsoil four inches thick should be placed on the front yard and that two shade trees be planted. Plaintiff testified that no topsoil was put on the front yard and that no shade trees were planted. Doster testified that all the required landscaping was done; that he planted no shade trees because there were two already on the lot. Be that as it may, if shade trees and topsoil were not provided as called for in the specifications, these omissions were obvious at the time plaintiffs moved into the house about 11 June 1963, at the time they signed the declaration of acceptance on 18 June 1963, and at the time they closed the loan and paid defendant the purchase price in full.

Plaintiffs' acceptance of the completed house and lot was in writing and unequivocal. It was executed neither under protest nor with reservations. Although plaintiff testified that he made certain complaints to Mr. Stroup at the time of the final inspection, there is no evidence that he protested to defendant. Acceptance manifests one's intent to receive the thing offered or tendered as one's own; it is a tacit agreement that the offerer — here the builder — has complied with his required duty. "Acceptance implies satisfaction and waives many rights." *Moss v. Knitting Mills,* 190 N.C. 644, 647, 130 S.E. 635, 636. See Black's Law Dictionary 27 (4th ed. 1951). In *Realty Co. v. Batson,* 256 N.C. 298, 123 S.E. 2d 744, this Court quoted with approval the following statement of the rules with reference to acceptance and waiver in building and construction contracts:

" 'Where work is accepted with knowledge that it has not been done according to the contract or under such circumstances that knowledge of its imperfect performance may be imputed the acceptance will generally be deemed a waiver of the defective performance. But this rule does not apply to latent defects. The acceptance of work which has been defectively done, the defects being unknown and not discoverable by inspection, does not amount to a waiver of the imperfect performance.' 12 Am. Jur., Contracts § 355. Annotation: 109 A.L.R. 625, 628. In *City of Seaside v. Randles* (Oregon), 180 P. 319, it is stated: 'An acceptance of work done under a construction contract does not constitute a waiver of latent defects of which the owner was ignorant at the time, or which may appear thereafter.' " *Id.* at 308, 123 S.E. 2d at 751. See also 13 Am. Jur. 2d, *Building and Construction Contracts* § 55 (1964).

Plaintiffs' evidence, taken in the light most favorable to them,

tends to show that at the time they accepted the property, there existed the following latent defects which were unknown to them and not discoverable by inspection: Defective subflooring in the living room and kitchen, poor workmanship in filling the nail holes in the hardwood floors in the hall and bedrooms caused by "face-nailing" in the rooms, and improper installation of the overhead cabinets in the kitchen.

It is the duty of every contractor or builder to perform his work in a proper and workmanlike manner, and he impliedly represents that he possesses the skill necessary to do the job he has undertaken. "In order to meet this requirement the law exacts ordinary care and skill only." *Moss v. Knitting Mills, supra* at 648, 130 S.E. 637; *accord, Byerly v. Kepley,* 46 N.C. 35.

The only allegation which plaintiffs make with reference to faulty workmanship in the house is the generalization that defendant "erected said residence in an unskillful manner." In an action for breach of a building or construction contract — just as in any other contract case — the complaint must allege the existence of a contract between plaintiff and defendant, the specific provisions breached, *the facts constituting the breach,* and the amount of damages resulting to plaintiff from such breach. I McIntosh, N. C. Practice & Procedure § 1066 (2d ed. 1956); 13 Am. Jur. 2d *Building and Construction Contracts* § 115 (1964); 9 C.J., *Building and Construction Contracts* § 241 (1916). The party who sues or defends upon the basis of a breach of contract " 'must allege it as well as the facts constituting it.' " *Yates v. Body Co.,* 258 N.C. 16, 22, 128 S.E. 2d 11, 15. "[W]here the cause of action is a failure to construct in a workmanlike manner and with the material contracted for, plaintiff's pleading should allege wherein the workmanship was faulty or the material furnished by defendant was not such as the contract required." 17A C.J.S. *Contracts* § 544 (1963). *Accord, Boettler v. Tendick,* 73 Tex. 488, 11 S.W. 497, 5 L.R.A. 270.

The rule with reference to pleading a breach of contract is no different from that which requires a plaintiff in a personal-injury action to plead the facts constituting the negligence which he claims proximately caused his injuries. " 'Negligence is not a fact in itself, but is the legal result of certain facts.' " *Stamey v. Membership Corp.,* 247 N.C. 640, 645, 101 S.E. 2d 814, 818. Likewise, a breach of contract is a legal result of certain facts. A plaintiff's failure to allege these facts renders the complaint subject to demurrer, but when the demurrer is sustained the plaintiff may then move for leave to amend his complaint in order to allege his cause of action properly. *Shives v. Sample,* 238 N.C. 724, 79 S.E. 2d 193.

In this case, defendant made no motion to strike the third portion of plaintiffs' cause of action, *i.e.*, the general allegation that it had constructed the house "in an unskillful manner." Had a motion to strike been made, it would have been allowed — with permission to amend, no doubt.

Plaintiffs' allegation of unskillful work was a defective statement of that part of their cause of action; it was not a statement of a defective cause. When plaintiffs introduced evidence from which the jury could have found that at the time they accepted defendant's work certain latent defects resulting from poor workmanship existed, there was no variance between this general allegation and their proof. G.S. 1-169. Variance occurs when the proof does not conform to the case pleaded. See *Zager v. Setzer,* 242 N.C. 493, 88 S.E. 2d 94; *Davis v. Rhodes,* 231 N.C. 71, 56 S.E. 2d 43. See also Note, 41 N.C.L. Rev. 647 (1963). The court therefore could not dismiss the action upon that ground even though defendant (assuming an amendment to its answer as indicated below) was entitled to a nonsuit or a directed verdict upon the other two portions of plaintiffs' cause of action. For that reason, the nonsuit must be reversed.

Since the case goes back for retrial, we also point out a defect in defendant's pleading. Waiver and estoppel are affirmative defences; yet defendant failed to plead plaintiffs' acceptance of the property in bar of their right to recover for its alleged failure to meet the specifications. See *Realty Co. v. Batson, supra.*

If there is to be a retrial of this case, no doubt both plaintiffs and defendant will move for permission to revamp their pleadings in order to bring them within the established rules.

Reversed.

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

STATE v. BOBBY ROSS.

(Filed 17 April 1968.)

1. Burglary and Unlawful Breakings § 5; Assault and Battery § 14—

Evidence in this case is held sufficient to go to the jury on the issues of defendant's guilt of first degree burglary and assault with a deadly weapon with intent to kill, inflicting serious bodily injuries not resulting in death.

2. Trial § 13—

The trial court has the discretionary power to grant or refuse a request

for a jury view of the scene of the crime, and the court's refusal to permit a jury view of the scene of a crime committed thirteen months previously is not an abuse of that discretion.

3. Criminal Law § 75; Constitutional Law § 33—

Defendant is not prejudiced by the failure of police officers to give him the constitutional warnings set forth in *Miranda v. Arizona*, 384 U.S. 436, where no evidence obtained as a result of interrogation was used against him at the trial.

4. Criminal Law § 146—

Where the record proper contains inconsistent and contradictory statements as to the judgment pronounced, the Supreme Court, pursuant to its inherent power and duty to make its records speak the truth, and acting under its supervisory power over the lower courts, will remand the cause to the Superior Court for a proper judgment.

APPEAL by defendant from *Martin, S.J.*, July 1967 Session of CLEVELAND.

Criminal prosecution on an indictment containing two counts: The first count charges first degree burglary in the dwelling house of Oscar Patterson, Sr., and Daisy R. Patterson, his wife, in Shelby. The second count charges an assault upon Oscar Patterson, Sr., with a deadly weapon, to wit, a knife, with the felonious intent to kill, inflicting serious bodily injuries not resulting in death, consisting of cuts and injuries about his face and body causing permanent scars thereon.

Defendant, by his court-appointed counsel who is counsel of record here, entered a plea of not guilty. The jury returned a verdict of guilty as charged on both counts in the indictment with a recommendation of life imprisonment upon the first count charging burglary in the first degree. When the verdict was returned, defendant's counsel asked that the jury be polled. The jury was polled, and each individual on the jury said that he found the defendant guilty as charged on both counts in the indictment with a recommendation of life imprisonment as to the first count charging burglary in the first degree, and that he still assented to that verdict.

On the first count in the indictment the court sentenced defendant to imprisonment for life, and on the second count in the indictment the court according to page 4 of the record sentenced defendant to imprisonment for not less than nine years nor more than ten years, this sentence to commence at the expiration of the sentence heretofore passed against him of life imprisonment for burglary in the first degree. The record before us on page 52 shows that the court sentenced the defendant on the first count in the indictment charging burglary in the first degree to imprisonment for life, and on the

second count the court sentenced defendant to imprisonment for five years, which sentence was to begin at the expiration of the sentence passed on the first count of life imprisonment for burglary in the first degree. From these judgments, defendant appeals.

Attorney General T. W. Bruton and Deputy Attorney General Harrison Lewis for the State.

Joseph M. Wright for defendant appellant.

PARKER, C.J. Defendant is an indigent. The trial court entered an order permitting him to appeal *in forma pauperis* and directed that the County of Cleveland furnish defendant's counsel a transcript of the trial. Defendant's counsel was ordered by the court to perfect his appeal, and the case on appeal and defendant's brief were mimeographed at public expense.

This is the second appeal in this case. At the July 1966 Session of Cleveland County Superior Court, defendant was convicted for the identical offenses for which he was convicted in the instant case. At that Session he received sentences substantially similar to those imposed in the instant case, the only difference being that at that former trial defendant was sentenced to ten years imprisonment on the second count, while on the subsequent trial from which this appeal was taken defendant was sentenced to imprisonment for not less than nine years nor more than ten years on page 4 of the record before us and was sentenced to imprisonment for five years on page 52 of the record before us.

Our decision on the appeal from the conviction in the first trial is reported in *S. v. Ross,* 269 N.C. 739, 153 S.E. 2d 469, wherein the evidence in this case is correctly and adequately summarized which obviates the necessity for a further recapitulation and discussion thereof, with two exceptions:

(1) In the first appeal a new trial was awarded because of the erroneous admission of evidence that defendant had stated that he was the owner of the hat found on the floor of the Patterson house shortly after it was broken into and Mr. Patterson assaulted. This admission by defendant that he was the owner of the hat was neither offered nor admitted in the instant case.

(2) In the report of our decision upon the former appeal, Mr. Patterson's injuries were not elaborated in detail. That portion of Mr. Patterson's testimony in the instant case, which clearly indicates the serious extent of his wounds, is as follows:

"I was facing Bobby Ross at that time and he cut me with a

knife. I saw the knife and it was in the shape of a Hawk-Bill and at the time he was about 2 or 2½ feet from me. He had it in his hand and hit my face down across my eye and cheek into my nose. The next time he hit me, then my nose just dropped over on my cheek.

"The knife is what he hit me with. I felt the sting and blood run down across my face; and I knowed I was cut. I commenced trying to get away. He followed me out into the utility room, then run out. As he followed me he cut me, jobbed me a time or two on the back and top of my head around up there (Mr. Patterson removed his shirt, tie, and undershirt and faced the jury before the jury box), indicating — he cut me across the face, struck me right there, my left eye, left side of my nose, down through both lips. The second lick split open my nose."

After Mr. Patterson was cut, he fainted. He regained consciousness in a hospital. He lost a great quantity of blood while the wounds were being sutured. He was given four pints of blood during the operation, and after surgery it was necessary to give him an additional pint of blood. It took 175 sutures to sew his wounds up.

Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of all the evidence. This assignment of error is overruled because, as indicated by the foregoing, there is plenary evidence in the record before us to carry the case to the jury. 2 Strong, N. C. Index 2d, Burglary and Unlawful Breakings, § 1; *S. v. Ferguson*, 261 N.C. 558, 135 S.E. 2d 626; *S. v. Jones*, 258 N.C. 89, 128 S.E. 2d 1.

Defendant assigns as error the denial by the court of his motion made at the close of all the evidence to permit the jury "to visit the scene of the crime and examine Suttle Street, Sumter Street and the houses 402 and 404 on Suttle Street and the area of this fence." Mr. Patterson lived at 304 Suttle Street in Shelby and his home is 250 feet from the intersection of East Suttle and Sumter Streets. Shortly after the assault on Mr. Patterson, two Shelby police officers saw defendant, whom they well knew, crawling under a fence. The evidence does not disclose the distance from the hole under the fence to Mr. Patterson's house. This motion to allow the jury to view the premises was made and denied by the court in the absence of the jury. The offenses here charged were committed on 3 April 1966, and the motion we are considering was made at the July 1967 Session of Cleveland County Superior Court, more than thirteen months after the crimes were committed. It seems to be settled at common law and in this jurisdiction that the trial court has the discretionary

power to grant or refuse a request for a jury view of the premises or object involved in the action. *Paris v. Aggregates, Inc.,* 271 N.C. 471, 482, 157 S.E. 2d 131, 139; *Highway Com. v. Hartley,* 218 N.C. 438, 11 S.E. 2d 314; Stansbury, N. C. Evidence, 2d Ed. § 120; 88 C.J.S. Trial § 47; 53 Am. Jur., Trial § 442. Since this motion was made some thirteen months after the commission of the offenses charged, it would seem that a view of the premises at that late date would not be of substantial aid to the jury in reaching a correct verdict. No abuse of discretion is shown by the judge in denying the motion. This assignment of error is overruled.

Defendant assigns as error the failure of the police officers to advise him of his legal rights "to remain silent, secure the services of an attorney, and call relatives." This assignment of error is overruled. The State's evidence does not reveal whether or not defendant was advised concerning the privilege against self-incrimination as required by *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 10 A.L.R. 3d 974. Defendant testified he was not so advised. In the trial on the first appeal defendant was represented in the Superior Court and in the Supreme Court by his court-appointed counsel, C. B. Cash, Jr., and in the second trial he was represented in the Superior Court and in the Supreme Court by his court-appointed counsel, Joseph M. Wright.

In the *Miranda* case the Supreme Court of the United States said:

> "To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, *no evidence obtained*

as a result of interrogation can be used against him." (Emphasis added.)

The fallacy in defendant's argument is that no evidence obtained as a result of interrogation was used against him. The police officers who testified for the State did not testify as to any statement made by the defendant. It does not appear from the record that the defendant made a statement or admission of any kind. Therefore, it is immaterial whether or not he was warned that any statement he made could be used against him in a court of law.

Defendant took the stand and testified in his own behalf. Prior to this the trial judge informed him of his right not to testify, and advised him that if he did testify the State had the right to cross-examine him and to offer evidence in contradiction to any evidence he might produce. Defendant was not cross-examined as to any statements he made to the officers or to anyone else. Defendant's contention that he was prejudiced by the failure of the officers to advise him of his rights is without merit.

In the trial and judgment in the first count in the indictment, we find no error.

In the trial of the second count in the indictment, we find no error except that there is a variance in the judgments which are inconsistent and contradictory as pointed out above. These variances in the judgments of imprisonment on the second count in the indictment appear on the face of the record proper. These inconsistent and contradictory judgments of imprisonment on the second count are not in defendant's brief. We have found them *ex mero motu*. This Court, pursuant to its inherent power and duty to make its records speak the truth, to correct the mistakes of the clerk or other officers of the court, so that its records shall import verity, and acting under its supervisory power over the lower courts of the State, vacates the conflicting judgments of imprisonment contained in the second count in the indictment and remands the second count in the indictment to the Superior Court of Cleveland County for a proper judgment. If the solicitor desires to pray judgment on the second count in the indictment, the solicitor and defense counsel and the defendant must be present in court where they can be heard, and where if the defendant is dissatisfied with the judgment passed on him in the second count, he can appeal, *S. v. Old,* 271 N.C. 341, 156 S.E. 2d 756.

In the trial and judgment in the first count in the indictment charging burglary in the first degree, we find no error. The judgments on the second count in the indictment are vacated and that count in the indictment is remanded to the Superior Court of Cleveland County for a proper judgment.

IN THE MATTER OF: VIRGINIA YANCEY MICHAL, INCOMPETENT.

(Filed 17 April 1968.)

1. Banks and Banking § 3—

Where funds are deposited in a bank, a contractual relation between the depositor and the bank is created whereby the bank becomes the debtor of the depositor.

2. Insane Persons § 4; Clerks of Court § 6—

The clerk of the Superior Court has no jurisdiction to determine the right of a surviving trustee for an incompetent person to draw a check upon an account in the name of the cotrustees, since any right of the surviving trustee is governed by the contractual relationship between the bank and the trustees, and the clerk's refusal to order the bank to honor the signature of the surviving trustee is not error.

3. Insane Persons § 2; Courts § 6—

The clerk of the Superior Court has the jurisdiction to appoint and remove the guardian of an incompetent person or a trustee appointed in lieu of a guardian, G.S. 33-1, G.S. 33-9, the jurisdiction of the judge of the Superior Court over such matters being limited to the correction of errors of law upon appeal from the clerk, and therefore an order of a Superior Court judge directing the clerk to appoint a cotrustee for an incompetent person is in excess of the court's authority and will be vacated on appeal.

APPEAL by petitioner from *Bryson, J.*, at the September 1967 Session of MCDOWELL.

On 15 August 1967, James Weston Michal, hereinafter called the petitioner, filed in this special proceeding his petition before the clerk. Therein, he prayed for the issuance of an order directing the First Union National Bank of Marion, N. C., hereinafter called the bank, "and all other persons and corporations dealing with him as Trustee for Virginia Yancey Michal, Incompetent, to honor his signature, acts and deeds as sole surviving Trustee of said Estate."

As grounds for the issuance of such order, the petitioner alleged: (1) He and William D. Lonon were duly appointed cotrustees for Virginia Yancey Michal, an incompetent, having been so appointed in this special proceeding; (2) William D. Lonon died; (3) the petitioner, as sole surviving trustee, has the complete authority and duty to perform the trust, including payment of current debts of the ward; (4) the cotrustees had a checking account at the bank, the signatures of both of them being on the bank's signature card, and the bank now refuses to honor checks drawn upon the account bearing the petitioner's sole signature; and (5) other persons with whom the petitioner "may need to do business for the said Estate might question his complete authority as sole surviving Trustee."

The petitioner tendered to the clerk an order directing that the

bank "and all other persons and corporations dealing with the Estate of Virginia Yancey Michal, Incompetent, or the Trustee for same, give full honor and credit to the signature, acts and deeds of James Weston Michal as the sole appointed, qualified and acting Trustee for Virginia Yancey Michal, Incompetent."

The clerk refused to sign the order so tendered by the petitioner, entering instead an order on the same day that the petition was filed, 15 August 1967, which order recites the clerk's finding of the following facts:

> "(1) That for sometime [*sic*] prior to July 24, 1967, James Weston Michal and William D. Lonon were the duly appointed, qualified and acting co-Trustees for Virginia Yancey Michal, Incompetent, appointed by this Court.
>
> "(2) That on July 24, 1967, the said William D. Lonon died.
>
> "(3) That for some time prior to July 24, 1967, said co-Trustees had a checking account at First Union National Bank, Marion, N. C., with both their signatures on the 'Signature Card,' and said Bank now refuses to honor the sole signature of James Weston Michal, sole surviving Trustee of Virginia Yancey Michal, Incompetent; and others with whom said Trustee does business, may do likewise."

The order of the clerk recited that "upon the foregoing facts the undersigned Clerk of the Court wishes the advice of the Judge of the Superior Court before making any decision, and therefore refuses to sign the attached Order tendered by Petitioner."

To this refusal the petitioner excepted and gave notice of appeal from the order of the clerk to the judge of the superior court.

On 28 August 1967, the clerk entered an order that the bank be made a party to the proceeding. Thereupon, this order, the petition, the former order of the clerk, and the order tendered by the petitioner and refused by the clerk were served upon the bank.

On 12 September 1967, Bryson, J., entered an order reading in its entirety as follows:

> "THIS CAUSE coming on to be heard before the undersigned Judge Presiding over the September 1967 Term of the Superior Court of McDowell County, upon Petition of James Weston Michal and Order of the Clerk of Superior Court, said order being dated and signed August 15, 1967, by said Clerk; and
>
> "IT IS ORDERED that the aforesaid Order of the Clerk of Superior Court be, and the same is hereby, in all respects, con-

firmed and the Clerk of Superior Court of McDowell County is respectfully directed and ordered to appoint some suitable discreet person and/or banking corporation to act as co-trustee in the aforesaid matter."

To the entry of that order by Bryson, J., the petitioner excepted and therefrom he now appeals to the Supreme Court. The assignments of error are that the clerk refused to sign the order tendered to him by the petitioner, refused to make any judicial decision upon the facts found by the clerk, and that the superior court in its order ignored the questions of law presented by the petitioner to it and ordered the clerk to take action, which was not requested by anyone and which would not solve the controversy between the petitioner and the bank.

M. John DuBose for appellant.
W. R. Chambers and E. P. Dameron for appellee.

LAKE, J. When the trustees opened an account in the bank and deposited funds of the trust estate therein, a contractual relation between them and the bank was created, whereby the bank became the debtor of the trustees. *Nationwide Homes v. Trust Co.*, 267 N.C. 528, 148 S.E. 2d 693; *Bank v. Weaver*, 213 N.C. 767, 197 S.E. 551; *Woody v. Bank*, 194 N.C. 549, 140 S.E. 150, 58 A.L.R. 725. The right, if any, of the petitioner, as surviving trustee, to draw a check upon that account and to proceed against the drawee bank for its refusal to honor the check arises out of and is governed by that contract. The clerk of the superior court has no jurisdiction to determine that right or to issue any order directing the bank to honor such check upon a petition, or motion, by the surviving trustee in the special proceeding in which such trustee was appointed. There was, therefore, no error in the refusal of the clerk to sign the order tendered to him by the petitioner or in that portion of the judgment of the superior court confirming such refusal. Whatever right the petitioner may have against the drawee bank by virtue of the contract of deposit has not been adjudicated. It is not before us upon this appeal. It cannot be adjudicated in this proceeding.

The remaining question relates to the authority of the superior court judge, in this proceeding and upon this record, to direct the clerk to appoint some suitable person or banking corporation to act as cotrustee with the petitioner. In the silence of the record, we assume that no such appointment has been made as yet.

This is not a testamentary trust or a trust established by an

agreement on conveyance by a settlor. This trust is in the nature of a guardianship, the trustees having been appointed by the order of the clerk in a special proceeding which, in the silence of the record, we assume was duly instituted and conducted before the clerk pursuant to G.S. 35-2. The trustees so appointed thereby became representatives of the court. In that capacity, and in that capacity alone, they acquired whatever powers they had and incurred whatever obligations rested upon them. As such, they were and are subject to the direction of or removal by the court which appointed them, and to the power of the court to appoint such successor trustee or additional trustee as that court may, from time to time, in accordance with the appropriate procedures, find necessary and proper to protect the interests of the ward of the court.

G.S. 35-2 provides: "The trustee * * * shall be vested with all the powers of a guardian administering an estate for any person and shall be subject to all the laws governing the administration of estates of minors and incompetents." G.S. 33-1 provides: "The clerks of the superior court within their respective counties have full power, from time to time, to take cognizance of all matters concerning orphans and their estates and to appoint guardians in all cases of infants, idiots, lunatics, inebriates and inmates of the Caswell School: * * * Provided, further, where any adult person is * * * found to be incompetent from want of understanding to manage his affairs by reason of physical and mental weakness on account of old age, disease, or other like infirmities, the clerk may appoint a trustee in lieu of a guardian for said person. The trustee so appointed shall be subject to the laws now or which hereafter may be enacted for the control and handling of estates by guardians." G.S. 33-9 empowers clerks of the superior court to remove a guardian or trustee appointed under the provisions of Chapter 33 of the General Statutes and to appoint successors for such fiduciaries, and provides that it shall be the duty of the clerk to remove such fiduciary in certain specified instances. G.S. 36-9 confers upon the clerk of the superior court power and jurisdiction to accept the resignation of a guardian or trustee and to appoint a successor.

These statutes confer upon the clerk of the superior court the jurisdiction to appoint and to remove guardians and trustees appointed in lieu of guardians. The jurisdiction of the judge of the superior court over such matters is confined to the correction of errors of law upon appeal from the action of the clerk. *In Re Simmons,* 266 N.C. 702, 147 S.E. 2d 231. Consequently, the order of the judge in the present instance directing the clerk to appoint a cotrustee was in excess of the authority of the judge, that matter not having been

considered or passed upon by the clerk. The matter must, therefore, be, and is hereby, remanded to the superior court, with direction that the order of the judge from which this appeal is taken be corrected by deleting therefrom the provision directing and ordering the clerk to appoint a cotrustee. This is without prejudice to the authority of the clerk, if he finds it proper to do so, to appoint a cotrustee for the estate of Mrs. Michal.

In Re Estate of Smith, 200 N.C. 272, 156 S.E. 494, is distinguishable from the present case. There, the trust was a testamentary one and one of the two persons designated as trustee in the will failed to qualify. A beneficiary filed with the clerk a petition seeking the appointment of another to serve as cotrustee in lieu of the designee who had so failed to qualify. The clerk made such appointment. Upon appeal to the superior court, the judge vacated the appointment. This Court affirmed, saying:

> "Where joint trustees are appointed any one of them may execute the trust in the event of the death of his cotrustee or cotrustees or of the refusal or inability of the cotrustee or cotrustees to act. It is so provided by C.S. 1736 [G.S. 41-3]. The principle is this: When the testatrix appointed DeMerritt and Arend to manage her estate she indicated her choice of their joint services and most probably the services of the survivor in preference to those of some other person in whose selection she could have no part. * * *
>
> "The result is that the appointment of a cotrustee with DeMerritt is not a condition necessarily precedent to a faithful execution of the trust created in behalf of the petitioner. For just cause a court of equity might remove DeMerritt; but the petitioner does not ask his removal. If just cause is shown a cotrustee may be appointed, as the petitioner prays; but the necessity or expediency of such appointment should be inquired into and determined by a suit in equity in which all persons having a beneficial interest are made parties and given an opportunity to be heard and in which the complaint or bill should fully set forth facts which, if established, would justify a decree for the relief sought by the petitioner."

The present matter does not involve a testamentary trust. The determination of the number of trustees to serve and the selection of the original trustees were matters for the clerk, and he made those determinations. Whether a successor should be appointed for one of those originally named by him, who has since died, is a matter which

rests in the sound discretion of the clerk. This discretion he may exercise upon his own motion or upon the motion of any interested person.

Error and remanded.

STATE v. BOBBY LEE GOINES.

(Filed 17 April 1968.)

1. **Rape § 17—**

In order to constitute an assault with intent to commit rape, it is not necessary that the intent continue throughout the assault, but it is sufficient if at any time during the assault the defendant intended to accomplish his purpose notwithstanding any resistance on the part of the prosecutrix.

2. **Criminal Law § 71—**

Testimony of the prosecutrix that the defendant put his face close to hers, "trying to kiss me," *is held* competent as a shorthand statement of fact.

3. **Evidence § 35; Criminal Law § 33—**

Testimony by the prosecutrix that during an assault upon her the occupants of a nearby apartment building were yelling for her assailant to free her *is held* competent as part of the *res gestæ.*

4. **Criminal Law §§ 104, 106—**

Upon motion to nonsuit, the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom, and nonsuit should be denied where there is sufficient evidence, direct, circumstantial, or both, from which the jury could find that the offense charged has been committed and that defendant committed it.

5. **Rape § 18—**

Evidence in this case *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of assault with intent to commit rape.

6. **Criminal Law § 168—**

A *lapsus linguæ* in the charge which is immediately corrected by the court so that the jury could not have been misled will not be held for prejudicial error.

7. **Criminal Law §§ 113, 163—**

A slight inadvertence in stating the contentions of the parties or in recapitulating the evidence must be called to the court's attention in time for correction.

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

APPEAL by defendant from *Bowman, S.J.*, 28 August 1967 Special Criminal Session, WAKE Superior Court.

Criminal prosecution upon a bill of indictment charging defendant with assault with intent to commit rape upon one Mable Minnie Allen. The jury returned a verdict of guilty as charged. From a judgment of imprisonment in the State's prison for a term of not less than twelve nor more than fifteen years, defendant appeals.

The State's evidence tends to show that Mrs. Mable Allen, a widow, lived in the Vance Apartments at the corner of Edenton and Wilmington Streets in Raleigh. Christ Episcopal Church is located across Edenton Street from said apartments. Mrs. Allen is a clerk at the Sir Walter Hotel where she has worked for twenty years. She arrived home from work on July 18, 1967 at about 11:20 p.m. and took her little blind dog for a walk as was her custom each night. While standing in front of the apartment building about twelve feet from the steps where two large lights are located, one on each side of the steps, she saw a colored boy walking toward her. She was facing him, and when he reached a point beside her he pivoted and grabbed her around her arms and shoulders, pinning her arms down by her side. "I screamed as soon as he grabbed me. I was still on the sidewalk outside the Vance Apartments. . . . When he grabbed me and pinned my arms to my side, he turned towards the street from the sidewalk and I was screaming and he couldn't get through the cars . . . parked by the curb . . . on the side of the street that the Vance Apartments are on. So he lifted me up clear of the sidewalk, my feet, and walked down about two cars where there was an opening and he went through that opening and I was begging him to let me get my dog because he was blind. He never spoke, and somehow or other I got aloose from his clutches and fell down on the street. This was in Edenton Street, after I had gone between the cars. He got hold of me and started dragging me across the street. . . . He pulled me over the curb by Christ Church, which is directly in front of the Vance Apartments. . . . He pulled me across the curb and across the sidewalk, and into the church yard. I felt something hit me in the face, and I realized it was bushes. I was on my back and still screaming; I never stopped. When I was on the bush, I was on my back on the ground. He was dragging me on my side, which skinned my ankle and knee and elbow, hip, but when he got me to the bush, he turned me over on my back and held both of my arms down on the ground. I was flat on my back on the ground then. He was on top of me. My arms were like this and he was holding both arms down. I was begging him not to kill me. He never said a word, never opened his mouth. And during this time the people in the apart-

ments were screaming out the windows. There's nothing but young girls live over there, work around the . . . Capitol buildings, State buildings . . . they were screaming that they had called the police, to turn me aloose. He turned my left hand aloose and started — he dropped it down on my leg. It was . . . my left hand that he released. He was on top of me. He was kind of on his knees until he turned my hand aloose. He had both my legs together and he was across my body, and when he turned my hand aloose, he kind of fell down flat on my stomach. He put his face down close to mine, trying to kiss me, and with my left hand I turned my head away from him and I got my left hand under his chin and was pushing his face away. He drew his fist back and I was afraid he had a knife or something and I was pleading with him not to kill me. The people were still yelling in the building; all this time no car passed, which was a matter of minutes. He hit me with his fist. He hit my head on the left side. This was while his body was on my body. He put his right hand down on my left leg and started pulling at my clothes. I had on a shirt-waist dress. . . . He just started pulling and I heard my dress rip, and about this time is when the cars stopped and that is when he hit me. I blacked out for a second or two, and when I realized what was going on, he was gone. I don't really know when he left, but he left, and I crawled to the sidewalk . . . and this car had parked there and a young man was in it and I asked him to please help me. I stood up and he ran into the church yard. I told him a man had attacked me. . . . [B]y that time the people were there . . . and the police car came, several of them."

The prosecuting witness found her little dog and returned to her apartment. Two police officers came and asked her if she was able to go a short distance to identify a man they had found. A cab had been called to take her to the hospital, and she rode in the cab with two of the ladies who lived in the building. They followed a police car to a filling station at the corner of New Bern Avenue and Person Street, about three blocks from the Vance Apartments. Defendant Bobby Lee Goines was leaning over into the trunk section of a car parked there as if looking for something. When he straightened up and Mrs. Allen saw his face, she started screaming and identified him as the man who had attacked her. "When I saw the defendant on the sidewalk in front of the Vance Apartments and in the church yard, he had on shorts, kind of dark grey shorts, solid color, and a sport shirt that was checked, had small checks in it. He had on those same clothes when I saw him at the service station."

Mrs. Allen further stated: "I can absolutely identify State's Exhibit 3. It is a plaid sport shirt. It is the shirt the defendant had on

when he attacked me. He had on this shirt when I saw him at the service station."

Sergeant Ralph Johnson of the Raleigh Police Department received a call on the police radio at 11:26 p.m. to go to the Vance Apartments. He had received a description over the police radio of a colored male, including a description of the clothing he was wearing. After arriving at the church yard of Christ Church, he received additional description of Mrs. Allen's assailant. He went to the service station at the intersection of New Bern Avenue and Person Street and found seven or eight police officers already there along with six or seven white males, a service station attendant, the defendant and another colored male with a Mustang. Defendant was sitting about thirty feet off the street inside the service station lot with the trunk of his car, which is the hood really, open. He was bending over with his hands down in the motor doing something. He was wearing a shirt and a pair of shorts, State's Exhibits 2 and 3. From his knees down, he had several scratches on his legs and ankles, light scratches which appeared fresh. Officer Johnson spoke to defendant and asked him to straighten up. He did and at that time Mrs. Allen said "that's him" and started screaming. Defendant was thereupon placed under arrest.

At the close of the State's evidence, defendant moved for nonsuit which was denied. Defendant rested his case and renewed his motion for nonsuit which was again denied.

Defendant assigns as error (1) the admission of Mrs. Allen's statement that defendant was "trying to kiss her" during the assault; (2) permitting Mrs. Allen to testify that persons in the Vance Apartment building were yelling for defendant to turn her loose; (3) denial of defendant's motion for judgment of nonsuit; (4) the charge regarding the effect of defendant's plea of not guilty; and (5) inaccurate recapitulation of the evidence during the charge.

Boyce, Lake & Burns by F. Kent Burns, Attorneys for defendant appellant.

T. W. Bruton, Attorney General, and James F. Bullock, Deputy Attorney General, for the State.

HUSKINS, J. To constitute an assault with intent to commit rape, it is not necessary that the assailant retain such intent throughout the assault. It is sufficient if he at any time during the assault has an intent to gratify his passion upon the prosecutrix at all events, notwithstanding any resistance on her part. *State v. Petry,* 226 N.C. 78, 36 S.E. 2d 653; *State v. Williams,* 121 N.C. 628, 28 S.E. 405. "The

intent is necessarily an inference to be drawn from the defendant's acts, and it must be drawn by the jury and not by the judge, when there is any evidence." *State v. Mehaffey,* 132 N.C. 1062, 44 S.E. 107.

Defendant's first assignment of error is addressed to the statement of the prosecuting witness, admitted over his objection, that defendant put his face down close to hers, "trying to kiss me." The statement is admissible as a shorthand statement of fact. It is not error to permit a witness to testify that a hammer was in "good condition," *Watson v. Durham,* 207 N.C. 624, 178 S.E. 218; that a car was moving "real fast," *Benson v. Sawyer,* 257 N.C. 765, 127 S.E. 2d 549; that a stairway went up "as a corkscrew would," *Mintz v. Railway,* 236 N.C. 109, 72 S.E. 2d 38. An observer may testify to common appearances, facts and conditions in language which is descriptive of facts observed so as to enable one not an eyewitness to form an accurate judgment in regard thereto. *Tyndall v. Hines Co.,* 226 N.C. 620, 39 S.E. 2d 828.

The prosecuting witness testified over defendant's objection that the occupants of the Vance Apartments on the front entrance of the building "up to the third floor had raised their window and was yelling for him to . . . turn that woman aloose." This testimony is obviously competent as part of the *res gestæ.* "Exclamations or declarations spontaneously evolved by the event and relevant to the inquiry are a part of the *res gestæ,* and testimony thereof is competent as an exception to the hearsay rule." 3 Strong, N. C. Index 2d, Evidence § 35, and cases cited.

Failure of the court to nonsuit is defendant's third assignment of error. Motion to nonsuit requires the trial court to consider the evidence in its light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom. *State v. Cook,* 273 N.C. 377, 160 S.E. 2d 49; *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679; *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44. Regardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled. *State v. Norggins,* 215 N.C. 220, 1 S.E. 2d 533. The evidence in this case, when so considered, depicts a vicious assault on a prosecuting witness who positively identifies defendant as her assailant. There is substantial evidence of every material element of the offense, including intent. It was therefore a question for the jury.

Defendant assigns as error the following excerpt from the charge in parentheses: "Upon the defendant's arraignment under this bill of indictment, the defendant entered a plea of not guilty. (By his

plea of not guilty he not only denies that he is not guilty) — he denies that he is guilty of any crime with which he is charged, but he challenges and denies the credibility of the witnesses and the evidence upon which the State relies for conviction." This was a *lapsus linguæ* immediately corrected by the court so that the jury could not possibly have been misled. *State v. Withers,* 271 N.C. 364, 156 S.E. 2d 733. It was therefore harmless.

The prosecuting witness testified that during the assault and while defendant was on top of her, he started "pulling at my clothes." In reciting the evidence during the charge, the court used the words "pulling up her clothes" and "pulling up her dress" in lieu of the words actually used by the witness. Defendant assigns this as error.

Slight inadvertencies in recapitulating the evidence or stating contentions must be called to the attention of the court in time for correction. Objection after verdict comes too late. *State v. Cornelius,* 265 N.C. 452, 144 S.E. 2d 203; *State v. Case,* 253 N.C. 130, 116 S.E. 2d 429; *State v. Holder,* 252 N.C. 121, 113 S.E. 2d 15; *State v. Adams,* 245 N.C. 344, 95 S.E. 2d 902. Even so, the evidence indicates defendant was trying to remove the clothing or get it in such position as not to interfere with his purpose. It seems immaterial whether he was "pulling up" or "pulling down" or "pulling at."

Defendant has had a fair trial, free from prejudicial error, and the verdict and judgment entered below will be upheld.

No error.

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

STATE v. SIDNEY EARL O'NEAL.

(Filed 17 April 1968.)

1. Criminal Law § 104—

Contradictions and discrepancies, even in the State's evidence, are for the jury to resolve and do not warrant nonsuit.

2. Burglary and Unlawful Breakings § 5; Larceny § 7—

Testimony of accomplice *held* sufficient to be submitted to jury on issue of defendant's guilt of the felonious breaking and entry into a garage and the larceny of goods therefrom.

3. Criminal Law § 32—

Defendant is not required to prove his defense of alibi, and the burden remains on the State to prove his guilt beyond a reasonable doubt.

4. Criminal Law § 112—

The court's instruction on the burden of proof arising from defendant's evidence of alibi *is held* without error in this case.

APPEAL by defendant from *Canaday, J.*, September 1967 "R" Criminal Session of WAKE.

Criminal prosecution on an indictment containing three counts: (1) The first count charges a felonious breaking and entry into a storehouse with the felonious intent to commit the crime of larceny; (2) the second count charges the larceny of personal property from said storehouse by means of a felonious breaking and entry into the building; and (3) receiving stolen personal property well knowing at the time of its receipt that it had been theretofore feloniously stolen, taken, and carried away. Defendant, who was represented at the trial by counsel employed by himself, Earle R. Purser, pleaded not guilty.

The court submitted to the jury only the first two counts in the indictment. Verdict: Guilty of breaking and entering and guilty of larceny as charged in the indictment.

From a single judgment of imprisonment for not less than three years nor more than five years, defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General Bernard A. Harrell for the State.

William T. McCuiston for defendant appellant.

PER CURIAM. Defendant on appeal was represented by a lawyer employed by himself, William T. McCuiston.

The State and the defendant offered evidence. Defendant assigns as error the overruling of his motion for judgment of compulsory nonsuit made at the close of all the evidence.

The State's evidence tends to show the following facts: Sherrill Wade Daniel is 19 years old and has known defendant Sidney Earl O'Neal practically all of his life. About 7:30 or 8:00 p.m. on 5 October 1966, he saw defendant at a poolroom in the town of Wake Forest. They had a conversation about a garage building owned by James W. Carter, who operated it as a business by the name of Bradsher's Garage; they decided they would break into Bradsher's Garage, which is located on U. S. #1 North about two miles out of Wake Forest. Defendant, Daniel, Danny Oakley, and Steven O'Neal (a cousin of defendant's) left the poolroom in a blue, white-top Dodge convertible belonging to and driven by defendant. After the four persons had stopped by Choplin's Restaurant to eat, defendant drove to Bradsher's Garage and they "looked at the place and sort

of checked around some." It was about 10:00 or 10:30 p.m., and Bradsher's Garage was closed. After looking around Bradsher's Garage, they parked defendant's car about three-quarters of a mile from the garage on the other side of a church so that it would not attract attention as much as if it were parked in front of the garage. They left the car and went to Bradsher's Garage, and defendant and Daniel broke into the side door of the garage by prizing the lock off the wooden door with the use of a tire tool and screwdriver. Then defendant, Daniel, Steven O'Neal, and Danny Oakley went into the garage. Defendant and Daniel broke into a vending machine therein by the use of a tire tool. They took a quantity of cigarettes out of the vending machine and some money therefrom, and a battery charger was taken from the garage. After committing the robbery, all four of them went back to defendant's car and he drove to his home. In defendant's home they divided the cigarettes and the money four ways. The battery charger taken out of the store was left in defendant's possession. On the night of 5 October 1966 or sometime thereafter R. A. Branch, a Deputy Sheriff of the Wake County Sheriff's Department, received a call that Bradsher's Garage had been broken into. He went there and found that the lock on the door on the west side had been ripped off and the door was open. He went inside and found that the vending machines containing drinks and cigarettes had been broken open. He could not say of his own knowledge how many cigarettes were missing or how much money was missing. Counsel for the defendant and for the State stipulated that on 5 October 1966 James W. Carter owned a business known as Bradsher's Garage, and on that night a battery charger, 50 packs of cigarettes, and U. S. currency, with a total value of $87.25, were removed from Carter's place of business without his permission.

In April or May 1967 Officer Branch talked with Sherrill Wade Daniel at Camp Polk Youth Center, where he was serving time for forgery. After warning him of his constitutional rights, he and Branch engaged in a conversation. Daniel said that while he was at the Camp Polk Youth Center that "he wanted to complete everything that he was guilty of; that he wanted to get all of his crimes behind him, and admit his guilt." He then told Officer Branch about the break-in at Bradsher's Garage and the larceny of goods therefrom. From the record it appears that Danny Oakley was not prosecuted because he was a juvenile, and is now in a youth center. The evidence does not disclose how old Steven O'Neal is or what became of his case.

Defendant introduced evidence tending to show that he got off work about 5:30 or 6:00 p.m. on 5 October 1966 and went directly

to his home; that his wife was there; that his mother and brother came in, and his brother left around 8:00 or 8:30 p.m. and his mother left about 11:00 p.m.; that his father came in later in the night; that he did not leave his house during the night nor did he see the State's witness Sherrill Daniel that night; that his wife got up during the night to feed the baby and he (defendant) was in his bed asleep; and that he is not guilty and he did not participate in the offenses charged against him in the indictment. He also introduced evidence tending to show that when he heard there was a charge against him in this case, he looked up an officer.

There are some contradictions and discrepancies in the testimony of Sherrill Wade Daniel and Officer Branch as to the night Bradsher's Garage was broken into and goods stolen therefrom, but according to a stipulation by defendant's counsel and the State Bradsher's Garage was broken into on 5 October 1966. It is well-settled law in this jurisdiction 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 2d, Criminal Law, § 104. The State offered plenary evidence to carry the case to the jury on the charges in the indictment of breaking and entry and of larceny. The case of *S. v. Harrington,* 258 N.C. 529, 128 S.E. 2d 886, relied upon by defendant, is clearly distinguishable upon the facts. It is stated in the opinion in the *Harrington* case that "while the evidence tends to show that the defendants broke into and robbed a filling station somewhere, at sometime, it does not connect the appellant herein with the breaking and entering and the theft of merchandise from Holt's Grocery Store at Merry Oaks on the night of November 2, 1960." Here we have an eye witness and a participant in the robbery with the defendant who testified that pursuant to their prior agreement defendant and he broke into Bradsher's Garage and stole and carried away goods therein. The court properly submitted the case to the jury. This assignment of error is without merit and is overruled.

Defendant introduced evidence tending to establish an alibi. Defendant assigns as error the judge's charge in respect to an alibi in failing to charge the jury that defendant is not required to satisfy the jury of the truth of his allegations beyond a reasonable doubt.

The trial judge charged as follows in respect to the defense of an alibi:

> "Now, ladies and gentlemen, the defendant in this case has raised the defense of alibi; that is to say, he contends that he was not on the premises of Bradsher's Garage on the night of October 5, 1966; that he was at home; and that he remained at

home all during that evening and did not leave his home until the following morning when he went to work.

"Now, I instruct you that an alibi, meaning elsewhere, is not properly speaking a defense within an accurate meaning of the word 'defense,' but an alibi is a fact which may be used to call and question the identity of the person charged, or the entire basis of the prosecution; and I instruct you, too, ladies and gentlemen, that the burden of proving an alibi, when the defendant raises an alibi in the defense, the burden of proving such alibi does not rest upon the State. The burden of proof never rests upon the defendant to show his innocence, or to disprove the facts necessary to establish the crime with which he is charged. The defendant's presence at and participation in the crime charged are affirmative material facts that the prosecution must show beyond a reasonable doubt to sustain conviction of the defendant.

"Now, for the defendant to say he was not there is not an affirmative proposition. It is a denial of the existence of a material fact in the case. Therefore, the defendant's evidence of an alibi is to be considered by you like any other evidence, wherein the defendant tries to refute or disprove the evidence of the State; and if, upon consideration of all of the evidence in the case, including the defendant's evidence with respect to an alibi, there arises in your mind a reasonable doubt as to the defendant's guilt, then he should be acquitted."

In the recent case of *S. v. Lentz,* 270 N.C. 122, 153 S.E. 2d 864, the Court said: "Even though a defendant offers evidence of an alibi, he is not required to prove it. The burden is still cast upon the State to prove his guilt beyond a reasonable doubt."

The court's charge on an alibi, while not happily phrased, is in substantial compliance and accord with our precedents. *S. v. Spencer,* 256 N.C. 487, 124 S.E. 2d 175; *S. v. Minton,* 234 N.C. 716, 68 S.E. 2d 844; *S. v. Bridgers,* 233 N.C. 577, 64 S.E. 2d 867; *S. v. Jaynes,* 78 N.C. 504. This assignment of error is overruled.

We have carefully examined the other assignments of error in the record. The trial court correctly and clearly applied the law to the facts in evidence and gave a charge the jury could not misunderstand. All defendant's assignments of error are overruled.

In the trial below we find

No error.

OLAN MILLS, INC., OF TENNESSEE v. CANNON AIRCRAFT EXECUTIVE TERMINAL, INC.

(Filed 1 May 1968.)

1. **Bailment § 1—**

Evidence and allegation to the effect that plaintiff turned over possession of his airplane to defendant for repairs are sufficient to establish the relationship of bailor and bailee in regard to the airplane while in defendant's control or possession.

2. **Bailment § 3—**

Plaintiff's evidence to the effect that when he delivered his airplane to defendant for repairs of the radio the plane was in good condition and that while the plane was in defendant's possession and control it became damaged, makes out a *prima facie* case of actionable negligence against the defendant in the absence of some fatal admission or confession.

3. **Trial § 23—**

When the facts in evidence make out a *prima facie* case, it is properly submitted to the jury.

4. **Negligence § 1—**

The term "act of God" is used to designate the cause of an injury to person or property where such injury is due directly and exclusively to natural causes without human intervention and could not have been prevented by the exercise of reasonable care and foresight.

5. **Negligence § 20—**

An "act of God" must be specifically pleaded.

6. **Negligence § 1—**

The term "act of God" in its legal sense applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them.

7. **Negligence § 8—**

Legal responsibility for negligence joined with an act of God depends upon the fact that the negligence operated as an efficient and contributing cause of injury.

8. **Bailment § 3—**

Plaintiff's evidence was to the effect that he delivered his airplane in good condition to defendant for repair of the radio and that while in defendant's possession the plane was damaged. The evidence was sufficient to be submitted to the jury. *Held:* Defendant's evidence that a severe thunderstorm, accompanied by hail and by gusts of wind of a force up to 92 miles per hour, occurred while the plane was in its possession does not rebut the *prima facie* case on the ground that the plaintiff's damages resulted from an act of God.

9. **Negligence § 23—**

Proximate cause is ordinarily to be determined by the jury as a fact

from the attendant circumstances, and conflicting inferences of causation arising from the evidence carry the issue to the jury.

10. Negligence § 28—

An instruction that plaintiff could not recover if the sole proximate cause of its damage was an act of God but that if defendant were negligent and if such negligence joined with a storm as one of the proximate causes of plaintiff's damages, then defendant would be liable, *held* without error.

11. Evidence § 48—

Where there is sufficient evidence to support a finding that the witness in question was an expert in his field, it will be presumed that the court, before admitting his expert testimony, found that he was an expert, notwithstanding the absence of a specific finding to this effect, and a general objection to his testimony without specific objection to his qualifications will be considered only as to the competency of the particular question.

12. Appeal and Error § 48—

An objection is waived when evidence of the same import is thereafter admitted without objection.

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

APPEAL by defendant from *Hasty, S.J.*, 2 January 1967 Schedule D Assigned Session of MECKLENBURG. Docketed and argued as Case No. 280, Fall Term 1967, and docketed as Case No. 279, Spring Term 1968.

Civil action for damages for destruction of an airplane while in defendant's possession for repairs to its radio.

From a verdict and judgment in favor of plaintiff, defendant appeals.

Boyle, Alexander & Carmichael by R. C. Carmichael, Jr., for defendant appellant.

Hedrick, McKnight & Parham by Philip R. Hedrick for plaintiff appellee.

PARKER, C.J. Defendant assigns as error the overruling of its motion for judgment of compulsory nonsuit made at the close of all the evidence, and certain alleged errors in the admission of evidence and in the court's charge to the jury.

Plaintiff's evidence tends to show: The plaintiff is a Tennessee Corporation engaged in the business of portrait photography with its principal place of business in Chattanooga, Tennessee. In July 1962 it operated two studios in Charlotte. Defendant is a North Carolina corporation with its principal place of business in Charlotte. It operates for profit a terminal and service facilities at Charlotte Municipal Airport, and in the course of its business maintains hang-

ers, service areas, and areas for parking and tying down aircraft.

On 23 July 1962 plaintiff's 1948 twin-engine Beechcraft airplane was piloted by its employee, Olan Mills, II, from Columbia, South Carolina, to Charlotte, arriving at Charlotte Municipal Airport about 12 noon. Mills wanted to have the plane's radio worked on, and had previously had radio work done by defendant. Mills was accompanied on his trip to Charlotte by Mr. and Mrs. J. M. McMillan and James E. Jolly, all employed by plaintiff corporation. Upon landing, Mills taxied the plane to the defendant's terminal and was directed to park in front of the terminal. He parked the plane, set the brake, locked the tail wheel to keep it from swiveling, and went into defendant's radio shop. He told the repairman that he had some radio work that needed to be done. Then Mills and the other three members of his party went to the terminal office and called someone on the telephone to pick them up and drive them into Charlotte. When the group left the terminal, the plane was still in the same place Mills had parked it. Mills was an experienced pilot, having been licensed in 1946; in 1952 he entered the Army, completed the Army aviation program, and flew while in the service.

Plaintiff alleges in its complaint that it delivered its airplane to defendant for repairs. Defendant admits in its answer that the plane was left with it. According to the plaintiff's evidence, and according to the allegation in its complaint and admissions in defendant's answer, the relationship of plaintiff and defendant was that of bailor and bailee; defendant in its brief admits this relationship. Under the circumstances defendant was under a legal duty to exercise ordinary care to protect plaintiff's airplane against loss, damage or destruction, and to return it in as good condition as when it received it. Liability for any damages to the airplane while in defendant's possession turns upon the question of the presence or absence of actionable or ordinary negligence on its part. *Electric Corp. v. Aero Corp.*, 263 N.C. 437, 139 S.E. 2d 682; *Dellinger v. Bridges*, 259 N.C. 90, 130 S.E. 2d 19; *Insurance Co. v. Motors, Inc.*, 240 N.C. 183, 81 S.E. 2d 416; *Vincent v. Woody*, 238 N.C. 118, 76 S.E. 2d 356; *Beck v. Wilkins*, 179 N.C. 231, 102 S.E. 313; *Hanes v. Shapiro*, 168 N.C. 24, 84 S.E. 33.

Plaintiff's evidence also tends to show the following: While Mills and his party were in Charlotte, a storm arose, with heavy rain and wind. When Mills returned to the airport about 5:30 p.m. and saw the Beechcraft it was about one hundred fifty feet south of where he had left it, wedged between a tree and a telephone pole. It was severely damaged. J. M. McMillan returned to the airport about 5:15 p.m. in an automobile with his wife and James E. Jolly. He drove up to the plane to see if Mr. Mills was there. He looked to

see if the plane had been secured and it had not. At that time the storm was increasing and McMillan drove back to the office area and sat in the car until the storm ended. McMillan had flown with Mills before and had served as a crew chief in charge of aircraft service and security in the Army Air Corps from 1942 to 1945.

Mrs. Willa McMillan testified that she "did not see any security ties of large chains or ropes or anything of that nature attached to the aircraft" when her husband drove up to it in the automobile. James E. Jolly also testified that he saw no lines or chains tying down the airplane. The McMillans and Jolly stated that they observed the plane again after the storm ended and that it was some distance from where they had last seen it and was severely damaged.

W. J. Connell, the operator of a repair and service shop for executive aircraft at Love Field in Dallas, Texas also testified for the plaintiff. In July 1962 he had been in the aviation business for 33 years; for 3½ years during World War II he was overseas as a technical adviser to the Air Corps with the duty of inspecting aircraft that had been damaged in battle or from other causes to determine if the planes were economically repairable; during this time he examined approximately 2000 aircraft, made detailed reports, and followed their repair and return to service. Connell testified that he had examined an average of approximately 100 aircraft per year in 43 states and several foreign countries since World War II, including many Beechcrafts similar to the one owned by the plaintiff. On the Saturday following the storm, Connell examined plaintiff's aircraft and determined that the repair cost would be approximately $46,000, and that it would not be economically feasible to repair the aircraft. He testified that the generally accepted practice for securing an aircraft when it was not stored in a hanger was to place chocks in front and rear of each main wheel, as well as tying the plane down with ropes, cables or chains; that the generally accepted practice for tying down an aircraft that is not equipped with tie-down loops on the wings was to tie it down by the landing gear.

Plaintiff's evidence tends to show that it delivered its airplane to defendant in good condition except for the trouble with the radio; that defendant accepted it for the purpose of checking and repairing the radio; that thereafter defendant had possession and control of it; that when plaintiff's employee returned to pick it up he found it in a badly damaged condition. This made out a *prima facie* case of actionable negligence against defendant, and, in the absence of some fatal admission or confession, was sufficient to take the case to the jury. *Electric Corp. v. Aero Co., supra; Dellinger v. Bridges,*

supra; Insurance Co. v. Motors, Inc., supra; Vincent v. Woody, supra; Wellington-Sears Co. v. Finishing Works, 231 N.C. 96, 56 S.E. 2d 24; *Oil Co. v. Iron Works,* 211 N.C. 668, 191 S.E. 508; *Hutchins v. Taylor-Buick Co.,* 198 N.C. 777, 153 S.E. 397; *Beck v. Wilkins, supra; Hanes v. Shapiro, supra.*

This Court said in *Insurance Co. v. Motors, Inc., supra,* at 187:

> "When the facts in evidence make out a *prima facie* case, it is one for submission to the jury. As stated by Connor, J., in *Ross v. Cotton Mills, supra* [140 N.C. 115, 52 S.E. 121]: 'The defendant may, or may not, introduce evidence as it is advised. By failing to do so, it admits nothing, but simply takes the risk of *non persuasion.* This is what is meant by going forward with testimony. He, by this course, says that he is willing to go to the jury upon the plaintiff's evidence.' If the defendant elects to offer evidence tending to explain the cause of the fire, the reasonableness of the explanation is for the jury. *Springs v. Doll,* 197 N.C. 240, 148 S.E. 251. If the defendant offers evidence tending to show what happened with reference to the car while in its possession as bailee, the credibility of such evidence is for the jury. If the evidence offered by the defendant, assuming credibility, would exonerate the defendant, it would be entitled to a peremptory instruction thereon. *Travis v. Duckworth,* 237 N.C. 471, 75 S.E. 2d 309. The significance of '*prima facie* case' has been stated clearly and often. *Speas v. Bank,* 188 N.C. 524, 125 S.E. 398; *Hunt v. Eure,* 189 N.C. 482, 127 S.E. 593; *Vance v. Guy,* 224 N.C. 607, 31 S.E. 2d 766; N. C. Evidence, Stansbury, Section 203."

Defendant relies on *Morgan v. Bank,* 190 N.C. 209, 129 S.E. 585, and *Swain v. Motor Co.,* 207 N.C. 755, 178 S.E. 560, in which judgments of involuntary nonsuit were affirmed. However, those two cases are easily distinguishable from the one now before the Court. In *Morgan v. Bank, supra,* it appeared affirmatively from undisputed evidence that plaintiff's bonds had been stolen by burglars, who blew open the vault with high explosives and broke into the safety deposit boxes by use of a sledge hammer and cold chisel, there being no evidence of negligence on the part of the defendant. In *Swain v. Motor Co., supra,* it appeared affirmatively from undisputed evidence that a third party had stolen plaintiff's car under circumstances which negatived negligence on the part of defendant.

The defendant contends that a judgment of involuntary nonsuit should nevertheless have been entered, for the reason that its evi-

dence clearly rebuts plaintiff's *prima facie* case. With that contention we do not agree.

Defendant's evidence tends to show: That about 4 p.m. two of defendant's employees moved the plaintiff's plane from where it had been parked to the tie-down area of defendant's ramp; that the plane was tied down by chains on each main landing gear and on the tail wheel; that chocks were placed in front and behind the main wheels; that neither the controls nor the tail wheel were locked, and the brake was not set; that the chain around one of the main landing gear was placed around the polished metal shock absorber strut and that the chain could have dropped down on top of the painted surface of the strut and would have marked it if something pulled against it; that the chains were fastened with "S" hooks; that at the time the plane was moved it was not raining, but thunderheads were building up from the north; that defendant's employees moved several planes that afternoon and there were a total of about 16 or 17 planes on defendant's ramp; that only plaintiff's plane and another plane, designated an AT-6, came loose; that upon examination of the area where plaintiff's plane had been tied down it was discovered that the "S" hooks had been straightened out. Sergeant Robert L. McAnulty, a member of the North Carolina Air National Guard stationed at the airport, was also a witness for defendant. He testified that at his facility two aircraft which were tied down with ropes in the approved military manner had been damaged by the storm; that he did not receive any weather information from the terminal building that day; that he heard defendant's employees testify and demonstrate in court how they tied down plaintiff's plane, and that in his opinion an airplane mechanic would place a chain around the polished metal surface of the main strut only in "true desperation"; that he observed plaintiff's plane around 5 p.m. and *saw no evidence of its being tied down.*

A meteorologist from the U. S. Weather Bureau at the airport testified that a severe thunderstorm passed over the area that afternoon and that thunder was first heard at 5:07 p.m.; that at 5:22 it was raining heavily with small hail and the winds were blowing from the north at 30 knots, gusting to 50 to 55 knots, or 60-61 mph; that the highest velocity of the gusts was 80 knots or 92 mph at 5:20; that winds 75 mph are hurricane force, but gusts in this area do not classify a storm as a hurricane; that the first inkling he had of the approach of the storm was a large accumulation of thunderstorm type clouds from the north-northwest; that his office probably received a report from the Aviation Severe Weather Report Station at

Kansas City forecasting severe thunderstorms and gusts 60 mph developing in western North Carolina; that the facility of the Federal Aviation Authority at Hickory broadcast hourly weather observations to anyone having a receiver.

Other witnesses for the defendant testified as to the heavy rain and the storm damage to buildings and other aircraft. The president of defendant corporation testified that he observed an Air Commander aircraft blown around and damaged although one chain remained fastened; that he did not know who tied down the AT-6 on defendant's ramp or how it was tied down; that on another ramp two light aircraft came loose and intermingled. An employee of an aircraft sales and service company testified that two of his aircraft were blown around and that the "S" hooks had been straightened out. There was also evidence that two Eastern Airlines passenger aircraft were damaged by the wind, but there was no evidence that they had been tied down. Defendant's clerk-secretary testified that defendant had a weather teletype in its office and also a radio to monitor different frequencies.

From the above evidence the defendant contends that it had no advance warning of the approach of the storm and, therefore, it acted with ordinary care in protecting plaintiff's airplane; that the damage to the plaintiff's plane was proximately caused by an "act of God" and was not due to any negligence on its part or, that regardless of its negligence, the plane would still have been damaged by the storm.

"The term 'act of God' is used to designate the cause of an injury to person or property where such injury is due directly and exclusively to natural causes without human intervention, and could not have been prevented by the exercise of reasonable care and foresight. . . ." 65 C.J.S. Negligence § 21(b). Defendant in its answer did not raise this issue or specifically plead it as a defense. An "act of God" must be specifically pleaded. 65A C.J.S. Negligence § 197. Nevertheless, the trial court allowed defendant to introduce evidence on this question, and instructed the jury just as if an "act of God" had been specifically pleaded.

Of course, a plaintiff is not entitled to maintain an action unless the facts alleged constitutes a cognizable cause of action. An "act of God" alone is not a sufficient predicate for an action for damages. This Court, in defining an "act of God," has said: "The term 'act of God,' in its legal sense, applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them." *Midgett v. Highway Commission*, 260 N.C. 241, 132 S.E. 2d 599.

"Legal responsibility for negligence joined with an act of God depends upon the fact that the negligence operated as an efficient and contributing cause of injury. Otherwise, the case will fall within the rule that no action lies for an injury attributable to an unavoidable accident. 'One who is under a duty to protect others against injury cannot escape liability for injury of such others on the ground that it was caused by an act of God unless the natural phenomenon which caused the injury was so far outside the range of human experience that ordinary care did not require that it should be anticipated or provided against, and it is not sufficient that such phenomena are unusual or of rare occurrence.' 65 C.J.S. Negligence, p. 433." *Bennett v. R. R.*, 245 N.C. 261, 96 S.E. 2d 31, 62 A.L.R. 2d 785, cert. den. 353 U.S. 958, 1 L. Ed. 2d 909.

In *Kindell v. Franklin Sugar Refining Co.*, 286 Pa. 359, 363, 133 A. 566, 568, the Supreme Court of Pennsylvania tersely and accurately said: "He whose negligence joins with the act of God in producing injury is liable therefor." See also *Lawrence v. Power Co.*, 190 N.C. 664, 130 S.E. 735; *Comrs. v. Jennings*, 181 N.C. 393, 107 S.E. 312; *Ridge v. R. R.*, 167 N.C. 510, 83 S.E. 762; *Ferebee v. R. R.*, 163 N.C. 351, 79 S.E. 685.

We are of the opinion that the storm which occurred in the Charlotte area on the afternoon of July 23, 1962 was not so extraordinary that the history of climatic variations and other conditions of the particular locality afforded no reasonable warning of it. The storm was not "so far outside the range of human experience that ordinary care did not require that it should be anticipated or provided against." *Bennett v. R. R., supra.* In fact, it appears from the defendant's own evidence that it had ample warning of the approach of the storm. All the defendant's witnesses placed the time at which the plane was moved at around 4 p.m., over an hour before the storm actually struck. One of the employees who moved the plane testified that at the time there were thunderheads building up from the north. Furthermore, it appears that there was weather information forecasting the storm available to the defendant, whether or not defendant actually took advantage of it. Also, one of defendant's own witnesses testified that he observed the plaintiff's plane at 5 p.m., and that it had not been tied down at all. The testimony of the defendant's witnesses who claimed that they actually tied the plane down was such that it could be reasonably inferred that the plane was tied down improperly and negligently. Defendant's evidence also indicates that of the 16 or 17 planes on its ramp, only two were blown loose by the wind.

It has been held that changes in the weather are conditions which

the bailee of an aircraft is bound to anticipate as likely to occur. In *Zanker v. Cedar Flying Service, Inc.*, 214 Minn. 242, 7 N.W. 2d 775, defendant was in possession of plaintiff's plane under an arrangement which amounted to a bailment. The plane had not been in use on the day of the storm, but was outside on the field with its wheels blocked. It was not anchored or tied down. Evidence tended to show that there was room for it in the hanger but that the doorways to the hanger were blocked by one or two large planes on which repair work was being done. The airport was equipped with radio reception equipment but paid no attention on that morning to the weather report. The weather was threatening, but the thunderstorm and wind squall that damaged the plane did not develop until about noon. The storm started in the vicinity of defendant's airport and traveled to northeast Minneapolis, where it developed into a tornado. When the wind struck the airport it became necessary to move the two planes upon which the repair work was being done in order to put the outside planes into the hanger. Defendant put three other planes into the hanger. This took so much time that it did not reach plaintiff's plane in time to get it into the hanger before the wind struck with such force as to lift the plane into the air, causing it to make a complete loop and land with tremendous force on top of one of the large planes being repaired. In affirming a verdict and judgment for the plaintiff, the Court said: "Changes in weather are conditions which a bailee is bound to anticipate as likely to occur. . . . Care commensurate with such likely changes must be exercised, and the effect of high or squally winds upon a plane as light as a 'Piper Cub' must be taken into account by the bailee. We think the evidence was ample to sustain a finding of negligence on the part of the defendant."

In *Shephard v. Graham Bell Aviation Service, Inc.*, 56 N.M. 293, 243 P. 2d 603, plaintiff's airplane broke away from its moorings where defendant had secured it as part of a storage arrangement during a violent windstorm. The Civil Aeronautics Authority had given ample warning that the vicinity would be visited by very heavy winds on the day in question. Defendant's employees had tied the plane down with a "single tie" which proved insufficient to hold it. The wind was quite strong in the afternoon and reached a velocity of 90 miles an hour during the night. In affirming a verdict and judgment for the plaintiff, the Court said:

> "We are satisfied if the defendant's manager, who was living not more than 100 yards from the place the plane was tied down, had heeded the warnings given him and followed the ex-

ample of a neighboring airport manager by putting additional ties on his planes and staying on the job as did his neighbor, the plaintiff's plane would not have been destroyed. On the contrary, he stayed in his house and, as found by the trial court, left the worry to the insurance carrier.

"A defendant may not find shelter behind the plea the injury was caused by an act of God when, but for his concurring negligence, the injury would not have occurred."

In *Rutledge v. Des Moines Flying Service, Inc.*, 254 Iowa 809, 119 N.W. 2d 262, plaintiff's plane overturned in a thunderstorm while parked in defendant's tie-down area. The relationship of the parties was that of bailor and bailee, the defendant having control of the plane for the purpose of repairing its radio. Plaintiff's plane was tied down by chains at each wing, but not at the tail. When defendant's agents saw the storm approaching, they checked the tie-downs on the planes, but still did not tie down the tail on the plaintiff's plane. The Court, in affirming a judgment and verdict for the plaintiff, said: "From the evidence the jury could find that the defendant's employees did not properly perform their duties of checking and securing planes in its area when a storm was approaching." It should be noted that one of the defendant's exceptions was to the failure of the court to allow its amendment to allege an "act of God." The Iowa Supreme Court held that the trial court was within its discretion in refusing to allow the amendment after trial commenced, pointing out that evidence in support of the defense of an "act of God" was admitted by the trial court and was before the jury on the question of proximate cause, and that the denial of the amendment could not have seriously prejudiced the defendant.

In *Alamo Airways, Inc. v. Benum*, 78 Nev. 384, 374 P. 2d 684, the main question presented to the Supreme Court of Nevada was whether the bailee had sustained the burden of proving that damage to the bailed airplane was due to causes consistent with due care on its part. The Court held that the bailee of a bailment for hire of an airplane delivered to the bailee for storage in the bailee's "tie-down area" was liable for damage to the bailed airplane because of its negligence in using inadequate tie-downs to withstand the pressure of anticipated winds where the wind which damaged the plane could have been, and was foreseen. Plaintiff's plane was stored in defendant's open tie-down area and defendant's employees performed the tie-down procedures. The plane was tied down by chains at each wing and the tail. The chains were attached to the tie-down rings on the underside of the plane by use of "S" hooks. Weather condi-

tions were described by the Nevada Court as follows: "The morning of July 28, 1958, was calm. Hourly readings by the United States Weather Bureau at the airport, a short distance from where the planes were moored, registered from calm to ten knots an hour. At noon it was again blowing five knots and characterized as light. A thunderstorm, typical to a July day, came up around noon or 1 o'clock 'as is normal in such thunderstorm conditions.' Such storms are common in that area at that time of the year. The United States Weather Bureau attendant characterized it as 'a common thunderstorm.' The weather bureau reported early that morning that there would be winds all that day. On the preceding day, July 27, it reported that there would be high winds all day on the 28th. At 12:45 p.m. the wind registered forty-one knots and at 1:25 p.m., forty knots." Plaintiff's airplane was torn loose from its moorings, and severely damaged. Two other planes owned by defendant were likewise torn loose and damaged. It was demonstrated both by testimony of witnesses and photographs that the "S" hooks had been stretched out almost straight. Nothing in the evidence indicated that the plaintiff's plane would have been torn loose if the "S" hooks had remained intact. The Court said that although there was some testimony to the effect that the high wind was a "twister," there was also substantial evidence to the contrary. The Nevada Court further said: "Where it is contended that the damage resulted from an act of God, such act, to avail the defendant, must be such a providential occurrence or extraordinary manifestation of the forces of nature that it could not reasonably have been foreseen, and the effect thereof avoided by the exercise of reasonable prudence, diligence and care, or by the use of those means which the situation renders reasonable to employ." The Court said that ordinary and reasonable precautions would require the use of "S" hooks that would not straighten out by reason of a foreseeable wind pressure applied to the plane. A verdict and judgment for the plaintiff was affirmed.

Plaintiff's evidence, and defendant's evidence favorable to plaintiff, would permit, but would not compel, a jury to find as a reasonable inference that defendant had, or in the exercise of ordinary care, could have had ample warning of the approach of the storm and negligently failed to secure properly plaintiff's plane against the expected dangerous weather condition. Proximate cause is ordinarily a question for the jury. It is to be determined as a fact from the attendant circumstances. Conflicting inferences of causation arising from the evidence carry the case to the jury. *Pruett v. Inman*, 252 N.C. 520, 114 S.E. 2d 360. Interpreting plaintiff's evidence with that degree of liberality required on motions for judgment of compulsory

nonsuit, we think, and so hold, that plaintiff's evidence, and defendant's evidence favorable to plaintiff, makes out a *prima facie* case of actionable negligence against defendant, which defendant's evidence does not affirmatively, clearly, and unambiguously rebut, and that on the facts of the instant case decision on the motion for judgment of compulsory nonsuit is controlled by our decisions in *Electric Corp. v. Aero Co., supra; Dellinger v. Bridges, supra; Insurance Co. v. Motors, Inc., supra; Wellington-Sears Co. v. Finishing Works, supra; Oil Co. v. Iron Works, supra; Hutchins v. Taylor Buick Co., supra; Beck v. Wilkins, supra.* The facts are distinguishable from the facts in *Swain v. Motor Co., supra,* and *Morgan v. Bank, supra.* The trial court correctly overruled defendant's motion for judgment of compulsory nonsuit at the close of all the evidence.

Defendant assigns as error the alleged failure of the court to charge the jury that there would be no liability if it found that the "act of God" was of such overwhelming and destructive character that it would have produced the damages in question, regardless of any negligence on the part of the defendant. As stated earlier, defendant did not plead an "act of God." Defendant was nevertheless allowed to introduce evidence in support of such a defense, and the court charged the jury as to the defense. The charge is free from prejudicial error. The trial judge charged, in substance, that one is not liable for damages caused by an "act of God" where there is no fault or negligence on his part; that one whose negligence joins with the "act of God" and is one of the proximate causes of the injury or damage is liable therefor; that the plaintiff could not recover if the sole proximate cause of plaintiff's damage was the "act of God," *i.e.,* the storm; that if the defendant was negligent and if such negligence joined with the storm as one of the proximate causes of plaintiff's damages, then defendant would be liable; and that the burden of proof was on the plaintiff to satisfy the jury by the greater weight of the evidence that the defendant was negligent and that such negligence was a proximate cause of the plaintiff's damages.

It appears, therefore, that the trial judge made it clear in his charge that for the plaintiff to prevail any negligence by the defendant would have to be a proximate cause of the damages. In *Vincent v. Woody, supra,* Barnhill, J. (later C.J.), writing for the Court said:

> "Ordinarily the presiding judge must instruct the jury extemporaneously from such notes as he may have been able to prepare during the trial. To require him to state every clause and sentence so precisely that even when lifted out of context it expresses the law applicable to the facts in the cause on trial

with such exactitude and nicety that it may be held, in and of itself, a correct application of the law of the case would exact of the *nisi prius* judges a task impossible of performance. The charge is sufficient if, when read contextually, it clearly appears that the law of the case was presented to the jury in such manner as to leave no reasonable cause to believe that it was misled or misinformed in respect thereto."

Such is the case here. The charge, when read as a composite whole, leaves us with the impression that the jury must have understood that the defendant was liable only for damages which proximately resulted from its negligence.

Defendant also assigns as error the trial court's allowing plaintiff's witness, Mr. Connell, when he was recalled as a witness for plaintiff after defendant rested, to answer questions as to what, in his opinion, would have happened to the tail wheel assembly and the polished metal cylinder on the main landing gear if the wind had blown against the plane with enough force to straighten out the "S" hooks on the chains allegedly used by the defendant. Mr. Connell stated that there would have been, in his opinion, some very deep dents in the cromolic tubing on the tail wheel assembly and the paint would have been peeled off in the area where the chain came in contact with the tubing, and that there would have been deep scratches caused by the chain in the chrome finish on the main gear strut assembly, and that in making his examination he found no such indications. Defendant contends that this evidence was prejudicial on several grounds: that the witness was not an expert; that his testimony was not in response to a proper hypothetical question; and that by stating what would have happened his testimony invaded the province of the jury. Sharp, J., said the following for the Court in *Teague v. Power Co.*, 258 N.C. 759, 129 S.E. 2d 507:

". . . Nevertheless, the rule with us is that the failure of the trial judge to specifically find that the witness is an expert before allowing him to give expert testimony will not sustain a general objection to his opinion evidence if it is in response to an otherwise competent question, and if there is evidence in the record on which the court could have based a finding that the witness had expert qualifications. In such a case, it will be assumed that the court found the witness to be an expert; otherwise, it would not have permitted him to answer the question. Stansbury, Evidence, § 133; *State v. Coal Co.*, 210 N.C. 742, 188 S.E. 412; *Summerlin v. R. R.*, 133 N.C. 551, 45 S.E. 898; *Brewer v. Ring and Valk*, 177 N.C. 476, 486, 99 S.E. 358.

"When the opinion of a witness is called for before the court has made a specific finding that he is an expert, if counsel wish to question the witness' qualifications, they should object specifically on this ground. If they confined themselves to a general objection it will be considered as applying only to the competency of the particular question; but the rule is otherwise if there is no evidence of the witness' special knowledge or expert qualifications. *State v. Secrest,* 80 N.C. 450; *Bivings v. Gosnell,* 141 N.C. 341, 53 S.E. 861."

Defendant's objections to the questions asked the witness were general objections and were not based on the witness' qualifications to answer the questions. While it is true the trial court did not specifically find that Mr. Connell was an expert, there is an abundance of evidence in the record, which we have stated above, showing that Mr. Connell had the requisite skill, experience, and learning to qualify him as an expert on the subject about which he testified; and that he was better qualified than the jury to draw appropriate inferences from the facts. When Mr. Connell was first on the stand in plaintiff's behalf, he testified as an expert witness without any objection by defendant. It was only after defendant had rested and Mr. Connell was recalled to the stand by plaintiff that defendant offered any objection to his testimony. It must be borne in mind that Mr. Connell examined the damaged plane and was testifying in part on what he saw and in part as an expert witness. Furthermore, defendant's own witness testified on cross-examination, without objection by defendant, that if a chain pulled against the painted surface of the strut or the polished metal, it would mark it. This was substantially the same evidence to which defendant later objected. An objection is waived when evidence of the same import is admitted without objection. *Dunes Club v. Insurance Co.,* 259 N.C. 294, 130 S.E. 2d 625; *Teague v. Power Co., supra; In re Will of Knight,* 250 N.C. 634, 109 S.E. 2d 470. While counsel's questions and defendant's answers might have been more precisely worded, it is clear that the evidence was the statement of the witness' opinion and that the jury could only have considered it as such. *Teague v. Power Co., supra.* In view of the above facts, the testimony of witness Connell was not prejudicial to the defendant.

In the trial below we find

No error.

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

CLIFFORD DELAIN DAVIS v. STATE OF NORTH CAROLINA.

(Filed 1 May 1968.)

1. **Criminal Law §§ 124, 134, 161—**

An appeal itself is an exception to the judgment and to matters appearing on the face of the record proper, and an opinion by the Supreme Court finding no error in the trial below is a tacit affirmation that the Court has examined the record proper and has found that the verdict is valid and unambiguous and that the sentence imposed is supported by the verdict.

2. **Criminal Law §§ 124, 126—**

A defendant has a substantial right in a verdict, and while a verdict is not complete until accepted by the court for record, the court does not have an unrestrained discretion in accepting or rejecting a verdict, but must examine its form and substance to prevent a doubtful or insufficient verdict from becoming the record of the court.

3. **Criminal Law § 124—**

The verdict in a criminal action should be clear and free from ambiguity.

4. **Same—**

A verdict should be considered in connection with the issue being tried, the evidence, and the charge.

5. **Criminal Law § 126—**

Either the defendant or the State has the right upon request in apt time to have the jury polled to enable the court and the parties to ascertain with certainty that a unanimous verdict has been reached and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented.

6. **Criminal Law §§ 124, 126— Clerk held not to have suggested or dictated verdict to the jury.**

After ascertaining that the jury had found the defendant not guilty of rape as charged, the clerk asked the jury if they found defendant "guilty of assault with intent to commit rape or not guilty," to which the jury merely replied "Yes." The clerk then stated, "Harken to your verdict, as the court recordeth it. You say (defendant) is guilty of assault with intent to commit rape, whereof he stands charged?" and the jury again replied "Yes." Upon being polled each juror answered that he found the defendant guilty of assault with intent to commit rape. *Held:* The clerk did not suggest or dictate to the jury what their verdict should be, but was merely ascertaining what the jury's verdict was, and any uncertainty or irregularity in the taking of the verdict was cured by the polling of the jury.

PETITION to rehear a petition for writ of *certiorari* which was denied by this Court on 7 February 1967.

For a clear understanding of the proceeding here it is necessary to state the history of this case. At the 15 February 1965 Criminal Session of Johnston Superior Court defendant was tried on an indict-

ment which charged him with the commission on 28 December 1964 of the capital offense of rape upon one Eugenia Elizabeth Upchurch, a female. Defendant who was represented by his counsel, Knox V. Jenkins, Jr., entered a plea of not guilty. After hearing the evidence and the charge of the court, the jury returned a verdict of "Guilty of an assault with intent to commit rape." From a judgment of imprisonment for not less than 12 nor more than 15 years, defendant appealed to the Supreme Court. Defendant having been declared an indigent, the trial judge ordered Knox V. Jenkins, Jr., to perfect his appeal to the Supreme Court; and the County of Johnston was commanded to pay the cost of mimeographing his case on appeal and the brief of his counsel.

His appeal was heard by the Supreme Court at the Fall Term 1965 and is reported in 265 N.C. 720, 145 S.E. 2d 7. This Court in its opinion briefly recapitulated the State's evidence and the defendant's evidence and found no error in the trial. Davis then petitioned the Supreme Court of the United States for a writ of *certiorari* to review the decision of the Supreme Court of North Carolina. The Supreme Court of the United States denied this petition for a writ of *certiorari* on 18 April 1966, 384 U.S. 907, 16 L. Ed. 2d 360.

On 3 September 1966 defendant, who was represented by his court-appointed counsel, George Mast, filed an application for a post-conviction hearing pursuant to the North Carolina Post-Conviction Hearing Act, N. C. Gen. Stat. Ch. 15, Art. 22. Davis's post-conviction hearing was held at the October 1966 Session of the Johnston County Superior Court by the Honorable Clarence W. Hall, Judge Presiding at that session, and the court ordered and adjudged that Davis's trial was valid and proper in all respects, that he was not entitled to the relief requested in his petition, and denied said petition. On 27 December 1966 Davis filed a petition for a writ of *certiorari* with the Clerk of this Court to review the denial of the relief which he had sought at the post-conviction hearing. This Court in conference denied his request for a writ of *certiorari* on 7 February 1967.

On 9 March 1967 Davis filed a petition for a writ of *habeas corpus*, pursuant to the provisions of Title 28, U.S.C.A. § 2254, in the United States District Court for the Eastern District of North Carolina before the Honorable John D. Larkins, Jr., United States District Judge for that District. Prior to the hearing of this petition for a writ of *habeas corpus*, Judge Larkins appointed Irvin B. Tucker, Jr., to represent Davis in this *habeas corpus* proceeding. This cause came on to be heard upon Davis's petition and the Attorney General's answer and motion to dismiss. The title of the proceeding in Judge Larkins' court is *Clifford Delain Davis, Petitioner, v. R. L.*

Turner, Warden, Central Prison, Raleigh, N. C., Respondent. The hearing having been concluded, Judge Larkins issued a "Memorandum Opinion and Order," which was filed 25 October 1967, in which he stated that the allegations of Davis's petition raise "a serious and fundamental issue," and Judge Larkins "respectfully requests the Supreme Court of North Carolina to entertain a belated or new petition for *certiorari,*" and "directs the petitioner's court-appointed counsel to take such steps as may be necessary to bring the matter before . . . the Supreme Court of North Carolina." Judge Larkins continued his "Memorandum Opinion and Order" by urging this Court to consider only allegation "(C)" of Davis's petition for a writ of *habeas corpus,* which is as follows: "(C) That an ambigious virdict [sic] and improper verdict was rendered by the petit jurors." Judge Larkins then went on to direct the attention of this Court to the following colloquy which is contained in the record of the trial:

"At 9:25 P.M. the Jury returned to the courtroom and the following proceedings were had:

BY THE COURT: Stand up as your names are called.

BY THE CLERK: Lady and Gentlemen of the Jury, answer to your names. (Clerk calls names of all jurors.)

BY THE CLERK: Have you all agreed on your verdict?

BY THE JURY: Yes.

BY THE CLERK: Who shall speak for you?

BY THE JURY: Mr. Eldridge.

BY THE CLERK: Clifford Delain Davis, Stand up and hold up your right hand.

BY THE CLERK: Ladies and Gentlemen of the Jury, look upon the prisoner. What say you, is he guilty of the felony of rape whereof he stands indicted or not guilty?

BY THE JURY: Not guilty of that.

BY THE CLERK: What say you, is he guilty of assault with intent to commit rape or not guilty?

BY THE JURY: Yes.

BY THE CLERK: Harken to your verdict, as the Court recordeth it. You say Clifford Delain is guilty of assault with the intent to commit rape, whereof he stands charged?

BY THE JURY: Yes.

BY THE CLERK: So say you all?

BY THE JURY: (Each juror answers "Yes".)

"Upon request of counsel for the defendant that the jury be polled, the Court so ordered. Upon inquiry by the Clerk, each juror answered that he found for his verdict that the defendant, Clifford Delain Davis, was guilty of assault with intent to com-

mit rape, that that was his verdict, and that he did still assent thereto.

"The defendant moves for a new trial. Motion denied. Defendant excepts.

"The defendant moves to set aside the verdict of the jury. Motion denied. Defendant excepts."

Judge Larkins further "ORDERED that the application for a writ of *habeas corpus* shall be held in abeyance until the Supreme Court of North Carolina shall have acted upon the request of this Court."

This Court in conference on 2 February 1968, in deference to the courteous request of Judge Larkins, allowed the petition for a rehearing of the petition for writ of *certiorari* which we had heretofore denied on 7 February 1967.

Irvin B. Tucker, Jr., for petitioner Davis.

Attorney General T. W. Bruton and Staff Attorney Ralph A. White, Jr., for the State.

PARKER, C.J. We have examined the records and briefs in the first appeal in this case, which are of record in the office of the Clerk of the Supreme Court. On that appeal there was no assignment of error and no contention that the verdict rendered was invalid or improper or ambiguous and that the verdict did not support the judgment. Defendant appealed from the judgment of imprisonment imposed upon the first appeal.

This is stated in 1 Strong, N. C. Index 2d, Appeal and Error, § 26:

> "An appeal is itself an exception to the judgment and to any matter appearing on the face of the record proper. A sole exception to the judgment or to the signing of the judgment likewise presents the face of the record proper for review. In either instance, review is limited to the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment, and whether the judgment is regular in form and supported by the verdict."

The verdict here, as in all cases tried in our Superior Courts, appears on the face of the record proper. While the opinion on the first appeal did not discuss the verdict rendered in the instant case, the fact that we found no error in the trial was tacit affirmation that we had examined the record proper, and that the verdict was not invalid or ambiguous or uncertain but was definite and certain, and that the verdict rendered supported the sentence of imprisonment.

With respect to the question which the clerk asked the jury — "What say you, is he guilty of assault with intent to commit rape or not guilty?" — to which the jury merely responded "Yes," the defendant contends that "the Presiding Judge should have sent the jury back into their chambers with instructions to bring out a verdict which was meaningful. However, he did not do this, and, instead, the Clerk put her own interpretation on what the jury verdict was and recorded it as a verdict of guilty of assault with intent to commit rape." Defendant also contends "that a poll would not cure a void verdict which has been suggested or dictated by the Clerk. . . . The jury, after having been told by the clerk in open court what their verdict should be, and having given in to the clerk in open court, would naturally answer the poll of the jury in favor of the verdict they had been committed to by the dictation of the Clerk." Defendant further contends that the clerk's interpretation of the meaningless jury verdict has deprived him of his right to trial by jury as guaranteed by the Sixth Amendment to the United States Constitution and Article I, section 13, of the North Carolina Constitution.

To support his argument, defendant relies on the decisions of *S. v. Godwin,* 260 N.C. 580, 133 S.E. 2d 166, and *S. v. Gatlin,* 241 N.C. 175, 84 S.E. 2d 880.

S. v. Godwin, supra, is factually distinguishable. In that case the defendant pleaded not guilty. The record discloses the following in respect to the verdict:

> "Upon the coming in of the verdict, the Jury says: 'We decided that he is guilty of an Assault on this person.'
>
> "COURT: Do I understand that the Jury finds the Defendant guilty of an Assault with a Deadly weapon, inflicting serious injuries, not resulting in death, as charged in the Bill of Indictment? Do you mean to say that?
>
> "JUROR: Yes, sir.
>
> "COURT: So say you all?
>
> "JURY: Yes, sir, we agree.
>
> "CLERK: Do you, the Jury, find the Defendant guilty of Assault with a Deadly Weapon with Intent to Kill, inflicting serious injuries not resulting in death? Jury: Yes.
>
> "COURT: Guilty as charged in the Bill of Indictment?
>
> "JURY: Yes."

Upon the verdict the court sentenced the defendant to prison. Defendant assigned as error the verdict as rendered upon which the judgment was based on the ground that the trial judge told them in

effect what their verdict should be. This Court agreed that that contention was good and awarded defendant a new trial. The decision was clearly right. In the first place the judge told the jury in effect what the verdict should be, and in the second place, so far as the record of the trial discloses, which is on file in the office of the Clerk of the Supreme Court, the jury was not polled.

S. v. Gatlin, supra, is also factually distinguishable. The case on appeal as reported in our Reports has this statement:

> "The defendant Wayne Anderson is not guilty of manslaughter and that the defendant Reeves Gatlin is guilty of driving. Without further statement by the jury the court directed this inquiry to them, 'And guilty of manslaughter?' To which the juror replied, 'Yes.' To the foregoing the defendant objects and excepts."

The Supreme Court was clearly right in awarding a new trial on the ground that the judge improperly suggested to the jury what their verdict should be. The Court in its opinion states this language:

> "(W)e have no hesitancy in holding that the verdict 'Guilty of driving' is no crime and is not responsive to the charge in the indictment. Hence the trial judge had the discretionary power to give further instructions to the jury and order that they retire and give further consideration to the matter, and bring in a proper verdict. But the judge was without authority to suggest to the jury what their verdict should be."

So far as is shown by the record, which is on file in the office of the Clerk of the Supreme Court, the jury was not polled in the *Gatlin* case.

These principles of law are well settled in this State: While a verdict is a substantial right, it is not complete until accepted by the court for its records. *S. v. Rhinehart,* 267 N.C. 470, 148 S.E. 2d 651; *S. v. Perry,* 225 N.C. 174, 33 S.E. 2d 869. Verdicts in criminal cases ought to be clear and free from ambiguities and uncertainties. *S. v. Rhinehart, supra; S. v. Jones,* 227 N.C. 47, 40 S.E. 2d 458. The enforcement of the criminal law and the liberty of citizens demands exactitude. *S. v. Jones, supra.* In accepting or refusing a verdict the trial judge cannot exercise unrestrained discretion. The trial judge should examine a verdict with respect to its form and substance to prevent a doubtful and insufficient verdict from becoming the record of the court, but his power to accept or refuse the jury's finding is not absolute. *S. v. Perry, supra; S. v. Bazemore,* 193 N.C. 336, 137 S.E. 172.

It is well settled in this jurisdiction that the verdict should be taken in connection with the issue being tried, the evidence, and the charge of the court. *S. v. Tilley,* 272 N.C. 408, 158 S.E. 2d 573; *S. v. Thompson,* 257 N.C. 452, 126 S.E. 2d 58; *S. v. Smith,* 226 N.C. 738, 40 S.E. 2d 363; *S. v. Cody,* 225 N.C. 38, 33 S.E. 2d 71; *S. v. Gregory,* 153 N.C. 646, 69 S.E. 674.

From the opinion in the first appeal, *S. v. Davis, supra,* and from the charge of the court as it appears in the record of this case which is on file in the office of the Clerk of the Supreme Court, it is shown that the court instructed the jury that they might return one of the following verdicts: Guilty of rape, guilty of rape with recommendation of life imprisonment, guilty of assault with intent to commit rape, guilty of assault with a deadly weapon, guilty of assault on a female (defendant being a male person over the age of 18 years), or not guilty. As appears from the "Memorandum Opinion and Order" transmitted to us by Judge Larkins, and from the original record in this case which is on file in the office of the Clerk of the Supreme Court, when the jury returned with its verdict and after the clerk, according to the practice in this jurisdiction, called over the names of the jury and asked them if they had all agreed on a verdict, the jury replied, "Yes." The clerk then said to the jury, "Who shall speak for you?" The jury replied, "Mr. Eldridge." The clerk then told the defendant, according to the practice in our courts, to stand up and hold up his right hand, and then the clerk addressed the jury as follows: "Ladies and Gentlemen of the Jury, look upon the prisoner. What say you, is he guilty of the felony of rape whereof he stands indicted or not guilty?" That was the proper question for the clerk at that stage of the proceeding to address to the jury. The jury replied, "Not guilty *of that.*" (Emphasis ours.) It is clear and manifest that that means that the jury found the defendant not guilty of the capital offense of rape, but it does not mean that the jury found a verdict of not guilty of all the charges. Immediately thereafter the clerk addressed the jury, "What say you, is he guilty of assault with intent to commit rape or not guilty?" The jury replied, "Yes." The clerk then said to the jury, "Harken to your verdict, as the Court recordeth it. You say Clifford Delain is guilty of assault with the intent to commit rape, whereof he stands charged?" The jury replied, "Yes." The clerk then said, "So say you all?" Each juror answered, "Yes." Immediately after that had been done, defendant requested that the jury be polled and the record before us reads as follows: "Upon inquiry by the Clerk, each juror answered that he found for his verdict that the defendant, Clifford Delain

Davis, was guilty of assault with intent to commit rape, that that was his verdict, and that he did still assent thereto."

When the jury answered "Yes" to the question propounded by the clerk, "What say you, is he guilty of assault with intent to commit rape or not guilty?" it was certainly not a verdict of acquittal on that charge of an assault with intent to commit rape. The trial judge should examine a verdict with respect to its form and substance to prevent a doubtful and insufficient verdict from becoming a record of the court. When the clerk said to the jury, "Harken to your verdict, as the Court recordeth it. You say Clifford Delain is guilty of assault with the intent to commit rape, whereof he stands charged?", the jury replied, "Yes." The clerk then said "So say you all?" Each juror answered, "Yes." That was not a verdict that was suggested or dictated by the clerk. It was merely an inquiry to ascertain what the verdict of the jury was and whether it was clear and free from ambiguities and uncertainties. The question asked the jury by the clerk was certainly a permissible interpretation of the answer "Yes" to the question. When this took place, counsel for defendant asked that the jurors be polled. This was done, and upon the polling of the jury each juror answered that he found for his verdict that the defendant, Clifford Delain Davis, was guilty of assault with intent to commit rape, that that was his verdict, and he did still assent thereto. If there was any uncertainty in the verdict, that uncertainty was completely removed by the polling of the jury and their answers to the court upon the polling. We do not agree with the contention of defendant that the jury, after having been told by the clerk in open court what his verdict should be, and having given in to the clerk in open court, would naturally answer the poll of the jury in favor of the verdict that they had been committed to by the dictation of the clerk, for three reasons: First, upon the face of the record proper, there is no proof that the clerk dictated or suggested what the verdict should be, but she merely addressed to them an inquiry; second, the record shows plenary proof tending to show the defendant's guilt of the capital charge of rape, and the jury mercifully convicted him of a lesser charge; and third, as anyone knows who has had long experience upon the trial bench in this State, juries are not so easily swayed as defendant contends. As stated above, it is well settled in this jurisdiction that a verdict should be taken in connection with the issue being tried, the evidence, and the charge of the court. In our opinion, and we so hold, if there is any irregularity in the taking of the verdict, which we do not admit, this irregularity was completely cured by the polling of the jury. The

verdict was legal and proper and supports the judgment of imprisonment imposed in this case.

When requested in apt time, both defendant and the solicitor for the State have a legal right to demand that the jury be polled. *S. v. Dow,* 246 N.C. 644, 99 S.E. 2d 860; *S. v. Cephus,* 241 N.C. 562, 86 S.E. 2d 70; *S. v. Young,* 77 N.C. 498. Article I, section 13, of the North Carolina Constitution provides: "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful persons in open court. . . ." The right of a defendant to poll the jury which has returned a verdict of guilty against him, when made in apt time, has been widely recognized and accorded. *Commonwealth v. Martin,* 379 Pa. 587, 109 A. 2d 325. The procedure had its genesis in ancient common law. See 2 Hale, Pleas of the Crown 299. The polling of the jury, which was the procedure in the instant case, is a procedure whereby the jurors are asked individually the finding they have arrived at. The practice requires each juror to answer for himself, thus creating an individual response. The object is to give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned, and thus to enable the court and the parties to ascertain *with certainty* that a unanimous verdict has been in fact reached and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented. *S. v. Dow, supra; S. v. Young, supra; Commonwealth v. Martin, supra; Miranda v. United States,* 255 F. 2d 9 (1st Cir.); 21 Am. Jur. 2d, Criminal Law § 371; 23A C.J.S. Criminal Law § 1392.

As far back as 1877 we said in *S. v. Young, supra:*

> "When the verdict has been received from the foreman and entered, it is the duty of the clerk to cause the jury to hearken to their verdict as the court has it recorded, and to read it to them and say: 'So say you all?' At this time any juror can retract on the ground of conscientious scruples, mistake, fraud, or otherwise, and his dissent would then be effectual. This right is surely one of the best safeguards for the protection of the accused, and as an incident to jury trials would seem to be a constitutional right, and its exercise is only a mode, more satisfactory to the prisoner, of ascertaining the fact that it is the verdict of the whole jury."

The facts about the rendition of the verdict in *S. v. Walls,* 211 N.C. 487, 191 S.E. 232, cert. den. 302 U.S. 635, 82 L. Ed. 494, are not identical with the facts in the instant case but are apposite. In that case the Court said:

"Did the court err when the jury returned a verdict of guilty by saying: 'You say that Tommie Walls is guilty of burglary in the first degree of the felony whereof he stands charged?' Was that not an expression of opinion? We think not; it was an inquiry.

"The jury announced it was ready to render verdict and the clerk said, 'Gentlemen of the Jury, answer to your names,' and called each name separately and each juror answered 'Present.' (By the clerk) Q. 'Have you agreed on your verdict?' A. 'We have.' (By the clerk) 'Stand up Tommie Walls; hold up your right hand. Gentlemen of the Jury, look upon the prisoner; what say you as to his guilt of the felony burglary in which he stands indicted in the bill of indictment, Guilty or Not guilty?' A. 'Guilty.' (By the court) Q. 'So say you all?' A. 'Yes.' (By the court) 'By your verdict you say that Tommie Walls is guilty of burglary in the first degree of the felony whereof he stands charged?' A. 'Yes, sir.' (By the clerk of court) Q. 'So say you all?' A. 'Yes, sir, we find him guilty of first degree burglary with recommendation of the mercy of the court.'

" 'Counsel for the defendant requested that the jury be polled, whereupon the clerk, under the directions of the court, called each juror by name, requesting that the said juror stand; that the clerk asked each juror two questions: (1) "Mr. Juror, did you assent to the verdict rendered by your foreman?" and (2) "Do you still assent thereto?" Each juror answered in the affirmative to each of the two questions propounded, each question being asked and answered separately.' If there was error in the inquiry of the court, it was not prejudicial, as defendant had the jury polled."

In *S. v. Wilson*, 218 N.C. 556, 11 S.E. 2d 567, the facts about the rendition of the verdict are not identical but are apposite. In that case the defendant was tried on an indictment containing two counts: First, a charge of the capital offense of rape, and second, a charge of feloniously and carnally knowing and abusing a female child over 12 years and under 16 years of age who had never before had sexual intercourse with any person, defendant being a male person over 18 years of age. The jury was impaneled. The solicitor announced that he would not ask for conviction of the capital offense of rape charged in the first count but of such lesser degree of crime as the evidence might appropriately present. With this announcement the case went to trial upon the two-count indictment. The Supreme Court in its opinion said this about the verdict in the case:

"When the jury returned to the courtroom to render their verdict, the record discloses that the following occurred:

THE CLERK: Gentlemen, have you agreed on your verdict?

JUROR: We have.

THE CLERK: What is your verdict on the first count?

JUROR: Not Guilty.

THE CLERK: What is your verdict on the second count?

JUROR: Guilty of an assault on a female.

THE COURT: Gentlemen, the Court cannot accept this verdict. It is not rendered in accordance with the instructions the Court has given you. As the Court has heretofore explained to you, as to the first count in the bill of indictment, the jury may return one of three possible verdicts, namely, a verdict of guilty of an assault with intent to commit rape, or a verdict of guilty of an assault on a female, or a verdict of not guilty, and that as to the second count in the bill of indictment, which is the charge that the defendant had sexual intercourse with a female child over 12 years of age and under 16 years of age, who had not previously had sexual intercourse with any person, the jury may return one of two possible verdicts, namely, a verdict of guilty or a verdict of not guilty. You may retire to your jury room and deliberate further as to your verdict.

"After deliberating for 30 minutes or more, the jury returned again to the courtroom, when the following occurred:

THE CLERK: Gentlemen, have you agreed on your verdict?

JUROR: We have.

THE CLERK: What is your verdict as to the first count?

JUROR: Guilty.

THE COURT: Guilty of what?

JUROR: Guilty of an assault on a female.

THE COURT: Guilty of an assault on a female: So say you all, gentlemen of the jury?

JURORS: (All twelve jurors spoke or nodded their assent.)

THE CLERK: What is your verdict as to the second count?

JUROR: (The juror who had heretofore acted as spokesman hesitated and made some remark, in a low voice, which the Court did not hear.)

THE COURT: Gentlemen, the second count, as the Court has explained to you, charges the defendant with having had sexual intercourse with a female child over 12 years of age and under 16 years of age, who had not previously had sexual intercourse with any person: Do you find the defendant guilty or not guilty of this charge?

JUROR: Guilty.

THE COURT: Guilty: So say you all, gentlemen of the jury?

JURORS: (All twelve jurors spoke or nodded their assent.)

THE COURT: Gentlemen, as the Court understands your verdict with reference to the first count, your verdict is that the defendant is guilty of an assault on a female. If that is your verdict as to the first count, raise your right hands.

JURORS: (All twelve jurors thereupon raised their right hands.)

THE COURT: Gentlemen, as the Court understands your verdict with reference to the second count, your verdict is that the defendant is guilty, that is, guilty of having sexual intercourse with a female child over 12 years of age and under 16 years who had not previously had sexual intercourse with any person. If that is your verdict as to the second count, raise your right hands.

JURORS: (All twelve jurors thereupon raised their right hands.)

THE COURT: Record the verdict, Mr. Clerk.

"The jury was then dismissed.

"Defendant's first exception is 'to all of the foregoing.' His second and remaining exception is to the judgment rendered on the verdict, which, upon the first count, sentences him to two years on the public roads, and, on the second count, sentences him to five years in State's Prison. Other exceptions are formal.

"Conceding that the jury had finished their deliberations and reached a verdict to the effect that the defendant was not guilty on the first count and had properly delivered the same in open court, and that it was beyond the power of the court to recommit the issue to them, we are of the opinion that no irregularity or defect of procedure attended the rendering of the verdict on the second issue, and that a judgment based thereupon is valid. The jury attempted to return a verdict upon this issue, it is true, but it was not responsive to the indictment, and since it was a verdict they could not in law render, it was the duty of the judge to require that they continue their deliberations until a proper verdict should be reached. His instructions as to the verdict they might render on this count are consistent with the law. The manner of its reception is unobjectionable.

"Since the terms of imprisonment assigned under both counts are to run concurrently, and that under the second count, where there is a valid conviction, is the longer, the defendant is not

harmed by something which would not add to his punishment. But the majority of the Court feels that so much of the judgment as is based on the verdict on the first count — that is, the sentence of two years — should be stricken out, and it is so ordered. The sentence on the second count — that is, five years in State's Prison — is valid, and will stand. As thus modified, the judgment is

"Affirmed."

In *S. v. Sears,* 235 N.C. 623, 70 S.E. 2d 907, the facts as to the rendition of the verdict are not identical with the facts in the instant case but they are apposite. In that case the Court said:

". . . Exception is taken to the manner in which the verdict of the jury was received.

"The record shows that: 'The jury retired and subsequently returned into the court and when asked by the Clerk how they found, the answer was "Guilty as charged;" whereupon the court stated to the jury that the charge in the bill of indictment was that of rape, which is the capital felony, and that, as explained in his charge to the jury, the Solicitor was not asking for a verdict of "Guilty of Rape" but for a verdict of "Guilty of Assault with Intent to Commit Rape"; and the court inquired of the jury if that was the verdict which they intended to render, that is to say, "Guilty of assault with intent to commit rape," whereupon the jurors all nodded their heads in acquiescence and the foreman stated, "That is our verdict, guilty of assault with intent to commit rape." The verdict was accepted by the court and enrolled upon the Minutes of the Court of the Term.'

"We hold that the manner of receiving the verdict is unobjectionable. This Court so held in *S. v. Wilson,* 218 N.C. 556, 11 S.E. 2d 567, where verdict on the second count was received in similar manner.

"The Court said: 'We are of opinion that no irregularity or defect of procedure attended the rendering of the verdict on the second issue, and that a judgment based thereupon is valid. The jury attempted to return a verdict upon this issue, it is true, but it was not responsive to the indictment, and since it was a verdict they could not in law render, it was the duty of the judge to require that they continue their deliberations until a proper verdict should be reached. His instructions as to the verdict they might render on this count are consistent with the law.'

"Such is the situation in hand. What transpired simply spelled out what the jury had agreed upon as its verdict."

The Attorney General in the case of *S. v. Gatlin, supra,* in his brief relied upon *S. v. Walls, supra; S. v. Wilson, supra;* and *S. v. Sears, supra.* The factual situation in the *Gatlin* case was not similar to the factual situation in the three cases upon which the Attorney General relied. In its opinion in the *Gatlin* case, the Supreme Court said in connection with the cases relied upon by the Attorney General: "However, careful consideration of the factual situations in these cases leads to the conclusion that they are not out of harmony with the principles hereinabove set forth. But if they were, this Court would not be inclined to follow them, and deviate from the salutary principles,— long safeguarded in the pages of our decisions." The opinion in the *Sears* case was written by the same judge who wrote the opinion in the *Gatlin* case. Certainly the Supreme Court did not overrule the decisions in the *Walls,* the *Wilson,* and the *Sears* cases. The last sentence quoted from the *Gatlin* case is pure dictum. We agree with the decision in the *Gatlin* case that the decisions in the *Walls,* the *Wilson,* and the *Sears* cases are not out of harmony with the decision in the *Gatlin* case, and we are of the opinion, and so hold, that the decision in the instant case is not out of harmony with the decisions in the *Gatlin* case and the *Godwin* case.

In *S. v. Brown,* 204 N.C. 392, 168 S.E. 532, this is said about the verdict:

> "As to the verdict of the jury on the trial, the record discloses: 'The jury returned to the court room and when asked by the clerk, if they had arrived at a verdict, one juror answered, we find them all guilty of manslaughter, another answered guilty of third degree murder. Attorney for defendants asked that jury be polled, each juror asked as to each of the defendants, R. J. Alphin being the first juror polled answered third degree murder. Attorney for the defendant requested that the record speak what they say. The juror, Mr. Alphin, said he intended to say manslaughter. All the jurors then polled as to each defendant and all answered guilty of manslaughter. To the foregoing verdict, the defendants in apt time, objected and excepted.'
>
> "In the order correcting the minutes, it appears that there were no minutes to be corrected. 'The court further finds as a fact, that the record heretofore sent to the Supreme Court by the clerk of this court spoke the truth as the records then existed.'
>
> "The record discloses that on the trial of defendant the jury as polled answered 'guilty of manslaughter.' We see no prejudicial or reversible error. The juror no doubt was thinking of

murder in the first degree, murder in the second degree and manslaughter was third degree. The juror said he intended to say manslaughter. The court below had, under the facts and circumstances of this case, discretion to do what was done to make the record speak the truth and have it so recorded. The cases cited by the defendant are not applicable to the facts of record.

"The learned and painstaking judge in the court below, in a long charge, gave all the contentions on both sides fairly, set forth the law carefully, applicable to the facts. We find no prejudicial or reversible error.

"No error."

Defendant has not been denied, as he contends, his right to a jury trial as guaranteed to him by the Sixth Amendment to the United States Constitution and by Article I, section 13, of the North Carolina Constitution. If there was any irregularity in the taking of the verdict, which we do not concede, what the verdict was was made crystal clear by the jury when the jury was polled. The verdict in this case was fixed, definite, and certain, as shown by the poll of the jury and otherwise, and the punishment of imprisonment was within the permissible limits fixed by the North Carolina statute for a conviction of assault with intent to commit the crime of rape. G.S. 14-22. We are of the same opinion that we were on the first appeal in this case. Our opinion then and now is that in the trial of this case, and particularly in the rendition of the verdict, there is

No error.

L. & M. GAS COMPANY, INCORPORATED, v. ETTA BROWN A. LEGGETT.

(Filed 1 May 1968.)

1. Pleadings § 12—

A demurrer admits, for the purpose of testing the sufficiency of the pleadings, the truth of factual averments well stated and relevant inferences of fact reasonably deducible therefrom.

2. Fraudulent Conveyances § 1—

A voluntary conveyance by a debtor is invalid as to creditors if the grantor did not retain property fully sufficient and available to pay his then-existing debts.

3. Same—

A conveyance is voluntary when it is not for value.

4. Fraudulent Conveyances § 3—

In plaintiff's action to set aside a deed as a fraudulent conveyance, an

allegation that the deed was without legal consideration is sufficient to allege that the conveyance was without valuable consideration.

5. Husband and Wife § 15—

The nature of the estate by the entireties is such that the estate cannot be subjected to execution to satisfy a judgment taken against the husband or wife alone, and the lien of a judgment so taken does not attach to the entirety property during coverture.

6. Same—

While the husband can do no act to affect the wife's right of survivorship in entirety property, the use, rents, issues and profits arising from the entirety property during coverture become the absolute property of the husband and constitutes a part of the fund from which his creditors may be satisfied.

7. Same; Fraudulent Conveyances § 3— Creditor may not set aside as fraudulent conveyances by husband of entirety property to wife.

In an action against the wife to set aside a deed from her husband as a fraudulent conveyance, plaintiff alleged that (1) it had recovered judgment against the husband, (2) subsequent thereto the husband conveyed to his wife certain lands owned by them as tenants by the entireties, (3) that the conveyance was without legal consideration and was for the purpose of defrauding his creditors, and (4) the husband, at the time of the conveyance, did not retain sufficient property to pay his existing creditors. *Held:* The wife's demurrer on the ground that the plaintiff had no interest or right in the conveyance was properly allowed, since no lien could attach to the entirety property or to the possibility that the husband might become sole owner by surviving his wife.

SHARP, J., concurring in result.

BOBBITT, J., joins in concurring opinion.

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

APPEAL by plaintiff from *McKinnon, J.*, August-September 1967 Civil Session of ROBESON. This case was docketed and argued at Fall Term 1967 as No. 855.

Civil action to set aside deed as being a fraudulent conveyance.

Plaintiff alleged in its complaint that it had recovered judgment against Alex L. Leggett on 17 May 1966 in the amount of $8,276.46; that on 27 December 1966 Alex L. Leggett purported to convey certain lands by warranty deed (filed for registration on 27 December 1966 and recorded in the Robeson County Registry in Book 15-W at page 25) to his wife, the defendant; that prior to 27 December 1966, Alex L. Leggett and defendant owned the lands described in the warranty deed as tenants by the entirety and that Alex L. Leggett was entitled to possession of said lands and the rents and profits therefrom; that the conveyance was without legal considera-

tion and was for the purpose of defrauding the creditors of Alex L. Leggett; that Alex L. Leggett did not, at the time of the conveyance, retain sufficient property to pay his then existing creditors.

Notice of *lis pendens* was filed in the office of the Clerk of Superior Court of Robeson County on 2 February 1967.

The demurrer to the complaint on grounds that it did not state facts sufficient to constitute a cause of action against defendant in that plaintiff had no interest, title or right in law to the proceedings, matters and things alleged in its complaint, was allowed. Defendant's motion for cancellation of the notice of *lis pendens* was also allowed.

Plaintiff appealed.

W. Earl Britt for plaintiff appellant.
L. J. Britt & Son and Robert Weinstein for defendant appellee.

BRANCH, J. It is well settled law in North Carolina that a demurrer admits, for the purpose of testing the sufficiency of the pleadings, the truth of factual averments well stated and relevant inferences of fact reasonably deducible therefrom. Strong's N. C. Index, Vol. 3, Pleadings, § 12, p. 625.

Aman v. Walker, 165 N.C. 224, 81 S.E. 162, is a "landmark case" on fraudulent conveyances. It is therein stated:

> ". . . If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; . . ."

Appellee contends that the complaint was fatally defective because it fails to allege that the conveyance was made without a valuable consideration. This poses the question whether a voluntary conveyance or conveyance without a valuable consideration was sufficiently alleged by plaintiff's allegation, "As plaintiff is informed and believes said deed was without legal consideration."

A conveyance is voluntary when it is not for value, *i.e.*, when the purchaser does not pay a reasonably fair price such as would indicate unfair dealing and be suggestive of fraud. *Supply Corp. v. Scott,* 267 N.C. 145, 148 S.E. 2d 1; *Austin v. Staten,* 126 N.C. 783, 36 S.E. 338.

A "good" consideration means a valuable consideration. *Arrington v. Arrington,* 114 N.C. 151, 19 S.E. 351. Black's Law Dictionary, Fourth Edition, defines "legal consideration" as follows: "One recognized or permitted by the law as valid and lawful; as distinguished from such as are illegal or immoral. *The term is also sometimes used*

as equivalent to 'good' or 'sufficient' consideration." (Emphasis ours.) Construing the pleadings in the light most favorable to the pleader with a view to substantial justice between the parties, as we must, *Glover v. Brotherhood,* 250 N.C. 35, 108 S.E. 2d 78, we hold that the complaint sufficiently alleges a conveyance without valuable consideration.

Applying these rules to the pleadings in instant case, it is apparent that had the property conveyed been owned by the husband alone, the allegations of the complaint would have been sufficient to withstand defendant's demurrer and motion.

Since the trial court sustained the demurrer because "plaintiff has no interest, title, or right in law in the proceedings and matters and things alleged in its complaint," the real question becomes whether or not during the lifetime of his wife the rents, uses, issues and profits from the entirety land could be subjected to judgment taken solely against the husband. We must therefore consider some of the incidents and properties of an estate by the entirety. An estate by the entirety is an estate where the husband and wife are neither "joint tenants" nor "tenants in common," since they are considered one person in law. They cannot take the estate by moities but both are seized *per tout and non per my,* thus neither can dispose of any part without the assent of the other, but the whole must remain in the survivor, *Bryant v. Shields,* 220 N.C. 628, 18 S.E. 2d 157. The doctrine of title by entireties between husband and wife as it existed at common law remains unchanged by statute or constitutional provision in North Carolina. *Johnson v. Leavitt,* 188 N.C. 682, 125 S.E. 490. The nature of the estate is such that the estate cannot be subjected to execution to satisfy a judgment taken against the husband or the wife alone, and the lien of a judgment so taken does not attach to the entirety property during coverture. Thus, in such case, during coverture the joint deed of the husband and wife may convey the entirety property free and clear of a judgment lien docketed against only one of them. *Grabenhofer v. Garrett,* 260 N.C. 118, 131 S.E. 2d 675. The reasoning which precludes a lien being placed on entirety property by a judgment solely against one spouse is forcibly stated in *Bruce v. Nicholson,* 109 N.C. 202, 13 S.E. 790, as follows:

> "The nature of this estate forbids and prevents the sale or disposal of it, or any part of it, by the husband or wife without the assent of both; the whole must remain to the survivor. The husband cannot convey, encumber, or at all prejudice, such estate to any greater extent than if it rested in the wife exclusively in her own right; he has no such estate as he can dispose of to the prejudice of the wife's estate. The unity of the

husband and wife as one person, and the ownership of the estate by that person, prevents the disposition of it otherwise than jointly.

"As a consequence, neither the interest of the husband, nor that of the wife, can be sold under execution so as to pass away title during their joint lives or as against the survivor after the death of one of them. . . . Indeed it seems that the estate is not that of the husband or the wife; it belongs to that third person recognized by the law, the husband *and* the wife. It requires the co-operation of both to dispose of it effectually."

Upon the death of husband or wife the survivor becomes the sole owner by virtue of the deed creating the tenancy by the entirety. *Woolard v. Smith,* 244 N.C. 489, 94 S.E. 2d 466. However, where a joint judgment is obtained against the husband and wife during coverture, the lien attaches and the entirety property may be sold under execution. Further, the lien of a judgment docketed against either the husband or the wife will immediately attach to the entirety property if the spouse against whom the judgment is obtained is the survivor and the judgment is still active and unsatisfied. *Johnson v. Leavitt, supra.*

Although neither the husband nor the wife can separately deal with the estate, and the interest of neither can be subjected to rights of creditors so as to affect the survivor's right to the estate, the husband, during coverture, is entitled to the full control, possession, income, and *usufruct* of the estate. *Bryant v. Bryant,* 193 N.C. 372, 137 S.E. 188.

In the exercise of this control, use and possession, he may, without joinder of the wife, lease the property, mortgage the property, grant rights-of-way, convey by way of estoppel — qualified in all these instances by the fact that the wife is entitled to the whole estate unaffected by his acts if she survive him. See 41 N. C. Law Review 67, 85, "Tenancy by the Entirety in North Carolina," by Dr. Robert E. Lee, and the cases therein cited.

In *Brinson v. Kirby,* 251 N.C. 73, 110 S.E. 2d 482, the wife brought suit to restrain sale of crops grown on land purportedly held by the entirety. The sale was to satisfy judgments against the husband alone. She offered evidence which tended to show that she owned the land as her separate estate; that an attempt to create an estate by the entirety was made but was void for failure to comply with G.S. 52-12. The court excluded this evidence. This Court held the evidence was erroneously excluded and stated:

". . . The evidence should have been admitted, and with

the evidence before the jury the court could not have given a peremptory instruction, to which plaintiff appellant likewise excepts."

In the case of *Lewis v. Pate,* 212 N.C. 253, 193 S.E. 20, plaintiff obtained a judgment against defendant J. R. Pate. Upon issue of execution the sheriff proceeded to have defendant's personal property exemption allotted. Crops raised on land owned by defendant and his wife by the entirety were set apart as part of the exemption, and other parts of the crops were ordered sold under the execution. In the trial below the jury found that the crops belonged to defendant J. R. Pate. This Court, in finding no error in the trial below, stated:

". . . the appellant presents to this Court for determination only one question, to wit: 'Does the husband own and have the right to dispose of all the income, rents and profits, products, etc., accruing from an estate held by entirety to such an extent that an execution against him may be levied upon it to the exclusion of any interest the wife may have?' This question must be answered in the affirmative. It is well established law in this State that the husband, during coverture and as between himself and the wife, has absolute and exclusive right to the control, use, possession, rents, issues, and profits of property held as tenants by the entirety. The common-law rule still prevails. . . ."

A husband alone can do no act to affect the wife's right of survivorship in entirety property; neither may his creditors affix a lien or encumbrance upon entirety property which will affect her right of survivorship. Yet, the use, rents, issues and profits arising from the entirety property become the absolute property of the husband and constitute a part of the fund from which his creditors may be satisfied.

In 24 Am. Jur., Fraudulent Conveyances, § 8, p. 166, it is stated:

"The determination of the character of a conveyance as fraudulent or otherwise involves the consideration of various elements and factors, . . .

". . . The law is based upon the theory that the assets or resources of the debtor constitutes a fund out of which the creditors have a right to be paid; and within the purview thereof is any business affair which diverts the debtor's assets from payment of his debts, or which places beyond the reach of creditors

property from which their claims might otherwise be satisfied. . . ."

Since in the instant case lien cannot attach to the entirety property, *Davis v. Bass, supra,* or to the possibility that the husband might become sole owner by surviving his wife, *Bruce v. Nicholson, supra,* and the pleadings do not allege that there were rents, income, issues or profits accrued or accruing from the entirety property, we hold that the trial judge properly allowed the demurrer to the complaint and the motion to cancel the notice of *lis pendens.*

Moreover, to avoid husband's deed would be an exercise in futility. Husband and wife could by joint voluntary conveyance transfer the property to anyone of their choice, free of lien or claim of husband's individual creditors.

Judge McKinnon's judgment is

Affirmed.

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

SHARP, J., concurring in result:

Defendant's demurrer to the complaint presents this case: Defendant Etta Leggett (wife) and her husband Alex L. Leggett (husband) owned land as tenants by the entirety. Plaintiff recovered a judgment against the husband. Thereafter, without consideration, for the purpose of defrauding creditors, and without retaining property sufficient to pay his debts, husband conveys the land to wife. Plaintiff brings this action to set the deed aside. The trial judge ruled that plaintiff had not alleged a cause of action.

The majority opinion states the determinative question to be "whether or not during the lifetime of his wife, the rents, uses, issues and profits from the entirety land could be subjected to judgment taken solely against the husband." The answer to the question upon which the majority opinion is predicated is, subject to certain limitations, YES, but I do not deem this to be the ultimate question. The decisive question is this: Where the accrued rents and profits from land may be taken for an individual's debts — but the land itself cannot be thus appropriated — may creditors object to a voluntary or gratuitous conveyance of the land by the debtor? Stated more specifically: Does a husband's conveyance of his interest in entirety property, on which his creditors can acquire no lien and which they cannot reach during the lifetime of his wife, come within the prohibition against fraudulent conveyances? Both logic and authority answer this question, No.

The incidents of an estate by the entirety are fully set out in the majority opinion. Those pertinent to this opinion are briefly restated: Lands held by husband and wife as tenants by the entirety are not subject to levy under execution on a judgment rendered against one during the lifetime of the other. During their joint lives, the husband is entitled to the possession and control of the estate and to the rents and profits therefrom to the exclusion of the wife under that principle of the common law which vested in the husband the right to control his wife's land and to take the rents and profits therefrom during coverture. *Highway Commission v. Myers,* 270 N.C. 258, 154 S.E. 2d 87; *Duplin County v. Jones,* 267 N.C. 68, 147 S.E. 2d 603; *Johnson v. Leavitt,* 188 N.C. 682, 125 S.E. 490; *Davis v. Bass,* 188 N.C. 200, 124 S.E. 566; *Simonton v. Cornelius,* 98 N.C. 433, 4 S.E. 38; 2 Lee, N. C. Family Law § 115 (3d ed. 1963). North Carolina, alone among the jurisdictions, allows a husband's individual creditors to reach rents and profits from the property but not the property itself. See Phipps, *Tenancy by Entireties,* 25 Temp. L. Q. 24 (1951-1952).

This Court has held that crops (210 bushels of corn and 10 haystacks) grown upon lands owned by husband and wife as tenants by the entirety were subject to sale under execution issued upon a judgment against the husband alone. *Lewis v. Pate,* 212 N.C. 253, 193 S.E. 20. ". . . The fruits accruing during their joint lives would belong to the husband after separation from the land. . . ." *West v. R. R.,* 140 N.C. 620, 621, 53 S.E. 477, 477; see also *Simonton v. Cornelius, supra.* Whenever the sheriff, seeking property from which to satisfy a judgment against the husband, can find rents and profits *which have accrued* to the husband from an estate by the entirety in an amount over and above his personal property exemption, he can levy upon them. The judgment creditor, however, is not entitled to have a receiver appointed to take possession of the land itself in order to rent the property and apply the rentals to the payment of the judgment. *Grabenhofer v. Garrett,* 260 N.C. 118, 131 S.E. 2d 675; 2 Lee, N. C. Family Law § 116 (3d ed. 1963).

By G.S. 39-15, fraudulent conveyances are made void as against creditors of the grantor. The statute is a substantial reenactment of the English statute 13 Eliz. c. 5 (1570). *Bank v. Adrian,* 116 N.C. 537, 21 S.E. 792 (dissenting opinion). The language of the statute is broad, declaring void ". . . every gift, grant, alienation, bargain and conveyance of lands, tenements and hereditaments, goods and chattels, by writing or otherwise, and every bond, suit, judgment and execution, at any time had or made . . ." with intent to ". . . delay, hinder and defraud creditors. . . ." Nevertheless, it was clear

from an early date that not every conveyance by a debtor was within the prohibition of the statute. Thus, in the English case of *Mathews v. Feaver,* 1 Cox 278, 29 Eng. Rep. 1165 (1786), creditors of the father sought to have set aside as fraudulent a conveyance by the father to his son. There the Master of the Rolls said:

"But I am not satisfied as to the nature or value of the copyhold premises, which, generally speaking, are not subject to debts, and therefore the assignment of them can never be fraudulent against creditors." *Id.* at 280, 29 Eng. Rep. at 1166. This rule in the United States is stated as follows in 37 C.J.S. *Fraudulent Conyevances* §§ 17 and 29 (1943):

"A debtor will not be permitted to donate the use of property belonging to him to another in fraud of his creditors, and if he does so the earnings of such property may be reached and subjected by his creditors; *but this principle does not apply where the property is exempt from the claims of creditors.* (Emphasis added.)

"As a general rule a debtor in disposing of property can commit a fraud on creditors only by disposing of such property as the creditor has a legal right to look to for satisfaction of his claim, and hence a sale, gift, or other disposition of property which is by law absolutely exempt from the payment of the owner's debts cannot be impeached by creditors as in fraud of their rights. Creditors have no right to complain of dealings with property which the law does not allow them to apply on their claims, even though such dealings are with a purpose to hinder, delay, or defraud them.

"* * *

"Where the interest of neither spouse in real property held as an estate in entirety is liable for the debts of the other, . . . a conveyance by one spouse of his interest to the other, directly or indirectly, or to a third person is not in fraud of the grantor's creditors."

In *Wylie v. Zimmer,* 98 F. Supp. 298 (U. S. Dist. Ct., E. D. Penn.), the husband and wife, as tenants by the entirety, owned land which they conveyed to a third party, who immediately reconveyed it to the wife. This transfer of title was made with the intent to defraud creditors. Thereafter the husband was adjudged bankrupt, and the trustee in bankruptcy brought suit against the wife to set the two deeds aside. Under applicable Pennsylvania law, the Federal District Court held that a judgment creditor of one spouse "has no right or claim to that property [entirety] during the lifetime of the other spouse and has no standing to complain of a conveyance which prevents the property from falling into his grasp." *Id.* at 299. The court said it would be futile to set aside the transfer and reinvest title in

the husband and wife since the trustee could not acquire the husband's contingent interest in the property. In reaching its decision the District Court relied upon *C. I. T. Corp. v. Flint,* 333 Pa. 350, 5 A. 2d 126, 121 A.L.R. 1022. *Accord, Hertz v. Wells,* 166 Md. 492, 171 A. 709.

In *American Wholesale Corp. v. Aronstein,* 10 F. 2d 991, a case similar to *Wylie v. Zimmer, supra,* the court said: ". . . [A]ppellants were not entitled to subject the separate interest of Aronstein [husband] to the payment of their claims. His conveyance to his wife accordingly could not hinder or delay them in the collection of their judgments."

In *Vasilion v. Vasilion,* 192 Va. 735, 66 S.E. 2d 599, a husband and wife who owned land by the entirety conveyed it to the wife. Thereafter, a creditor of the husband sought to set aside the conveyance as a fraud upon creditors. The Supreme Court of Appeals of Virginia, after stating the rule that the entire property held by a husband and wife as tenants by the entirety, "as well as the expectancy attendant upon survivorship, is free from judgment or execution liens against either of them," said:

"Therefore, if the property can be conveyed by the husband and wife jointly, free from liens or claims of creditors, to a third party, there is no reason why it cannot be so conveyed by the husband and wife to himself or herself. Code 1950, § 55-9.

"No question of fraud is involved as property so held is insulated against the claims of creditors of the individual spouse."

North Carolina has applied the general rule that "statutes invalidating fraudulent conveyances are applicable to all property which may be subjected to the payment of debts, and to no other property," 24 Am. Jur. *Fraudulent Conveyances* § 106 (1939), to cases involving a creditor's disposition of personalty falling within his personal property exemptions. N. C. Const. art. X, § 1; G.S. 1-369; *Winchester v. Gaddy,* 72 N.C. 115; *Duvall v. Rollins,* 71 N.C. 218. In *Winchester v. Gaddy, supra,* it is said:

"A conveyance of property by a debtor for his own ease and favor, whereby creditors are delayed or hindered, is fraudulent and void; and that even when the conveyance is made for a valuable consideration, or to pay or secure a *bona fide* debt. But a manifest qualification of this rule is that the property must be such as the creditor has the right to subject to the payment of his debt.

"If a debtor sells his 'wearing apparel, Bible and hymnbook, loom,' etc., which are exempt from execution for debt, no matter how or for what purpose he makes the sale, his creditors cannot

complain; because under no circumstances can the creditor subject that property to the payment of his debt. He cannot therefore be defrauded.

"* * *

"It is true that if she [debtor] had died without having sold it, he [creditor] would have been entitled to have it applied to his debt in whole or in part as the case might be, but she did sell it to the defendant in such manner as to divest the title out of her, in satisfaction of a debt which she owed the defendant of more than $1,000."

The case *Winchester-Simmons Co. v. Cutler,* 199 N.C. 709, 155 S.E. 611, although distinguishable from the instant case in that it involved a conveyance by both husband and wife, is nevertheless, an application of the controlling principles. It was an action in which the plaintiff, a judgment creditor, sought to set aside a conveyance of land owned by the defendant, judgment debtor, and his wife as tenants by the entirety. The complaint alleged these facts: The defendant and his wife, who was on her death bed, conveyed the land to their granddaughter without consideration. The defendant's purpose in making the conveyance was to defeat the plaintiff's right to have the land sold under execution in the event he should become the owner by survivorship. The defendant's wife died four months after she executed the deed. In sustaining the defendant's demurrer to the complaint, this Court held: The judgment in favor of the plaintiff was not a lien upon the land at any time during the joint lives of the defendant and his wife, nor was the land subject to sale under execution for the satisfaction of the judgment during that time. Since the creditors of the defendant husband had no right to subject the land to the satisfaction of his debts during the lifetime of the wife, the husband and wife were at liberty to convey it, and such conveyance could not be held fraudulent as to the husband's creditors.

As stated in the majority opinion, the futility of avoiding husband's deed to defendant wife is apparent. Were title in the property revested in them as tenants by the entirety, plaintiff could not levy on the land nor could he have a receiver appointed to collect and accumulate the rents (if any) in order to pay the judgment. Only accrued rents which husband could not claim as a part of his personal property exemption would be subject to the sheriff's levy under execution. Furthermore, husband and wife together could, by voluntary conveyance, transfer the property to any third person, free from the claims of their individual creditors. Neither, of course, could convey any interest in the land to a *stranger* without the joinder of the other. Here, however, husband alone has conveyed it to

the only person to whom he could convey without the wife's signature, the wife herself. G.S. 39-13.3(c). Thus, by express statutory authority, husband has conveyed to her the title which he and she formerly held, not as two individuals but as one — that legal personage known as husband and wife. *Woolard v. Smith,* 244 N.C. 489, 94 S.E. 2d 466. The legal consequences of husband's conveyance to wife, therefore, are the same as if the two of them had conveyed to a third person.

This case does not involve a lease, a sale or a mortgage of husband's right to the possession of the land, or the right to receive the rents and profits from it during his lifetime as did *Dorsey v. Kirkland,* 177 N.C. 520, 99 S.E. 407; *Greenville v. Gornto,* 161 N.C. 341, 77 S.E. 222; *Bynum v. Wicker,* 141 N.C. 95, 53 S.E. 478. See also *Davis v. Bass, supra* at 204-206, 124 S.E. at 568-69. It does not involve the disposition of *accrued rents and profits* as did *Lewis v. Pate, supra.* Plaintiff does not seek to set aside an assignment or conveyance of any property of which husband could dispose. He seeks to preserve an estate by the entirety in the hope that husband may acquire the fee by outliving his wife. This he is not entitled to do, for the possibility of survival, which is not the subject of sale or lien, cannot serve as the basis of an action to set aside a deed as a fraud upon creditors. "The [judgment] lien extends to and embraces only such estate, legal and equitable, in the real property of the judgment debtor as may be sold or disposed of at the time it attached." *Bruce v. Nicholson,* 109 N.C. 202, 205, 13 S.E. 790, 791; *accord, Bristol v. Hallyburton,* 93 N.C. 384.

The rationale of the North Dakota Supreme Court in *Olson v. O'Connor,* 9 N.D. 504, 84 N.W. 359, is applicable here. In *Olson,* the husband, a judgment debtor, conveyed his homestead to his wife. Thereafter, the husband gave the judgment creditor a chattel mortgage on grain growing upon the land. The sheriff levied upon the grain and sold it at an execution sale. The wife sued both the sheriff and the creditor for the value of the grain. With respect to the property conveyed, the court observed: "But that was his homestead, and was exempt. It was property to which the lien of the judgment did not attach and was beyond the reach of an execution issued thereon. It was not possible to defraud his creditors by transferring the title to his wife, for it was property to which they could not look for the collection of the claims." *Id.* at 510, 84 N.W. at 362. Thus, the creditor sought to appropriate the usufruct from land which (he conceded) was not subject to his debt. The creditor's contention was that the transfer to the wife was "void for the reason and to the extent that it affects the title to the crops thereafter grown on such

land." His position was that if the husband had not transferred the title to the land, he — not the wife — would have been the owner of the grain subsequently grown thereon. The court, in rejecting the defendant's position, reasoned as follows: "As a statement of fact, this [*i.e.*, that Olson would have owned the grain but for the transfer] is true; but as a ground for claiming that the transfer of the land was in fraud of creditors, it is not sound. Its fallacy lies in falsely assuming that the transfer of the title then and there conveyed something of value other than the land itself, namely, the crops subsequently grown. Of course, Olson transferred to plaintiff nothing more than he had then, and that was the land itself. At that time these subsequent crops had no existence of value. By transferring the land to his wife he did not transfer crops afterwards grown." *Id.* at 510, 84 N.W. at 362.

The majority opinion says that, since the lien of plaintiff's judgment cannot attach to the land itself, and, since "the pleadings do not allege that there were rents, income, issues or profits accrued or accruing from the entirety property," the demurrer was properly sustained. In my view, the complaint would not state a cause of action even if it alleged that there were rents or profits "accrued or accruing." Such an allegation would add nothing to the assertion that the transfer of the *land* was fraudulent. This is true because: (1) The prohibition against fraudulent conveyances has no application to property which is not liable for one's debts; it applies only to property which is subject to levy and sale under execution at the instance of the creditor who seeks to set the conveyance aside. (2) This case involves *only* the land — not severed crops, accrued rent payable in cash, or other personality belonging to the husband.

BOBBITT, J., joins in the concurring opinion.

GROVER P. SNOW v. NORTH CAROLINA BOARD OF ARCHITECTURE.

(Filed 1 May 1968.)

1. *Architects—*

G.S. 83-11 gives an architect whose certificate of admission to practice has been revoked for failure to pay the annual renewal fee the absolute and unqualified right to have his certificate renewed upon paying the renewal fee and prescribed penalty within one year after its due date.

2. Same—

Renewal of the certificate of admission to practice upon payment of the renewal fee and penalty does not preclude the State Board of Architecture from subsequently revoking the certificate for cause other than the failure to pay the renewal fee.

3. Same; Administrative Law § 3—

Where notice of a contemplated action to withhold for cause the renewal of a certificate to practice architecture is given pursuant to G.S. 150-11, and the architect does not request a hearing before the Board of Architecture pursuant to that statute, the Board has jurisdiction to determine the matter, and its order is not subject to judicial review. G.S. 150-11(c).

4. Architects; Administrative Law § 4—

While the State Board of Architecture loses its authority to render a decision at the expiration of ninety days from the date of the hearing, G.S. 150-20, an order entered within that time does not become a nullity by the fact that it is not served upon the certificate holder within five days after it is rendered as required by G.S. 150-21.

5. Mandamus § 1—

Mandamus may not be used as a substitute for an appeal.

6. Same—

Mandamus lies only to enforce a clear legal right where plaintiff has no other adequate remedy.

7. Mandamus § 4—

Mandamus may not be used to review the final action taken by an administrative board on a matter within its jurisdiction.

8. Same; Architects—

Where the State Board of Architecture has withheld for cause the renewal of an architect's certificate of admission to practice, *mandamus* may not be used to compel the Board to renew the certificate, the exclusive method for obtaining a judicial review of the Board's order being an appeal to the Superior Court pursuant to G.S. 150-24. G.S. 150-33.

APPEAL by plaintiff from *Olive, E.J.*, at the September 1967 Non-Jury Assigned Session of WAKE.

On and prior to 30 June 1965, the plaintiff was a duly licensed architect, practicing his profession in North Carolina. He failed to pay to the Board of Architecture the fee prescribed by G.S. 83-11 to be paid on or before that date for the renewal of his certificate of admission to practice for one year, beginning 1 July 1965. On 12 July 1965 and again on 25 October 1965, the board sent him notice that, by reason of such failure, his certificate of admission to practice was revoked.

On 26 March 1966 the plaintiff tendered to the board payment of the prescribed annual renewal fee plus the penalty prescribed by

G.S. 83-11 for a late renewal. The board rejected the tender and refused to renew the certificate.

On 31 May 1966 the plaintiff, through his attorney, sent a letter to the board again requesting renewal of his certificate, enclosing a certified check in the amount of such fee and penalty. On the same day, 31 May 1966, without waiting for action by the board upon the second tender and request, he instituted in the Superior Court of Wake County a suit against the board. In that action he prayed for the issuance of an order in the nature of a writ of *mandamus* directing the board to issue immediately a renewal of his certificate of admission to practice.

On 2 June 1966 the board received the letter of 31 May 1966, containing the tender of the renewal fee and the request for renewal, and on the same date it was served with the summons and complaint in the said action.

On 3 June 1966 the board dispatched to the plaintiff by "registered mail, receipt requested" a letter, copies of which it delivered personally to the plaintiff and to his attorney on 7 June 1966. This letter stated that the board had "sufficient evidence, which, if not rebutted or explained, would justify the Board in suspending or revoking" his license, in withholding the renewal of his license "for cause," and in bringing action against him for unauthorized practice of architecture. It set forth four specific charges (set forth below) which the board deemed the evidence in its possession sufficient to establish. The letter then advised the plaintiff that the board could not pass upon his request for renewal of his certificate until it had a hearing and a determination of these charges. It advised him that if he desired to be heard on his request for such renewal and on such charges, he might secure a public hearing by mailing to the board within twenty days a registered letter requesting such hearing, whereupon the board would notify him of the time and place thereof. The letter further stated that if the plaintiff did not request a hearing within such allowed time the board would "feel free to withhold the renewal * * * for cause," to "revoke the license for cause other than failure to renew," and to take such other action as might appear to the board necessary and proper. The plaintiff did not request such hearing.

On 8 June 1966 the board filed its answer to the complaint in the action instituted on 31 May 1966, attaching to and incorporating in its answer a copy of the above letter of 3 June 1966.

On 29 June 1966 the plaintiff mailed to the board his request for the renewal of his certificate of admission to practice for the then upcoming period of 1 July 1966 to 30 June 1967, enclosing the pre-

scribed renewal fee. (The record does not disclose the date on which this communication was received by the board, but presumably it was subsequent to 29 June 1966.)

The board, in the form of a letter to the plaintiff, dated 29 June 1966, issued its order, reciting that the plaintiff had failed to request a hearing pursuant to the letter of 3 June 1966, that the board, in the absence of such request, considered the evidence before it (not set out in the record on appeal), including copies of plans signed by the plaintiff as architect subsequent to the revocation of his license for the nonpayment of the renewal fee due on or before 30 June 1965, and that it made the following findings of fact, concerning the four charges set forth in the letter of 3 June 1966:

> "1. That *since notice of revocation of your license,* and warnings from the Board against continued practice, you have continued to hold yourself out to the public as an architect qualified to practice in North Carolina, to use the title 'Architect' and to practice architecture as defined in G.S. 83-1. (Emphasis added.)
>
> "2. That, *since revocation of your license,* you have signed as 'Architect' plans for (1) Clark's Discount Stores, Lumberton, N. C., (2) A store for the J. C. Penny Company, Inc., Lumberton, N. C.; and (3) Plans for a Holiday Inn in Chapel Hill, N. C. (Emphasis added.)
>
> "3. That you have used or permitted the use of your name and/or seal with the title 'Architect' on plans made by others and not by you under your personal supervision; namely, post office building plans prepared in New Jersey by an individual not licensed to practice architecture in North Carolina and which you knew or should have known were illegally prepared.
>
> "4. That you have furnished 'limited services' by permitting the use of your name and seal for the purpose of enabling others to evade the public health and safety requirements of the General Statutes of North Carolina."

The board, in its said order, concluded, as matters of law, that the plaintiff had engaged in unauthorized practice of architecture in violation of G.S. 83-12, and in "dishonest practice" under Rule IV A 7 of the Rules and Regulations of the board; that in the said use or permitted use of his name and seal, together with the title "Architect" on plans prepared by others, the plaintiff had engaged in "dishonest practice" under Rule IV A 2a and b of the Rules and Regulations of the board; and in furnishing the above mentioned "limited

services," he had violated Rule IV A 3 of the Rules and Regulations of the board. (The Rules of the Board are not set forth in the record on appeal.)

Upon the foregoing findings and conclusions, the board ordered that the plaintiff's "certificate or license to practice architecture in North Carolina, having already been revoked under the provisions of G.S. 83-11 for failure to pay the renewal fee, is hereby revoked for cause, effective as of the date of this order, and [his] request for reinstatement is denied."

The board concluded the letter of 29 June 1966 with the statement that if the plaintiff felt that evidence considered by the board could be rebutted or satisfactorily explained, the board would consider reopening the matter for hearing, upon good cause shown within a reasonable time, and that its next regularly scheduled meeting would be held on 16 July 1966. (Except as noted below, nothing in the record on appeal or in either brief indicates any request by the plaintiff for such hearing by the board.)

(The defendant's brief on appeal states that the order so dated 29 June 1966 was first circulated among the members of the board for approval as to form and then was mailed to the plaintiff by the board by registered mail 6 July 1966, he signing a receipt therefor on 8 July 1966. This is not set forth in the record on appeal.)

The suit for *mandamus* instituted by the plaintiff on 31 May 1966 was heard by Mallard, J., at the July 1966 Regular Civil Term of the Superior Court of Wake County. After hearing evidence and arguments of counsel, Judge Mallard entered his order, dated 13 July 1966, containing his findings of fact and conclusions of law, including the conclusions that G.S. 83-11 does not permit the board to refuse to renew a certificate of admission to practice architecture when the renewal fee, plus the penalty prescribed by the statute, is paid by the applicant within one year after its due date, and that the plaintiff, having on 26 March 1966 complied with this requirement, was entitled to have his license renewed as of that date. Judge Mallard, therefore, ordered that the board immediately issue to the plaintiff a certificate or license to practice architecture for the year 1965-66, such certificate to be dated 26 March 1966. The order of Judge Mallard contained his further conclusion that "this proceeding is separate and independent of any action taken by the Board of Architecture after May 31, 1966, but the plaintiff is entitled to have its license renewed as of March 26, 1966."

The board gave notice of appeal from the judgment of Judge Mallard but this appeal was never perfected, and on 14 July 1966 it mailed to the plaintiff its letter enclosing the renewal of his cer-

tificate dated 26 March 1966. In this letter the board returned the plaintiff's check for the renewal fee for the period beginning 1 July 1966 and advised him that its order of revocation for cause, dated 29 June 1966, remained in full force and effect from the date of the service thereof, 8 July 1966, and that, for this reason, the board would not issue a renewal of the plaintiff's certificate for the year beginning 1 July 1966 "unless and until the Board's Order of Revocation should be changed *at the hearing you requested for July 15, 1966 or thereafter.*" (Emphasis added.) (There is no other reference in the record on appeal or in the plaintiff's brief to any request by the plaintiff for a hearing by the board or to any hearing conducted by the board following its order of 29 June 1966.)

(Nothing in the record on this appeal indicates a filing by the plaintiff of a notice of appeal to the superior court from the order of the board dated 29 June 1966.)

On 25 August 1967, approximately fourteen months after the revocation of his certificate by the board and nearly two months after the expiration of the twelve months period for which he last tendered a renewal fee, the plaintiff instituted this action in the Superior Court of Wake County. In his complaint he alleges: To and including 30 June 1966 he was a duly licensed architect; on 29 June 1966 he made formal request for the renewal of his license for the period beginning 1 July 1966 and ending 30 June 1967, attaching to his application for renewal the required fee; the board replied thereto as set forth in the above mentioned letter of 14 July 1966, denying such application for renewal; the plaintiff did not, *at any time between 31 March 1966 and 30 June 1966,* receive notice from the board in compliance with Chapter 150 of the General Statutes or in compliance with G.S. 83-9 *to the effect that the plaintiff's license had been suspended or revoked,* that the plaintiff is entitled to have his license immediately reissued, having complied with G.S. 83-11, and praying that an order in the nature of a writ of *mandamus* be issued by the court, directing the board to issue such renewal of the plaintiff's certificate to practice architecture.

On 12 September 1967 the board filed its answer, denying that the plaintiff is entitled to renewal of his certificate, and alleging, as a further answer and defense: The plaintiff's license was revoked for his failure to renew it on or before 1 July 1965; he was notified thereof on 12 July 1965 and on 25 October 1965; the plaintiff received on 4 June 1966 the above mentioned letter from the board, dated 3 June 1966, and was thereby notified in accordance with G.S. 150-10(3) of his opportunity to be heard before the board; he did not request a hearing within the time and in the manner required

by G.S. 150-11(c); by the above mentioned letter, dated 29 June 1966, which was registered, and which the plaintiff received 8 July 1966, the plaintiff was notified of the revocation of his license by the board "for cause other than failure to pay the statutory renewal fee, and of the refusal of the Board to reinstate the license"; he failed to file notice of appeal from the decision of the board in the manner and within the time stated in G.S. 150-24.

The present action was heard by Olive, E.J., at the September Session of the Superior Court of Wake County. On 13 September 1967 he rendered judgment, reciting the following findings and order:

"1. The plaintiff was given proper notice by the defendant in accordance with G.S. 150-11 of the contemplated action to withhold the plaintiff's certificate to practice architecture for cause,

"2. At the time of its notice to plaintiff on June 3, 1966, and of its Order of June 29, 1966, the defendant had jurisdiction and properly refused to grant a certificate to practice architecture to the plaintiff under the power given to the defendant in North Carolina General Statutes, Chapter 83,

"3. The plaintiff was given proper notice of this action by the defendant in accordance with G.S. 150-21, and

"4. The plaintiff failed to perfect an appeal from the finding and order of the defendant in accordance with G.S. 150-24;

"Now, therefore, it is ordered, adjudged, and decreed that said plaintiff's action to show cause be dismissed, and that the defendant recover its costs of the plaintiff, to be taxed by the clerk."

From this judgment of Olive, E.J., the plaintiff has appealed to the Supreme Court, his sole exception being to the judgment. In his assignments of error, he asserts that the signing of the judgment was error for the following reasons:

1. The plaintiff was not an architect within the purview of G.S. 83-1(1) and the defendant had no jurisdiction over the person of the plaintiff at the time of its letter to him on 3 June 1966;

2. The plaintiff was not notified until 8 July 1966 of the action of the board in revoking his certificate on 29 June 1966;

3. The board had no jurisdiction to revoke the plaintiff's certificate because of his unauthorized practice of architecture, this being a criminal offense;

4. The board's letter of 3 June 1966 was not proper notice to the plaintiff for the reason that on 31 May 1966 he had instituted in the Superior Court of Wake County the action heard and determined by Judge Mallard on 13 July 1966;

5. The charge of unauthorized practice of architecture contained in the board's letter to the plaintiff of 3 June 1966 was rendered "moot" by Judge Mallard's judgment;

6. The conclusion contained in Judge Mallard's judgment that the matter before him was separate and independent of any action taken by the board after 31 May 1966 did not relieve the defendant from complying with Chapters 83 and 150 of the General Statutes;

7. Judge Mallard, in his judgment, did not find the plaintiff guilty of unauthorized practice of architecture as alleged in the board's letter to the plaintiff of 3 June 1966, and such judgment bars the board from charging the plaintiff again with the misconduct alleged in that letter;

8. The judgment of Judge Mallard was retroactive in that it reinstated the plaintiff's license from 1 July 1965 to 30 June 1966, but the board's letter to the plaintiff of 3 June 1966 could not constitute notice of the charges against the plaintiff since the board is not granted authority to make its order retroactive.

William T. McCuiston for appellant.
Albright, Parker & Sink for appellee.

LAKE, J. The judgment of Mallard, J., terminated the action instituted by the plaintiff on 31 May 1966, no appeal from that judgment having been perfected. That judgment dealt with the right of the plaintiff to a renewal of his certificate of admission to the practice of architecture for the period ending 30 June 1966. It determined that the plaintiff, having tendered to the board on 26 March 1966 the required fee and penalty for the renewal of his certificate, was entitled, as a matter of law, to such renewal as of that date. The judgment specifically stated that it did not relate to any action taken by the board after 31 May 1966. The validity of the order of the board, dated 29 June 1966, is, therefore, not *res judicata* by reason of the judgment of Judge Mallard, nor did the pendency on that date of the action before Judge Mallard suspend the statutory authority of the board to consider and pass upon an entirely different matter.

G.S. 83-11 provides:

> "*Annual renewal of certificate; fee.* — Every architect continuing his practice in the State shall, on or before the first day of July in each year, obtain from * * * the Board * * * a renewal of his certificate for the ensuing year upon the payment of a fee in such amount as may be fixed by the Board * * * and upon failure to do so shall have his certificate of admission to practice, revoked, but such certificate may be renewed at any time within one year upon the payment of the prescribed renewal fee and an additional five dollars ($5.00) for late renewal."

Judge Mallard correctly concluded that this statute gives to the architect who fails to pay the prescribed renewal fee on its due date the right to pay the fee thereafter, within the next twelve months, and obtain a renewal of his certificate, this being an absolute, unqualified right so far as mere delay in payment of the fee is concerned. As to that the board has no discretion. The complaint in the action heard by Judge Mallard alleged that the plaintiff had tendered the fee and penalty, that the board had nevertheless refused to renew his certificate and that the plaintiff was entitled to an order in the nature of a *mandamus* requiring the board to issue the renewal. That was the question before Judge Mallard and that was what his judgment, dated 13 July 1966, determined. It determined nothing except that the plaintiff was entitled to a renewal of his certificate authorizing him to engage in the practice of architecture from 26 March 1966 to and including 30 June 1966.

The present action heard by Judge Olive does not relate to the matter determined by Judge Mallard, but relates solely to the authority of the board to refuse to renew the certificate, for a period beginning after 30 June 1966, for a cause other than the nonpayment of the renewal fee. The authority of the board to revoke, for cause, the renewal issued pursuant to Judge Mallard's judgment is a moot question not before us on this appeal since it is conceded, and plainly appears from the record, that the order of the board did not take effect until 8 July 1966, when it was served upon the plaintiff, at which time the renewal issued pursuant to the judgment of Judge Mallard had expired by lapse of time.

The judgment of Judge Mallard, entered after the expiration of the renewal period with which it was concerned, was not a vain thing. It established that the plaintiff was entitled to a certificate as of 26 March 1966, so that any otherwise lawful practice of architecture by him from 26 March 1966 to 30 June 1966, inclusive, was not

unauthorized practice and would not, for that reason, justify a refusal by the board to renew his certificate for a subsequent period. The validity of the order of the board, dated 29 June 1966, which was the order before Judge Olive, is to be determined, therefore, as if the board had on 26 March 1966 accepted the tender of the renewal fee by the plaintiff and had then issued to him a renewal of the certificate, such renewal expiring at the end of 30 June 1966. Such action by the board would not preclude it from subsequently considering and acting upon charges of conduct by the certificate holder which, if true, would constitute cause for revocation of the certificate.

Chapter 150 of the General Statutes applies to the revocation of a license or certificate issued by the defendant board. G.S. 150-10 provides that every licensee shall be afforded notice and opportunity to be heard before the board takes any action to withhold the renewal of his license for any cause other than failure to pay a statutory renewal fee. G.S. 150-11(b) prescribes the contents of such notice. The letter of the board to the plaintiff, dated 3 June 1966, complies with these requirements. G.S. 150-11(c) provides:

> "(c) If the licensee * * * does not mail a request for a hearing within the time and in the manner required by this section, the board may take the action contemplated in the notice and such action shall be final and *not subject to judicial review.*" (Emphasis added.)

G.S. 150-12 provides that such notice "may be served either personally or by an officer authorized by law to serve process, or by registered mail, return receipt requested * * *." The complaint in the present action does not allege that this notice was not so served. What the complaint alleges is that the plaintiff did not, between 31 March 1966 and 30 June 1966, receive notice that his license had been suspended or revoked. It appears from the record that the notice of 3 June 1966 was sent by "registered mail, receipt requested," and that the plaintiff received it on 4 June 1966. Judge Olive found as a fact that "the plaintiff was given proper notice by the defendant in accordance with G.S. 150-11 of the contemplated action to withhold the plaintiff's certificate to practice architecture for cause." The record supports this finding. It follows that the board had jurisdiction, both of the subject matter and of the person of the plaintiff, at the time of its order dated 29 June 1966. The plaintiff did not request a hearing by the board. Consequently, by the express terms of G.S. 150-11(c), the board was empowered to determine the matter and its order became final and not subject to judicial review.

G.S. 150-21 provides:

> "*Service of written decision.* — Within five days after the decision is rendered the board shall serve upon the person whose license is involved a written copy of the decision, either personally or by registered mail. If the decision is sent by registered mail it shall be deemed to have been served on the date borne on the return receipt."

Judge Olive found that the plaintiff was given proper notice of its decision in accordance with G.S. 150-21. The brief of the defendant in this Court contains a statement to the effect that the decision of the board, dated 29 June 1966, was first circulated to the members of the board in order to obtain their approval as to its form and, thereafter, was dispatched by registered mail to the plaintiff on 6 July 1966, and he signed a receipt for it on 8 July 1966. In the absence of a stipulation to this effect by the plaintiff, we cannot base our decision upon this statement of fact in the defendant's brief, the record being silent on that point. Furthermore, the defendant's own "Statement of the Case on Appeal," included in the record, by stipulation, as part of "the case and record on appeal," says, "On June 29, 1966, the Board entered its order." There is nothing in the record to indicate any contrary evidence or contention before Judge Olive. We, therefore, must determine whether an order, within the authority of the board when entered by it, and not subject to judicial review as of that time, becomes a nullity by reason of service upon the certificate holder nine days after its entry.

G.S. 150-20 provides:

> "*Manner and time of rendering decision.* — After a hearing has been completed the members of the board who conducted the hearing shall proceed to consider the case and as soon as practicable shall render their decision. * * * In any case the decision *must be rendered within ninety days after the hearing.*" (Emphasis added.)

We think the clear intent of G.S. 150-20 is that the board loses its authority to render a decision at the expiration of ninety days from the date of the hearing and an order entered thereafter is a nullity, but it was not the intent of G.S. 150-21 that an order entered within the authority of the board becomes a nullity through a delay in serving it.

G.S. 150-24 governs the right to and procedure for obtaining judicial review of a decision of the board, where the decision is subject to judicial review. It provides:

> "*Availability of judicial review; notice of appeal; waiver of*

> *right to appeal.* — Any person entitled to a hearing pursuant to this chapter, who is aggrieved by an adverse decision of a board issued after hearing, may obtain a review of the decision in the Superior Court of Wake County * * * In order to obtain such review such person must, within twenty days after the date of service of the decision as required by § 150-21, file with the board secretary a written notice of appeal, stating all exceptions taken to the decision * * * *Failure to file such notice of appeal in the manner and within the time stated shall operate as a waiver of the right to appeal and shall result in the decision of the board becoming final;* except that for good cause shown, the judge of the superior court may issue an order permitting a review of the board decision notwithstanding such waiver." (Emphasis added.)

G.S. 150-33 provides:

> "*Judicial review procedure exclusive.* — The provisions of this chapter providing a uniform method of judicial review of board actions of the kind specified in G.S. 150-10 [including revocation of and refusal to renew a license] shall constitute an exclusive method of court review in such cases and shall be in lieu of any other review procedure available under statute or otherwise. * * *"

The plaintiff did not give notice of appeal from the decision of the board. On the contrary, he did nothing until he instituted this action for a *mandamus* to compel the renewal of his certificate, approximately fourteen months after the decision of the board was received by him. An action for *mandamus* may not be used as a substitute for an appeal. *Young v. Roberts,* 252 N.C. 9, 112 S.E. 2d 758; *Realty Co. v. Planning Board,* 243 N.C. 648, 92 S.E. 2d 82; *Baker v. Varser,* 239 N.C. 180, 79 S.E. 2d 757; *Pue v. Hood, Comr. of Banks,* 222 N.C. 310, 22 S.E. 2d 896. This extraordinary remedy "is not a proper instrument to review or reverse an administrative board which has taken final action on a matter within its jurisdiction." *Warren v. Maxwell,* 223 N.C. 604, 27 S.E. 2d 721. An action for a writ of *mandamus* lies only where the plaintiff shows a clear legal right to the action demanded and has no other adequate remedy. *Thomas v. Board of Elections,* 256 N.C. 401, 124 S.E. 2d 164; *Young v. Roberts, supra; Hospital v. Wilmington,* 235 N.C. 597, 70 S.E. 2d 833; *Jarrell v. Snow,* 225 N.C. 430, 35 S.E. 2d 273; *Harris v. Board of Education,* 216 N.C. 147, 4 S.E. 2d 328. When the statute under which an administrative board has acted provides an orderly procedure for an appeal to the superior court for review of the board's

action, this procedure is the exclusive means for obtaining such judicial review. *In Re Assessment of Sales Tax,* 259 N.C. 589, 131 S.E. 2d 441; *Sanford v. Oil Co.,* 244 N.C. 388, 93 S.E. 2d 560; *In Re Employment Security Com.,* 234 N.C. 651, 68 S.E. 2d 311; Strong, N. C. Index, 2d Ed., *Mandamus,* §§ 1 and 4.

The plaintiff having failed, as found by Judge Olive, to perfect his appeal from the order of the board, dated 29 June 1966, the judgment dismissing his action for *mandamus* was proper.

Affirmed.

IN THE MATTER OF THE APPEAL OF REEVES BROADCASTING CORPORATION FROM THE VALUATION PLACED ON PROPERTY BY BRUNSWICK COUNTY FOR 1965.

(*Filed 1 May 1968.*)

1. Taxation § 25—

The time and manner for listing and valuing property for ad valorem taxation is regulated by the Machinery Act, G.S. 105-271, *et seq.*

2. Same—

Real property is valued octennially for ad valorem taxation, G.S. 105-278, and all property not subject to reassessment must be listed in subsequent years at the value at which it was assessed at the last revaluation.

3. Same—

Real property which has increased more than $100 in value by virtue of improvements or which has been subdivided into lots on streets already laid out and open for travel and sold or offered for sale as lots since the last assessment is subject to reassessment in the years between octennial revaluations. G.S. 105-279.

4. Same—

The County Board of Equalization and Review has the duty to correct the valuation of any property so that all property is listed on the tax records at the valuation required by law.

5. Same—

A taxpayer may appeal an order of the Board of Equalization and Review to the State Board of Assessment pursuant to G.S. 105-329.

6. Same—

The county tax supervisor must provide for a uniform schedule of values to be used in appraising real property, and must see that all property being appraised is actually visited and observed by the township list taker or an expert appraiser. G.S. 105-295.

7. Same—

G.S. 105-295 is directory only, and failure of the assessors to consider

every *indicia* of value recited in the statute does not vitiate the appraisal.

8. Same—

All real property must be appraised for ad valorem taxation, as far as practicable, at its true market value in money, and the Board of County Commissioners must determine the assessment ratio to be applied to the appraised value of the property. G.S. 105-294.

9. Same—

Upon appeal from the County Board of Equalization and Review, the State Board of Assessment has authority to reduce, increase or confirm the valuation fixed by the County Board, and the valuation fixed by the State Board is final and conclusive when supported by material and substantial evidence in the absence of a showing of abuse of discretion or an error of law prejudicial to the taxpayer.

10. Appeal and Error §§ 26, 28—

An exception to the findings of fact and conclusions of law and the judgment of the court, although broadside, is sufficient to present the record proper for review and to raise the question whether error of law appears on the face of the record.

11. Appeal and Error § 26—

An appeal is itself an exception to the judgment and to any matter appearing on the face of the record proper.

12. Taxation § 25—

Upon an appeal from an order of the State Board of Assessment, the Superior Court is without authority to make its own findings of fact and to order that the County Board place a certain valuation on the property in question, and where the findings of the State Board are supported by competent, material and substantial evidence and are unaffected by error of law, it is error for the Superior Court to fail to affirm the Board's decision.

APPEAL by Brunswick County from *Bailey, J.*, at the August 1967 Civil Session WAKE Superior Court.

The record in this case was made at the hearing before the State Board of Assessment (State Board). The following facts, supported by the evidence, are related here for a better understanding of the matters involved on this appeal.

1. About 1960 Reeves Broadcasting Corporation (Reeves) became the owner and developer of a large tract of land in Brunswick County known as the Boiling Spring Lakes property. Over 6,000 acres are located in Town Creek Township and about 5,000 acres in Smithville Township.

2. Real property in Brunswick County was last revalued for tax purposes in 1958, and the next revaluation year prescribed by G.S. 105-278 for Brunswick County was 1967.

3. In 1958 the property in question was listed for taxation as follows:

Town Creek Township	
6602 acres Allen Creek	$ 66,020
Smithville Township	
5000 acres Allen Creek	$ 50,000
Total tax valuation	$116,020

4. Improvements were made to the land during 1959, 1960, 1961 and 1962. Conferences were held between the taxpayer and Brunswick County and the assessed value of the property for 1962 was increased to $141,390 by agreement. In 1964 certain additional improvements to the property were listed by Reeves bringing the assessed value to $150,750 for that year. The County attempted to increase the assessed valuation for 1964 but due to a technicality, which was unexplained, reverted to the 1963 valuation and used it for tax purposes for 1964. The changes made as of January 1, 1965 were the changes which the County attempted to make for 1964.

5. In 1963 and 1964 Reeves opened new areas and new streets and developed new sections. It has spent $75,000 to $100,000 building a dam to form a large lake covering more than 100 acres and subdivided the area around the lake into more than 100 lots which have an average market value of $3,000 each. It built a nine-hole golf course and a club house on the property at a cost of approximately $200,000. There are approximately 37 miles of road in the development, some of which were built between 1962 and 1965. Between twelve and fifteen maps are on record showing various areas being subdivided into lots. All the land within the development, except the portion subdivided into lots, is on the tax books at a valuation of $10 per acre. Some of this acreage is being sold as 10-acre timber tracts at $149.50 per acre.

6. In 1963 Reeves furnished the Tax Supervisor for Brunswick County a list showing the various sections under development, the number of lots in each section, and the value, or selling price, placed on each lot by the owner. On the basis of that information Brunswick County attempted to make the 1964 listing but reverted to the 1963 values due to some technicality. The values thus furnished in 1963 were followed in making the tax assessment for 1965 now under attack in this case.

7. Real estate valuations for the year 1965 in Brunswick County were made under the supervision and direction of Mrs. Ressie R. Whatley, County Tax Supervisor. In 1958 the property consisted primarily of swamp and woods and was listed at $10 an acre. The

1963 and 1964 assessments were based on changes that had been made to and including 1962. Many additional changes occurred during 1964 which prompted the reappraisal for 1965. Mrs. Whatley went upon the property a number of times, riding through it in her car and looking it over. She did not go out and walk over the property. She observed it with respect to subdivision into lots and made a report to the County Board of Equalization and Review (County Board) with her recommendations in the form of a breakdown of values by the acre and by the lot. The County Board inspected the property, accepted the recommendations of Mrs. Whatley and assessed the Reeves property for 1965, using the 1963 sales price figures furnished by the taxpayer as the appraised value of each parcel, tract or lot. Recorded maps show a total of 4,174 lots in Town Creek Township and 905 lots in Smithville Township.

The listing by Reeves Broadcasting Corporation for the year 1965, except for subdivided lots, is as follows:

Smithville Township	
4723 acres Allen Creek, $10 per acre	$47,230
200 acres in Town of Boiling Spring Lakes at $50 per acre	10,000
77 acres, country club and golf course	20,770
Sales office building (new)	2,830
Total	$80,830

Town Creek Township	
6302 acres at $10 per acre (this also has a small office building on it.)	$63,340
300 acres within the town, Allen Creek, $50 per acre, plus pump house	17,700
154.9 acres at $10 per acre	1,550
1 lot, # 140, Sec. 6 (Admin. office Bldg.)	3,500
Less Brown and Hufham houses (sold)	(7,430)
1 lot, #93, Sec. B, Lake View section	4,400
1 lot, #1B, Commercial	900
Total	$83,960

In addition to the foregoing listings by the taxpayer, the County Tax Supervisor added the following:

In Town Creek Township 4174 lots as shown on recorded maps of subdivisions at a valuation of	$528,310	
This is an average per lot valuation of		$126.57

In Smithville Township, 905 lots as shown on recorded maps of subdivisions at a valuation of	$180,910	
This is an average per lot valuation of		$200.00

All of the Town of Boiling Spring Lakes and the holdings of Reeves Broadcasting Corporation were carried on the tax books as acreage until subdivision maps had been placed on record from which lots were sold or contracted to be sold.

8. No lots around the big lake have been sold for less than $2,000. The price for these lots has ranged from $2000 to $3800, averaging $3000, according to Charles A. Tate, Development Manager for Reeves. Waterfront lots at Spring Lake were sold for $695, while those not fronting on the water were sold from $300 to $500. Every lot which has been sold in every development is adaptable to the use for which it was sold. Some of the lots shown on the maps are not salable in their present condition but will require filling in before they can be sold.

9. Brunswick County has endeavored to encourage developers of real estate within the county and has followed a system of placing fixed values on all real estate within the county and then giving a discount to a developer. With the exception of Reeves Broadcasting Corporation, the County, after establishing the appraised value, then gives all developers a 35% "depreciation" so that in effect property under development is appraised at 65% of its market value. Then an assessment ratio of 50% is applied to the depreciated value, the net result being that a developer's property is taxed at 32.50% of its appraised market value.

Because Reeves Broadcasting Corporation was a large, new development trying to get started, Brunswick County gave it special consideration in that appraised values were established for its property and then Reeves was given a developer's "depreciation" of 50% (instead of 35%), and then an assessment ratio of 50% was applied to such depreciated value, the net result being that its property was initially placed on the tax books at 25% of its appraised market value.

In preparing the 1965 listing and values of the Reeves property, Brunswick County first appraised the lots at 65% of the advertised selling price, the value fixed by the taxpayer itself. Then the 50% "depreciation" allowance was applied. Then the property was actually assessed for taxation at 50% of the "depreciated" value, the net result being that the lots in the various subdivisions of the Reeves property were listed for taxes for the year 1965 at 16.25% of the advertised selling price.

Long Beach and its Tranquil Harbour division is the development in Brunswick County which most reasonably compares with Reeves. In this development all lots shown on recorded maps are first appraised at 65% of the advertised sales price. Then 35% of that figure is deducted as a "depreciation allowance", and then each lot is taxed at 50% of this figure, the net result being that the lots are taxed at 21.13% of the advertised sales price.

Barbee's, Inc., James M. Harper, Jr.'s "Deep Water Heights Subdivision of Southport", the R. I. Mintz "River Heights Addition to the Town of Shallotte", Ocean Isle Development and Sunset Beach-Twin Lakes Development are all treated in the same basic manner as the Tranquil Harbour-Long Beach development.

10. After the tax supervisor and the County Board of Equalization and Review had assessed the Reeves property for 1965 as set out in paragraph 7 above, Reeves appealed to the State Board of Assessment assigning as grounds "excessive and illegal valuation and discrimination in comparison with valuation of similar lands, the increase over the 1964 valuation was without legal authority, no competent appraiser has visited and observed the property in making the valuations from which this appeal is taken, . . . the increase in valuation is confiscatory and is an unconstitutional taking of private property for public use without due process of law, . . ."

The State Board of Assessment "gave careful consideration to all pertinent facts, evidence and testimony given by the taxpayer and the County" and to the brief filed by the taxpayer, made certain findings set out in its order, and determined that "the valuation of Section 16 of the property and such portions of Sections 8 and 9 as do not represent lots on streets which were open to travel on January 1, 1965, [nor on a lake front,] should be valued on an acreage basis and appraised at $10 an acre. . . . [A]ny lots on swampy land not suitable for the use for which intended should be appraised at values which would reflect the cost of reclaiming the lots. . . . [A]ppraised values placed on all other property of appellant by Brunswick County are proper." The State Board thereupon remanded the taxpayer's appeal to Brunswick County for action in keeping with such order.

11. Reeves Broadcasting Corporation petitioned the Superior Court of Wake County for a judicial review of said order under G.S. 143-306 *et seq.* contending the State Board (1) exceeded its authority, (2) acted arbitrarily and capriciously, (3) placed an excessive valuation on the property which was unlawful and unequal when compared with similar property in Brunswick County, and (4) was erroneous in failing to adjudge that Brunswick County had followed

an unlawful procedure in violation of the statutes in its 1965 reassessment of the property for taxation.

When the matter was heard before Judge Bailey at the August 1967 Civil Session of Wake County Superior Court, he made certain findings which, conjunctively, sustained the position of Reeves, vacated and set aside the reassessment of the property for the year 1965 and remanded the cause to the State Board with directions that the 1964 valuation of said property be placed into effect for the tax year 1965.

To the findings and conclusions and to the judgment itself Brunswick County excepted and appealed to the Supreme Court.

E. J. Prevatte, attorney for Brunswick County, appellant.

Sullivan & Horne; Broughton & Broughton by John D. McConnell, Jr.; attorneys for Reeves Broadcasting corporation, appellee.

HUSKINS, J. The assessment, listing and collection of taxes is regulated by the Machinery Act, G.S. 105-271, *et seq.*, which prescribes the time and manner for listing and valuing property for *ad valorem* tax purposes. Portions of the act pertinent to decision in this case are analyzed below.

Real property in Brunswick County must be listed and assessed for *ad valorem* taxes on January 1, 1958 and every eighth year thereafter. G.S. 105-278. The Board of County Commissioners is required to appoint a tax supervisor, G.S. 105-283, who is responsible for the proper listing and appraising of property. G.S. 105-286. The tax supervisor appoints list takers who in the first instance determine valuations. G.S. 105-287. The tax supervisor has the power, however, at any time prior to the meeting of the Board of Equalization and Review, "to change the valuation placed on any property by the list taker." G.S. 105-286(g). After the property has been listed and valuations placed upon it by the list takers or by the tax supervisor, the County Commissioners sit as a County Board of Equalization and Review. In such capacity it has the duty to equalize the valuation of all property in the county to the end that property shall be listed on the tax records at the valuation required by law. G.S. 105-327(g) (1). This board is required to correct, *inter alia,* the valuation of any taxable property on the tax list, increasing or decreasing the assessed value so as to conform the valuation to legal requirements. The board may not change the valuation of any real property from the value at which it was assessed for the preceding year except in accordance with the terms of G.S. 105-278 and G.S. 105-279. G.S. 105-327(g) (3). Real property is valued octennially as provided in G.S. 105-278. In other than octennial revaluation years, all

real property *not subject to reassessment* must be listed for *ad valorem* taxes at the value at which it was assessed at the last revaluation. The following property, however, is subject to reassessment in other than revaluation years, to wit: (1) all real property which has increased more than $100 in value by virtue of improvements or appurtenances added since the last assessment (except those exempt from taxation by G.S. 105-294 not pertinent here); and (2) all real property which has been subdivided into lots *on streets already laid out and open for travel,* and sold or offered for sale as lots, since the date of the last assessment. However, where lands have been subdivided into lots and more than five acres of any such subdivision remain unsold by the owner, the unsold portion may be listed as land acreage in the discretion of the tax supervisor. G.S. 105-279(3) b., f.

Any taxpayer may except to the order of the Board of Equalization and Review and appeal to the State Board of Assessment in the manner provided by G.S. 105-329.

In appraising real property for tax purposes, it is the duty of the county tax supervisor to see that every lot, parcel, tract, building, structure and other improvement being appraised is actually visited and observed by the township list taker or an expert appraiser employed to assist the tax supervisor and list takers. G.S. 105-295. Furthermore, the county tax supervisor is required to provide for the development and compilation of standard uniform schedules of values to be used in appraising real property in the county. G.S. 105-295. A separate property record for each tract, parcel, lot or group of contiguous lots must be prepared so property owners may ascertain the method and standard of value used in evaluating their properties. G.S. 105-295.

In determining value, the assessors should consider any or all of the following *indicia* when applicable to the particular property being valued, to wit: the location, quality of soil, timber, water power and privileges, mineral deposits, fertility, adaptability for commercial and other uses, past and probable future income therefrom, present assessed valuation, and any other features affecting the value of each separately listed tract, parcel or lot. G.S. 105-295. This statute, generally speaking, is directory. Failure to consider each and every *indicia* of value recited in the statute does not vitiate the appraisal. In appraising a vacant lot on Main Street, for example, an assessor would not likely give attention to mineral deposits or water power.

With respect to tax valuation, all real property as far as practicable, shall be appraised at its true market value in money. In re-

valuation years and annually thereafter, the Board of County Commissioners is required to adopt some uniform percentage of the appraised value as the value to be used in taxing property. This percentage is known as the assessment ratio and is applied to the appraised value of all property subject to assessment. The tax records of the county should show both the appraised value and the assessed value for tax purposes. G.S. 105-294.

When appeal is taken from the County Board of Equalization and Review to the State Board of Assessment, said Board is authorized, after timely notice to all interested parties and after hearing all evidence offered, to reduce, increase or confirm the valuation fixed by the County Board. The valuation thus determined by the State Board is entered upon the fixed and permanent tax records "and shall constitute the valuation for taxation." G.S. 105-329. Failure of the tax listers, or of the tax supervisor, to perform all duties imposed upon them in strict compliance with law does not give the taxpayer a tax-free year nor deprive the State Board (on appeal) of its authority "to reduce, increase, or confirm" the valuation fixed by the County Board. The State Board has full authority, notwithstanding irregularities at the county level, to determine the valuation and enter it accordingly. Such valuation so fixed is final and conclusive unless error of law or abuse of discretion is shown. *Belks Department Store, Inc., v. Guilford County,* 222 N.C. 441, 23 S.E. 2d 897. But judicial review of its administrative decisions is always available. *In re Freight Carriers,* 263 N.C. 345, 139 S.E. 2d 633. When a judicial review is sought in the superior court on the record made before the State Board, as in this case, that court is without authority to make findings at variance with the findings of the State Board which are supported by material and substantial evidence because that is the exclusive function of the State Board of Assessment. G.S. 143-315; *In re Pine Raleigh Corp.,* 258 N.C. 398, 128 S.E. 2d 855.

Applying these legal principles, it is apparent that the Reeves property was last reassessed in 1962 and was subject to reassessment in 1965 because (1) it had increased more than $100 in value by virtue of improvements since its last assessment and (2) many sections of it had been subdivided into lots on streets already laid out and open for travel, and sold or offered for sale as lots since the last assessment.

It is equally apparent that the 1965 list takers for Town Creek and Smithville Townships never placed a valuation on the Reeves property. The tax supervisor simply accepted the 1963 advertised selling price of the taxpayer itself, gave it a 35% reduction to

establish the true market value of the lots in question, then gave it a developer's "depreciation" of 50%, and the lots were then assessed for taxation at 50% of that amount. In short, the 1965 assessed value for tax purposes is 16.25% of the 1963 advertised selling price of each lot. This was done after the tax supervisor had driven over the property several times and looked it over. The County Board of Equalization and Review had also made an inspection trip before finally adopting the tax valuations established by the supervisor. This valuation appears to be as favorable to Reeves, or more so, than the valuations placed upon the property of any other taxpayer mentioned in the record. It is therefore difficult to understand how Reeves is aggrieved by failure of the County to strictly follow the statutes in listing this property. But be that as it may, after careful consideration of all pertinent facts, evidence and testimony, the State Board of Assessment determined that "the valuation of Section 16 of the property and such portions of Sections 8 and 9 as do not represent lots on Streets which were open to travel on January 1, 1965, [nor on a lake front,] should be valued on an acreage basis and appraised at $10 an acre. . . . [A]ny lots on swampy land not suitable for the use for which intended should be appraised at values which would reflect the cost of reclaiming the lots. . . . [A]ppraised values placed on all other property of appellant by Brunswick County are proper." The State Board thereupon remanded the taxpayer's appeal to Brunswick County for action in keeping with such order. Returning Section 16 to an acreage basis reduced the assessed valuation by $88,000. Further reduction in an undisclosed amount is effected with respect to Sections 8 and 9 and all lots on swampy lands. In this fashion the State Board determined the correct valuation of the Reeves property for tax purposes for 1965 as was its duty under G.S. 105-275.

The decision of the State Board was supported by material and substantial evidence and was therefore binding on the superior court. *In re Pine Raleigh Corp., supra.* The valuation as thus fixed is final and conclusive absent error of law or abuse of discretion. *Belks Department Store, Inc., v. Guilford County, supra.* Abuse of discretion is not shown, and error of law prejudicial to the taxpayer does not appear. Even so, in the future Brunswick County would be well advised to follow statutory procedure prescribed by the Machinery Act for the listing and assessment of taxes. Had it done so in this instance, resort to the State Board would not have been necessary.

Brunswick County excepted to the "findings of fact and conclusions of law" contained in the judgment of the superior court and to the judgment itself. This was sufficient to present the record proper

for review and to raise the question whether error of law appears on the face of the record. This is true even when the exceptions to the findings of fact are broadside, as in this case, and too general to be effective. *In re Wallace,* 267 N.C. 204, 147 S.E. 2d 922; *Vance v. Hampton,* 256 N.C. 557, 124 S.E. 2d 527; *Hertford v. Harris,* 263 N.C. 776, 140 S.E. 2d 420; *Lowe v. Jackson,* 263 N.C. 634, 140 S.E. 2d 1. "An appeal is itself an exception to the judgment and to any matter appearing on the face of the record proper." 1 Strong's N. C. Index 2d, Appeal and Error, § 26, and cases cited. Here, error appears on the face of the judgment in that it contains findings of fact whereas the superior court is not empowered to make findings of fact. Nor does it have authority to decree that "the valuations as of January 1, 1964 be that which said Brunswick County shall also place in effect as of January 1, 1965." The State Board of Assessment is the fact-finding body and not the superior court. The substantial rights of Reeves have not been prejudiced by the findings and conclusions of the State Board. It acted within its authority upon competent, material and substantial evidence, unaffected by error of law, and proceeded in a lawful way to adjudicate the basic question raised before it, *viz.,* whether the tax assessment of the Reeves property was too high. The superior court was therefore in error when it failed to affirm the decision of that agency. G.S. 143-315; *In re Pine Raleigh Corp., supra.*

For the reasons stated, the judgment of the superior court is reversed. Judgment will be entered in the court below remanding the proceeding to Brunswick County for compliance with the order of the State Board of Assessment.

Reversed and remanded.

LARRY CAPUNE v. JOHN S. ROBBINS, TRADING AS MOREHEAD OCEAN PIER.

(Filed 1 May 1968.)

1. State § 2—

Subject to the authority and rights of the United States respecting navigation, flood control and production of power, Congress has relinquished to the states the entire interest of the United States in all lands beneath navigable waters within state boundaries, inclusive of submerged lands within three geographical miles seaward from the coast of each state. 43 U.S.C.A. § 1311 *et seq.*

2. Same—

No submerged lands of the State may be conveyed in fee, but easements therein may be granted by the State in the manner prescribed by statute. G.S. 146-3, G.S. 146-12.

3. Waters and Water Courses § 6—

In the absence of any special legislation on the subject, a littoral proprietor and a riparian owner have a qualified property in the water frontage belonging by nature to their land, such property consisting chiefly of the right of access and the right to construct wharves, piers or landings.

4. Same—

The right of fishing in the navigable waters of the State belongs to the people in common.

5. Same—

The foreshore is that strip of land that lies between the high and low water marks and that is alternately wet and dry according to the flow of the tide.

6. Same—

Although the littoral owner has the right to construct a pier in order to provide access to ocean waters of greater depth, the owner may not lawfully prohibit the use of the ocean waters beneath his pier as a means of passage by water craft in a manner that involves no contact with the pier itself, nor may he unnecessarily obstruct the equal rights of the public to use the ocean waters seaward from the strip of land constituting the foreshore.

7. Same; Assault and Battery § 3— Evidence in this action for civil assault held sufficient to warrant submission to the jury.

Plaintiff's evidence tended to show that plaintiff, who was attempting a trip from New York to Florida down the Atlantic coastal waters on a paddleboard, approached defendant's fishing pier which extended one thousand feet into the Atlantic Ocean, that as plaintiff attempted to pass under the pier defendant yelled to plaintiff to turn back, and that defendant threw several bottles at plaintiff, one of which hit and injured him. *Held:* The evidence is sufficient to be submitted to the jury in plaintiff's action for civil assault, there being no evidence of any legal right of defendant to prohibit plaintiff from passing under the pier in continuation of his journey.

8. Appeal and Error § 45—

Exceptions not set out in appellant's brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

9. Assault and Battery § 3—

In an action to recover damages on account of an assault by defendant on plaintiff as the latter was attempting to pass under defendant's ocean pier, defendant's requested instruction that his action would not be wanton or reckless if he believed he was acting in an attempt to protect his property from a trespasser *is held* properly refused when the evidence is in-

sufficient to support a finding that plaintiff was a trespasser at the time he was struck and injured by defendant.

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

APPEAL by defendant from *Bundy, J.*, January-February 1967 Civil Session of CARTERET, docketed and argued as No. 109 at Fall Term 1967.

Plaintiff instituted this civil action August 17, 1965, to recover $7,500.00 compensatory damages and $25,000.00 punitive damages on account of an alleged wilful, wanton, intentional and malicious assault by defendant on plaintiff. An order was then entered for the arrest of defendant as provided in G.S. Chapter 1, Article 34, "Arrest and Bail," upon failure to give bail in the amount of $10,000.00.

Uncontroverted evidence tends to show the facts narrated below.

Plaintiff, then about 22, was attempting a trip from Seagate, Coney Island, New York, to Florida, on an eighteen-foot-long paddleboard, without mast or sail. Plaintiff testified: "I would paddle it with my hands and steer with my feet. Paddling, I placed my arms in front of me and pulled down alongside the board. The total length of the trip I had planned was approximately 1,154 miles, paddling all the way." He came "down the entire coast on the paddleboard."

The trip was being covered by "Associated Press, United Press International, and television media, along with radio and local news coverage . . . plus coverage back on the West Coast" where plaintiff had completed a similar trip. Plaintiff testified that the publicity "enables me to make contracts with different sponsors." He testified further that, "in doing these trips I put myself as an endorser for various products that I use as you have seen with golf clubs, with baseball, that baseball players endorse. They get a certain percentage and this is what I hoped to achieve."

Plaintiff arrived at the Oceanana Motel on Atlantic Beach, N. C., on August 14, 1965, and spent the night there. The next morning, August 15th, he left the Oceanana about 9:00 o'clock a.m. on his paddleboard and "headed south under the Oceanana pier behind the surf line and . . . went under the next pier, which is Sportsmans' Pier." He then proceeded west and landed "near the Morehead Ocean pier," about two miles from the Oceanana pier. He intended to "go to the concession stand to buy something to eat and go to the rest room, . . ."

On August 15, 1965, defendant was the owner and operator of the Morehead Ocean Pier, on Bogue Banks in Carteret County. This pier, constructed pursuant to a permit issued by the U. S. Army Corps of Engineers on January 10, 1958, to Morehead Pier, Inc.,

from whom defendant purchased, extends out into the Atlantic Ocean for one thousand feet and is located approximately in the middle of the three hundred feet of water frontage land owned by defendant.

The pier, which is "about 20 feet above the water," was operated "for the purpose of sport fishing only." Defendant charged fishermen a fee of $1.00 a day to fish from the pier. On August 15th, a Sunday, there were "approximately 90 to 100 fishermen on the pier." Defendant operated "a concession stand and tackle shop" on the shore end of the pier. Nearby, on the shore, there was a picnic area. To avoid interference with the fishermen, defendant did not permit surf casting or bathing on his premises and undertook to prohibit boating and surfboarding in the waters 150 feet each side of the center of the pier. A sign facing those approaching from the road was in these words: "No soliciting and boats allowed on these premises." There was posted on each side of the pier a sign in these words: "No fishing or swimming near the pier."

Plaintiff and defendant were strangers. According to plaintiff's testimony, plaintiff approached defendant's premises from the ocean by paddleboard, his only means of travel, and was unaware of defendant's attempted restrictions on the use of the ocean waters alongside defendant's pier. According to defendant's testimony, defendant had no knowledge of plaintiff's sporting and publicity venture and assumed the paddleboard had been brought to his premises by land transportation.

Evidence, summarized except where quoted, tending to support plaintiff's allegations, is narrated below.

Upon landing on defendant's premises, plaintiff put his paddleboard on the sand and walked towards the pier. Defendant came running up, told plaintiff to leave, and to get his surfboard off defendant's property, and that "for many reasons he didn't allow surfboards around the fishing pier." Thereupon defendant went back "to his business" and out of plaintiff's sight. Plaintiff took his paddleboard "out in the ocean again, starting out a little bit to sea and . . . towards the middle of the pier." Plaintiff testified: "I saw there were a lot of fishermen on the end of the pier and didn't want to get in their way . . . I figured I would go through the center of the pier where there wasn't any or many fishermen and go on my way. . . . As I approached the pier, Mr. Robbins came running out on the pier, yelling and screaming, telling me not to go under the pier, so I stopped and said O.K., I'll go around it, and he threw a bottle at me and it came pretty close and I was trying to turn the board around to go around the pier. He told me not to go around, but to go back where I came from. I said I would, and then he threw

another bottle and I had to get off in the water; I was afraid. The only place I could hide was under the water to avoid being hit, and I asked him if I could come up and get the board and turn it around and leave, and as I got the board to turn around and leave (by turning it around I mean it was sort of broadside to the pier. It's a big board and you have to head it where you are going), and I started to paddle away from the pier to go around and he got me, hit me in the head with a third bottle. He hit me on the right side of my forehead." The next thing plaintiff remembered was that somebody pulled him out of the water and helped him get on his board and took him on his board to the shore. Thereafter he was taken to the Oceanana Motel and later to the hospital in Morehead City where "(i)t took approximately 24 sutures to close the wound" on his head. There was other testimony as to plaintiff's injuries. Too, there was testimony tending to show plaintiff suffered loss of income by being forced to give up his publicized venture.

Evidence offered by defendant, summarized except where quoted, tends to show the facts narrated below.

Defendant was at the tackle shop when he saw plaintiff standing "beside the boat" on defendant's property. Defendant, going down to the shore, told plaintiff: "Take your boat and get out of here; we don't allow them to operate this close to the pier and don't allow them on our property." Defendant then "rushed back" to the tackle shop. It was about fifteen or thirty minutes later when he next saw plaintiff. At that time, "(H)e (plaintiff) was on the paddleboard paddling out about 40 feet from the pier parallel with the pier going out from the shore and was about half-way out with regard to the pier about 400 feet, and he was on the east side of the pier about 40 feet away and he was paddling. . . . When I saw Capune out in the water as I have described, I went out on the pier and asked him to leave and asked him to turn away from the pier. When I saw Capune out in the water, I ran out on the pier and got almost straight in line with him, about 40 feet from him, and told him to turn away and leave. There were other people there. There were four or five fishermen standing there close by. When I told him to turn away from the pier, he turned towards the pier. I didn't hear him say anything. If he said anything to me, I didn't hear it. When he turned towards the pier, he started paddling and it looked like he was trying to go under the pier. There were fishermen there where he was trying to go under the pier. They had their lines in the water and were fishing. I told him three different times to turn away from the pier and leave. He paid no attention to it. I picked up a pop

bottle beside the bench and threw it in his direction hoping that he would turn away. It hit the water about ten feet from the surfboard. He kept coming and I threw another one at him. Throwing the first two bottles had no effect on him whatsoever. I threw a third bottle at him and it hit him. I did not intend to hit him; I merely intended to frighten him to the extent that he would turn away from the pier. He fell off the surfboard. He and the surfboard separated. He was paddling around out in the water and a wave hit the board and one knocked it away from him and a fellow on the fishing pier who had a line that got tangled in the surfboard threw down his rod and reel and jumped overboard and swam to the surfboard, paddled out to Capune and both of them got on the board and came back to shore. Capune's head did not go under the water any time. He was on top of the water paddling."

The court submitted and the jury answered the following issues: "1. Did the defendant John S. Robbins assault the plaintiff, as alleged in the Complaint? Answer: Yes. 2. What damages, if any, is the plaintiff entitled to recover from the defendant? Answer: $1,000.00. 3. What amount of punitive damages, if any, is the plaintiff entitled to recover from the defendant? Answer: $10,000.00."

The court entered judgment which, after preliminary recitals and after setting forth said issues and the jury's answers, continued and concluded as follows:

"And it further appears to the Court, and the Court finding as a fact that the Complaint in this cause alleges a willful and malicious assault by the defendant upon the plaintiff such as to justify an Order for arrest;

"And it further appears to the Court, and the Court finding as a fact that an Order of arrest in this matter was issued on the 17th day of August, 1965, and that the defendant was arrested under arrest and bail proceedings in this cause as will appear of record;

"And it further appears to the Court, and the Court finding as a fact that, in lieu of furnishing bail by causing a written undertaking, payable to the plaintiff, to be executed by sufficient surety, as provided for by G.S. 1-420, the defendant and his wife, on the 18th day of August, 1965, gave bail by executing a deed of trust dated August 18, 1965, to A. H. James, Trustee for Larry Capune, in the amount of Ten Thousand ($10,000.00) Dollars conditioned as provided in G.S. 1-420;

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover of the defendant the sum of Eleven

Thousand ($11,000.00) Dollars, together with the costs of this action."

Defendant excepted and appealed.

Hamilton, Boshamer & Graham for plaintiff appellee.
Wheatly & Bennett for defendant appellant.

BOBBITT, J. We consider first whether defendant had a legal right to forbid and prohibit plaintiff from passing under the pier on his paddleboard.

The Federal Statute, 33 U.S.C.A. § 403, relating to the obstruction of navigable waters, required that defendant's predecessor, before constructing a pier, obtain permission to do so from the U. S. Corps of Engineers. Otherwise, the issuance of the permit did not enlarge or impair defendant's littoral rights.

Subject to the authority and rights of the United States respecting navigation, flood control and production of power, Congress, by enactment of the Submerged Lands Act (1953), 43 U.S.C.A. § 1311 *et seq.*, relinquished to the states the entire interest of the United States in all lands beneath navigable waters within state boundaries, inclusive of submerged lands within three geographical miles seaward from the coast of each state. See *Bruton v. Enterprises, Inc.*, 273 N.C. 399, 160 S.E. 2d 482.

Our statutes, prior to enactment of Chapter 683, Session Laws of 1959, relating to "Lands Subject to Grant," were codified as Chapter 146, Article 1, of the General Statutes, recompiled 1952. Based on the statutes brought forward and codified in 1952 as G.S. 146-1 and G.S. 146-6, it was held that lands covered by navigable waters were not the subject of entry with one exception, to wit; Riparian owners were given a right of entry for the restricted purpose of using such lands for erecting wharves on the side of deep water in front of their shorelines. *R. R. v. Way*, 172 N.C. 774, 90 S.E. 937; *Land Co. v. Hotel*, 132 N.C. 517, 44 S.E. 39, and cases cited. Accord: *Barfoot v. Willis*, 178 N.C. 200, 100 S.E. 303. In *R. R. v. Way, supra*, Walker, J., for the Court, said that the State "granted merely a privilege or easement in the land and waters covered thereby, for the single purpose of building wharves in aid of commerce and a better enjoyment of the shores of navigable waters."

G.S. Chapter 146, as codified in 1952, was superseded by Chapter 683, Session Laws of 1959, which rewrote Chapter 146. G.S. 146-1 and G.S. 146-6 as codified in 1952 were repealed. Chapter 146, as rewritten in 1959, is now codified as Chapter 146 of Volume 3C of the General Statutes, 1964 Replacement.

G.S. 146-3, as now codified, provides that no submerged lands of the State may be conveyed in fee but that easements therein may be granted in the manner prescribed.

G.S. 146-12 provides:

"The Department of Administration may grant, to adjoining riparian owners, easements in lands covered by navigable waters or by the waters of any lake owned by the State for such purposes and upon such conditions as it may deem proper, with the approval of the Governor and Council of State. The Department may, with the approval of the Governor and Council of State, revoke any such easement upon the violation by the grantee or his assigns of the conditions upon which it was granted.

"Every such easement shall include only the front of the tract owned by the riparian owner to whom the easement is granted, shall extend no further than the deep water, and shall in no respect obstruct or impair navigation.

"When any such easement is granted in front of the lands of any incorporated town, the governing body of the town shall regulate the line on deep water to which wharves may be built."

Nothing in the record indicates an easement in the submerged land was granted to defendant or to any of his predecessors by the State. Absent such grant, his rights depend solely upon his status as a littoral or riparian owner.

In *Bond v. Wool,* 107 N.C. 139, 12 S.E. 281, involving a controversy between two riparian owners, neither had a grant for any of the property extending between the shore line and the channel, and each relied upon his rights as riparian owner. This Court, in opinion by Avery, J., said: "In the absence of any special legislation on the subject, a littoral proprietor and a riparian owner, as is universally conceded, have *a qualified property* in the water frontage belonging, by nature, to their land, the chief advantage growing out of the appurtenant estate in the submerged land being *the right of access* over an extension of their water fronts to natural water, and the right to construct wharves, piers, or landings, subject to such general rules and regulations as the Legislature, in the exercise of its powers, may prescribe for the protection of the public rights in rivers or navigable waters." (Our italics.) This statement is quoted with approval by Winborne, J. (later C.J.), in *O'Neal v. Rollinson,* 212 N.C. 83, 192 S.E. 688. Accord: *Gaither v. Hospital,* 235 N.C. 431, 70 S.E. 2d 680; *Jones v. Turlington,* 243 N.C. 681, 92 S.E. 2d 75.

In *Bell v. Smith,* 171 N.C. 116, 118, 87 S.E. 987, 989, where it was held that "(n)o person has a several or exclusive right of fishery

in any of the public navigable waters of the State," Clark, C.J., for the Court, said: "The right of fishing in the navigable waters of the State belongs to the people in common, to be exercised by them with due regard to the rights of each other, and cannot be reduced to exclusive or individual control either by grant or by long user by anyone at a given point."

The question arises as to whether the right of a littoral proprietor to construct a pier and thereby provide access to ocean waters of greater depth authorizes him to exclude the public from the use of the waters of the ocean under and along such pier. Although no decision of this Court bearing directly on the question has come to our attention, decisions of the Court of Appeals of New York relating to "(t)he strip of land that lies between the high and low water marks and that is alternately wet and dry according to the flow of the tide," known as the "foreshore," (Black's Law Dictionary, Fourth Edition, p. 777) bears significantly upon the question.

In *Barnes v. Midland Railroad Terminal Co.*, 218 N.Y. 91, 112 N.E. 926, the plaintiff sought to restrain the obstruction of part of the foreshore of Staten Island. On an earlier appeal, *Barnes v. Midland R. R. Terminal Co.*, 193 N.Y. 378, 85 N.E. 1093, 127 Am. St. Rep. 962, the relative rights of the littoral owner on the one hand and of the public on the other were defined. It was held that the littoral owner had the right to construct a pier in order to provide a means of passage from the upland to the sea; that the public must submit to any necessary interference to their right of passage over the foreshore, but that unnecessary obstruction was an invasion of the public right. In the later decision, where an injunction granted by the lower court was modified and affirmed, the court, in opinion by Cardozo, J., said: "If passage under the pier is free and substantially unobstructed over the entire width of the foreshore, the plaintiffs are entitled to no more. The pier was not built for their use, and is not to be maintained for their convenience. *Weems Steamboat Co. v. People's Steamboat Co.*, 214 U.S. 345, 29 S. Ct. 661, 53 L. Ed. 1024, 16 Am. Cas. 1222. But the passage under the pier must be free and substantially unobstructed over the entire width of the foreshore. This means that from high to low water mark it must be at such a height that the public will have no difficulty in walking under it when the tide is low or in going under it in boats when the tide is high." Accord: *Town of Brookhaven v. Smith,* 188 N.Y. 74, 80 N.E. 665, 9 L.R.A. (N.S.) 326; *Aquino v. Riegelman*, 104 Misc. Rep. 228, 171 N.Y.S. 716. It would seem the public would have equal rights to use without unnecessary obstruction the ocean waters seaward from the strip constituting the foreshore.

Conceding (1) defendant's ownership *of the pier* and *adjacent beach* and his right to prohibit the use *thereof* by others, and (2) that the use defendant was making of the pier and adjacent beach was lawful, it does not follow that defendant could lawfully prohibit the use of the ocean waters beneath the pier as a means of passage by water craft in a manner that involves no contact with the pier itself.

Here, evidence fails to disclose any legal right of defendant to forbid and prohibit plaintiff from passing under defendant's pier on his paddleboard in continuation of his journey to the south.

Defendant, by his failure to set them out in his brief, has abandoned, and properly so, his exceptions to the denial of his motions for judgment of nonsuit. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810. There was ample evidence to require submission to the jury of the issues raised by the pleadings. Moreover, there was no objection to trial on the issues as submitted by the court.

The assignments of error brought forward in defendant's brief, except formal assignments, relate to (1) asserted errors in the charge, and (2) asserted errors in rulings on evidence.

Defendant assigns as error excerpts from the charge in which the court defined "assault" and "assault and battery" and stated the contentions of plaintiff and of defendant with reference to the first issue. Considerations of these assignments fails to disclose error prejudicial to defendant. With reference to defendant's contentions, the court gave this instruction: "The defendant contends here that he did not assault the plaintiff; that he did not throw these bottles *at him* to strike him, but only *threw them into his vicinity* to scare him away where he was interfering with his business. Now, the Court instructs you that if he didn't throw them *at him,* then that would not constitute an assault, but if he threw them *at him,* then it would constitute an assault." (Our italics.) Although defendant excepted to this excerpt and assigned it as error, it seems clear the error was in defendant's favor.

With reference to the third (punitive damages) issue, the court gave appropriate instructions as to the nature of punitive damages and the circumstances under which punitive damages could be awarded. The only ground on which defendant challenges the two excerpts from the charge relating to this issue is that the court "failed to instruct the jury that if they found the defendant was acting in an attempt to protect his property from a trespasser under the belief it was necessary or reasonable, his action would not be wanton or reckless." Although the charge seems quite sufficient if plaintiff's

status were that of a trespasser, in the light of the legal principles set forth in the first portion of this opinion the evidence here is insufficient to support a finding that plaintiff was a trespasser on the occasion he was struck and injured by defendant.

The court permitted plaintiff's counsel, over defendant's objections, to cross-examine defendant as to whether he had assaulted other named persons on other specific but unrelated occasions. Clearly, the questions were permissible. Each was answered in the negative. Hence, defendant fails to show either error or prejudice in respect thereof.

Three persons who operated other fishing piers in the general area were offered as witnesses by defendant. Each testified, in accord with defendant's testimony, to the effect that activity such as swimming, surfboarding and boating in the ocean waters near a fishing pier seriously disturbed persons fishing from the pier and adversely affected the business of the operator thereof.

On cross-examination of one of these witnesses (Freeman), plaintiff's counsel was permitted, over defendant's objection, to ask: "(Y)ou never ran out on your pier and threw bottles and hit a man in the head with it, have you?" The witness answered: "No, sir." On cross-examination, plaintiff's counsel was permitted to ask, over defendant's objection, the second of these witnesses (Bradley): "You have never been out on your pier and thrown three bottles at some boy on a surfboard right under your pier, have you?" The witness answered: "No, sir." On cross-examination of the third of these witnesses (Snipes), the witness was permitted to testify without objection: "I have felt like throwing Coca-Cola bottles at people on surfboards, but I never have."

The thrust of the testimony of Freeman, Bradley and Snipes was in support of defendant's contention that activity such as that of plaintiff constituted a serious interference with the fishermen on defendant's pier and with defendant's business. The cross-examination tended to mitigate the impact of this testimony. Assuming, without deciding, that evidence responsive to the questions asked Freeman and Bradley was of doubtful relevance, the conclusion reached is that such evidence did not bear with sufficient significance on the outcome of the trial as to be deemed prejudicial to defendant. In our view, the assignments of error relating thereto are untenable.

Defendant having failed to show prejudicial error, the verdict and judgment of the court below will not be disturbed.

No error.

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

HENRY McWILLIAMS v. GEORGE H. PARHAM, JR.

(Filed 1 May 1968.)

1. Games and Exhibitions § 4—

It is the duty of a person hitting a golf ball to exercise ordinary care under the circumstances for the safety of other players, caddies, or spectators, and he must give adequate and timely notice to persons who appear to be unaware of his intention to hit the ball when he knows, or by the exercise of ordinary care should know, that such persons are so close to the intended flight of the ball that danger to them might be reasonably anticipated, but he is not an insurer of such persons.

2. Customs and Usages—

An ordinary custom, while admissible in evidence, is not conclusive on the issue of negligence, especially where the custom is clearly a careless or dangerous one.

3. Same—

A local custom is binding only upon persons who have knowledge of it.

4. Same; Games and Exhibitions § 4—

Defendant's contention that a custom of a particular golf course relieved him of the duty to warn the plaintiff of his intention to drive the ball from a certain tee *is held* to be without merit where defendant offered no evidence that he had knowledge of the custom, and since, in any event, the custom would not obviate the requirement of reasonable care.

5. Games and Exhibitions § 4—

In an action by a caddy to recover for injuries sustained when he was struck by a golf ball driven by defendant, who was playing behind the foresome for whom plaintiff was caddying, evidence that defendant observed plaintiff walking from the intended path of the ball, that plaintiff gave no warning of his intention to hit the ball until after he struck the ball, and that plaintiff heard no warning, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence.

6. Same—

Where a golfer gives a timely warning of his intention to drive a ball, a person who hears the warning or in the exercise of due care should have heard it in time to avoid being struck is negligent if he fails to take appropriate action to protect himself.

7. Same—

A player or caddy is entitled to assume that players in a party following him on the golf course will observe the rules and customs of the game.

8. Negligence § 26—

Nonsuit for contributory negligence is not proper unless plaintiff's evi-

dence establishes the facts necessary to show contributory negligence so clearly that no other reasonable conclusion can be drawn therefrom.

9. **Games and Exhibitions § 4— Evidence held insufficient to establish contributory negligence as a matter of law in golfing accident.**

Evidence that plaintiff caddy was unaware that defendant was about to drive a golf ball, that plaintiff could have seen defendant preparing to drive had he looked, that plaintiff did not hear a warning given by defendant after he had struck the ball, and that plaintiff took no action to avoid being struck, *is held* not to disclose contributory negligence on the part of plaintiff as a matter of law, since plaintiff was entitled to assume that players following the party for whom he was caddying would observe the rules and customs of the game requiring them to give warning of their intention to drive a golf ball in the vicinity of a person who does not appear to be aware of such intention, the timeliess of defendant's warning in this case being a question for the jury.

APPEAL by plaintiff from *Canaday, J.*, Second September 1967 Regular Civil Session of WAKE.

Civil action to recover damages for injuries sustained by plaintiff as a result of being struck by a golf ball driven by defendant.

Plaintiff's evidence was, in substance, as follows:

Paul A. Tillery testified that plaintiff was caddying for him in a foursome playing ahead of defendant and another at Carolina Country Club in Raleigh, N. C., on 29 October 1964. Plaintiff was injured after Tillery's foursome had completed play at the thirteenth green. The witness described the thirteenth hole as being a par three hole, 180 yards long. A rough consisting of grass about four inches high separated the thirteenth and fourteenth fairways, which fairways were parallel and were played in opposite directions. There were no visual obstructions from the thirteenth tee to the thirteenth green. After Tillery's foursome completed play on the thirteenth green, they walked toward the fourteenth tee, and the caddies walked in a diagonal direction toward the rough separating the thirteenth and fourteenth fairways. Tillery heard someone yell "fore" and about eight seconds later he observed plaintiff on his knees at a point about fifteen feet into the rough from the left edge of the thirteenth fairway on a line with the sand trap located at the left front of the thirteenth green, which is the sand trap closest to the fourteenth fairway. When Tillery reached plaintiff, he was lying on the ground moaning, with his hand over his left eye.

Tillery did not see defendant hit the ball, nor did he see plaintiff at the time he was struck. He testified that the word "fore" was called before plaintiff was struck, but he did not know whether "fore" was called before or after the ball was struck. When he heard "fore" called, he had his back in the direction from which the ball

was coming and he kept on walking until he heard "this commotion" behind him.

Dr. Vonnie M. Hicks, Jr. (stipulated to be an expert medical doctor in the field of eye, ear, nose and throat and expert ophthalmologist) testified as to plaintiff's injuries.

Plaintiff, Henry McWilliams, who was 51 years of age at the time of the injury, testified that he walked from the center of the thirteenth green, passing 3 feet to his right of the trap located at the left front of the green (the sand trap closest to the fourteenth fairway), in a straight line to the point where he was struck by the ball, which was about two or three feet into the rough. At that time, he was going over to pick up the golf bags, which were lying in the rough between the thirteenth and fourteenth fairways and "was watching the ball going in the fourteenth. I was watching the ones I was caddying for, Dr. Pritchett and Mr. Tillery, going on the fourteenth. I was doing that because I was supposed to watch the ball, was supposed to keep up with the ball and pick up the bag. . . . As I left the green, I was walking fast because I had to get over there in a hurry to catch up so I could watch the ball of the one I was caddying for. As I was walking over the green, I did not look back toward the thirteenth tee. I didn't look back because I didn't think anybody would hit a ball that close to the green, no one ever had."

Plaintiff stated that he did not hear anybody yell "fore." On cross-examination, plaintiff testified that he had been caddying "on and off" for about 38 years and was familiar with the travel of a golf ball when the golfer hooked or sliced it and had seen golfers hook the ball. He stated that he had never seen a ball hooked to the left when driven from the thirteenth tee while players were still in the vicinity of the thirteenth green.

At the close of plaintiff's evidence, defendant's motion for judgment as of nonsuit was denied.

Defendant offered evidence substantially as follows:

Defendant testified that as he and Mrs. J. J. Stewart, Jr., were approaching the thirteenth tee, a foursome, including Mr. Tillery, had not yet completed play on the thirteenth green, so he sat down to wait. When the green and fairway were clear, he hit his ball and it hooked toward the rough. He noticed that the ball was going toward the caddy and yelled "fore" almost immediately after he hit the ball. The ball hit the ground and bounced up, hitting the caddy in the eye. Defendant stated that plaintiff was about 20 steps (estimating three feet to a step) from the thirteenth green when he hit the ball and about 23 steps from the green when he was struck. The latter distance was about 15 feet into the rough and defendant stated

that plaintiff was walking in the rough when he hit his tee shot. Defendant estimated that about 2½ to 3 seconds elapsed from the time he struck the ball and the time the ball struck plaintiff. He stated that his ball had not traveled out of bounds at the point where it struck plaintiff.

On cross-examination defendant testified that he had been playing golf for a period of a month and a half before the accident and that he had played golf at the Carolina Country Club one time previously. He stated that plaintiff was in his view but not within his intended range nor in the general range where he was to play. He gave no warning prior to hitting his tee shot. He saw plaintiff and others but could not tell where plaintiff's attention was focused. Defendant stated that he was familiar with the rules of golf.

Mrs. James J. Stewart, Jr., who was playing with defendant at the time of the accident, testified that she had played golf regularly at the Carolina Country Club for about 15 years. She stated that after completion of play on the thirteenth green, "the caddies usually come back up that rough" between the thirteenth and fourteenth fairways. She stated that it was the custom among players to hit the ball after the caddies had left the green and started up toward the rough, and that players teeing off on the thirteenth tee did not customarily yell "fore". Plaintiff followed the route usually taken by caddies after leaving the green. The witness stated that balls often hook into the rough from the thirteenth tee.

Jimmy Anderson, golf professional at Carolina Country Club for two years, testified that it was customary for players to hit from the thirteenth tee when the group ahead had putted out on the thirteenth green and had moved about ten yards away from the green. When the players and caddies had moved that distance from the green, it was not customary to yell "fore" before striking the ball.

Defendant's motion for judgment as of nonsuit at the conclusion of all the evidence was allowed.

Plaintiff appealed.

Joyner & Howison by Henry S. Manning, Jr., for plaintiff, appellant.

Maupin, Taylor & Ellis for defendant, appellee.

BRANCH, J. The sole question presented for decision on this appeal is: Did the trial court err in granting defendant's motion for involuntary nonsuit at the close of all the evidence? This single question presents for consideration whether there was evidence of

actionable negligence on the part of defendant and whether as a matter of law plaintiff was contributorily negligent.

This case has previously been before this Court on appeal from an order denying plaintiff's motion to strike the entire second and third further answers of defendant, and is reported in 269 N.C. 162, 152 S.E. 2d 117.

The duty that one golf player owes to another in playing the game, which duty is equally applicable to a caddy in the performance of his duties, was considered in the case of *Everett v. Goodwin*, 201 N.C. 734, 161 S.E. 316, where Brogden, J., speaking for the Court, stated:

> ". . . 'The courts are generally in accord on the point that a golfer, when making a shot, must give a timely and adequate warning to any persons in the general direction of his drive.'
>
> . . .
>
> ". . . 'A golf course is not usually considered a dangerous place, nor the playing of golf a hazardous undertaking. It is a matter of common knowledge that players are expected not to drive their balls without giving warning when within hitting distance of persons in the field of play, and that countless persons traverse golf courses the world over in reliance on that very general expectation.' "

The Virginia Court considered the rules of law relative to golf ball injuries in the case of *Alexander v. Wrenn*, 158 Va. 486, 164 S.E. 715. We quote from that case as follows:

> ". . . it is the duty of a golf player to exercise ordinary care to prevent injury to others by a driven ball; that, before driving, it is his duty to give timely warning to persons unaware of his intention whom he knows, or in the exercise of ordinary care should have known, are in line, or so close to the line, of the intended flight of the ball that danger to them reasonably might be anticipated."

In *Berry v. Howe*, 34 Wash. 2d 403, 208 P. 2d 1174, a case involving golf ball injuries to a caddy, the Court stated:

> "In all of his conduct which might result in harm to the caddy the golfer must exercise reasonable and ordinary care under the circumstances, . . . Driven balls do not always travel in the straight course intended and frequently deflect to the right or left, and thus a rather extensive zone of danger may be created. . . .
>
> "It is the duty of a golf player in the exercise of ordinary

> care to give to a caddy timely warning of his intended drive if the caddy is not aware of such intention, and the player either knows or by the exercise of ordinary care under the existing circumstances should know of such unawareness. He must use ordinary care to observe whether a caddy is within the general direction of his drive, or otherwise within a zone of danger, if the ball should deviate from its intended course, and exercise ordinary care to see that he is adequately warned."

The general rule adopted in most jurisdictions (including North Carolina) is that it is the duty of a person hitting a golf ball to exercise ordinary care under existing circumstances for the safety of others, whether they be players, caddies, or spectators; he must give adequate and timely notice to persons who appear to be *unaware* of his intention to hit the ball when he knows, or by the exercise of ordinary care should know, that such persons are so close to the intended flight of the ball that danger to them might be reasonably anticipated. However, he is not an insurer of such persons, nor does such duty arise for the benefit of persons situate in a place where danger from the driven ball might not be reasonably anticipated. *Everett v. Goodwin, supra; Toohey v. Webster,* 97 N.J.L. 545, 117 Atl. 838; *Page v. Unterreiner,* Mo. App., 106 S.W. 2d 528; *Stober v. Embry,* 243 Ky. 117, 47 S.W. 2d 921; *Miller v. Rollings,* Fla., 56 So. 2d 137; *Boynton v. Ryan,* 257 F. 2d 70. Full and exhaustive notes relative to injuries on golf courses may be found in 138 A.L.R. 541, 82 A.L.R. 2d 1183, and A.L.R. 2d Later Case Service, beginning on page 509.

Defendant introduced evidence that it was not customary to "holler fore" when teeing off on the thirteenth hole of Carolina Country Club, and that it was customary for a person teeing off on the thirteenth hole of the course to do so after the preceding players had cleared about 10 yards from the thirteenth green. He contends that such custom relieved him of the duty to warn plaintiff of his intention to drive the ball.

> ". . . The weight of authority supports the view that since negligence is the failure to do that which an ordinarily prudent man would do, or the doing of that which an ordinarily prudent man would not do, under the same circumstances, an ordinary custom, while relevant and admissible in evidence on the issue of negligence, is not conclusive, especially where the custom is clearly a careless or dangerous one. What usually is done may be evidence of what ought to be done, but in the last analysis, what ought to be done is fixed according to the standard of the

ordinarily prudent man, whether it is customary to comply with that standard or not." 38 Am. Jur., Negligence § 34, p. 680,

"A custom which is local is binding only upon persons who have knowledge of it." 21 Am. Jur. 2d, Customs and Usages, § 20, p. 694.

Here, defendant offered no evidence that he had knowledge of the customs which he seeks to rely upon, but negatived such knowledge by evidence that he had only played on the golf course on one other occasion. In any event, this custom could not obviate the requirement of reasonable and ordinary care.

It is common knowledge among players of the game and among those who enjoy it as spectators that good golfers, and occasionally even the best golfers, cannot always control the line of flight of the golf ball. Hooks (curves to the left), slices (curves to the right) and other erratic shots, are common occurrences, and in the case of beginners or "duffers" they are more often the rule than the exception. It is equally well known, even among non-golfers, that the velocity of a driven golf ball may be so great as to cause it to become a dangerous missile.

In the instant case defendant, who had been playing golf for only six weeks, observed plaintiff walking diagonally from the path of the intended flight of the ball. According to defendant's own testimony, he gave no notice or warning of his intention to hit the ball until after the ball had been struck. Other witnesses heard the warning, but plaintiff testified that he heard no warning. The evidence of plaintiff and defendant was in conflict as to plaintiff's location in the rough at the time he was struck.

Considering the evidence in the light most favorable to plaintiff, and giving him the benefit of every reasonable inference which may be reasonably deduced from the evidence, as we must on motion to nonsuit (*Pinyan v. Settle,* 263 N.C. 578, 139 S.E. 2d 863), we hold that it was for the jury to determine whether defendant's conduct was such as to meet the test of ordinary care.

We next consider whether plaintiff was guilty of contributory negligence as a matter of law.

Appellee contends that plaintiff, an experienced caddy of full age, was contributorily negligent as a matter of law because he did not use his senses of sight and hearing to become aware that defendant was about to drive the ball, and thereby dispense with the necessity of warning by defendant.

It is true that if warnings were timely given so that plaintiff heard it, or in the exercise of due care should have heard it, in time

to avoid being struck, and plaintiff failed to take appropriate action to protect himself, he would have been guilty of contributory negligence. *Toohey v. Webster, supra.*

Defendant offered evidence that he gave an audible warning *after* he struck the golf ball and that persons other than plaintiff heard the warning. Plaintiff testified that he heard no warning. Thus the timeliness of defendant's warning as bearing on plaintiff's contributory negligence became a question for the jury.

A player or caddy is entitled to assume that players in the party following him on a golf course will observe the rules and customs of the game. *McWilliams v. Parham,* 269 N.C. 162, 152 S.E. 2d 117; *Everett v. Goodwin, supra.*

There was evidence which would have justified the jury in finding that plaintiff could have seen defendant on the tee had he looked. Conversely, there was evidence which would have permitted the jury to find that plaintiff was unaware that defendant was an inexperienced golfer, that plaintiff was rightfully upon the golf course, and was walking in a direction so as to increase the distance between him and the intended line of flight of the ball; that plaintiff, being well acquainted with the rules of the game of golf, was entitled to assume that players following the party for whom he was caddying would observe the rules and customs of the game, requiring them to give warning of their intention to drive a golf ball in the vicinity of a person who does not appear to be aware of such intention.

Concerning his failure to look toward the thirteenth tee, plaintiff stated "I didn't look back because I didn't think anybody would hit a ball that close to the green, no one ever had."

It is a well recognized rule in this jurisdiction that unless plaintiff's evidence establishes facts necessary to show contributory negligence so clearly that no other reasonable conclusion can be drawn therefrom, nonsuit is not proper. The issue is ordinarily for the jury. *Rouse v. Peterson,* 261 N.C. 600, 135 S.E. 2d 549; *Jones v. Bagwell,* 207 N.C. 378, 177 S.E. 170.

The evidence would permit but not compel a jury to find that plaintiff in the exercise of due care should have been aware that defendant was about to drive the golf ball and should have taken appropriate action to avoid injury. Thus plaintiff's evidence did not establish contributory negligence on his part so as to justify the ruling of the trial court.

We hold that the trial court erred in granting defendant's motion for involuntary nonsuit.

Reversed.

CARLTON C. ROBERTS v. PILOT FREIGHT CARRIERS, INC.

(Filed 1 May 1968.)

1. **Automobiles § 58— Evidence held sufficient to show employee's negligence in making sudden turn without warning onto a private driveway.**

Plaintiff's evidence tended to show that defendant's employee, driving a 50 to 52 foot tractor-trailer at a speed of 50 miles per hour, passed plaintiff's truck on the highway and, after signalling his intention to do so, returned to the right lane in front of the truck, that with his right turn signal still blinking defendant's employee immediately turned to the right into a private driveway, and that plaintiff collided into the rear of the tractor-trailer unit. *Held:* The evidence is sufficient to establish that defendant's negligence in violating G.S. 20-154(a) and (b) was the proximate cause of the collision and is insufficient to establish that plaintiff was contributorily negligent as a matter of law, and defendant's motions for nonsuit were properly overruled.

2. **Damages § 4—**

When a plaintiff's vehicle is damaged by the negligence of a defendant, the plaintiff is entitled to recover the difference between the fair market value of the vehicle before and after the damage, and if the vehicle can be economically repaired, the plaintiff will also be entitled to recover special damages for loss of its use during the time he was necessarily deprived of it.

3. **Same—**

In general, the right to recover for loss of use of a vehicle is limited to situations in which the damage to the vehicle can be repaired at a reasonable cost and within a reasonable time, but where the vehicle is totally destroyed or where parts for repair are unavailable, the plaintiff is entitled to damages for loss of use only if another vehicle was not immediately obtainable for purchase and, in consequence, he suffered loss of earnings during the interval between the accident and the acquisition of another vehicle.

4. **Same; Damages § 15—**

Ordinarily, the measure of damages for loss of use of a business vehicle is the cost of renting a similar vehicle during a reasonable period for repairs, but to recover for loss of profits resulting from deprivation of the vehicle, plaintiff must show (1) that he made a reasonable effort to obtain a substitute vehicle for the time required to repair or replace the damaged one, and (2) that he was unable to obtain one in the area reasonably related to his business.

5. **Damages §§ 15, 16—**

In an action to recover damages arising out of a collision between plaintiff's truck and the tractor-trailer of the defendant, it was error for the court to instruct the jury that plaintiff was entitled to lost profits from the loss of his truck when plaintiff's evidence revealed that repairs to his truck could have been economically made and when plaintiff made no showing that he attempted to hire a substitute vehicle or, failing that, to purchase another truck.

6. Automobiles § 90—

An instruction on the issue of negligence which incorporates the provisions of G.S. 20-140 without further instructions upon what facts the jury might find from the evidence that would constitute reckless driving, *held* erroneous as not complying with G.S. 1-180.

LAKE and HUSKINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendant from *Hall, J.*, August 1967 Assigned Civil Session of WAKE, docketed and argued at the Fall Term 1967 as Case No. 539.

This action for property damage arises out of a collision between plaintiff's 1957 Ford dump truck and defendant's tractor-trailer. The accident occurred at approximately 4:30 p.m. on 9 December 1965 in the heavily graveled, 35-foot driveway which connects the premises of Carolina Machinery and Supply Company (M. & S. Co.) with US Highway No. 70. M. & S. Co. is located on the north side of No. 70 a few miles west of Raleigh. In this area, No. 70 is a four-lane highway for east-west traffic with a median dividing the two lanes for opposing traffic. Both vehicles were proceeding west. Plaintiff's employee, C. G. Goldston, was hauling a load of gravel in the dump truck. Defendant's employee, H. H. Bost, was taking the tractor-trailer to the M. & S. Co. From a hillcrest 1500-1800 feet east of the M. & S. Co.'s building, the highway runs slightly downgrade until it "flattens out" several hundred feet from the driveway. At the time of the accident, the weather was clear and the road dry. The posted speed limit for the area was 60 MPH for automobiles and 50 MPH for trucks.

Evidence for plaintiff tended to show: Goldston first saw the tractor-trailer when it approached from his rear in the left or passing lane east of the hillcrest. Goldston was driving in the right lane for westbound traffic at a speed of about 45 MPH. The tractor-trailer passed him at a speed of 50 MPH. Immediately thereafter Goldston saw its right-turn signal come on, and he responded by blinking his lights — his signal to Bost that he could safely return to the right lane. Bost then applied his brakes and Goldston realized that he was stopping. Goldston applied his brakes also and — because there was a car in the left lane — pulled to the right shoulder. At the time the tractor-trailer started back into the right lane, it was about 25-30 feet, or the length of the dump truck, in front of Goldston. It turned into M. & S. Co.'s driveway, and the left front of the dump truck collided with the right rear wheels of the trailer in the driveway directly in front of the M. & S. Co.'s building. Both

vehicles at once came to a complete stop. From the time Bost first turned on his right-turn signal, Goldston never saw it go off. It was blinking at the time the accident occurred.

When the highway patrolman arrived at the scene, he found both trucks in the driveway; the tractor-trailer was perpendicular to the highway, and the dump truck was almost parallel to it. Fifty feet of skid marks led from the shoulder of the road to the heavily loaded dump truck. Gravel in the driveway was misplaced to one side, where the dump truck slid into the trailer. Nothing indicated side-swiping damage to the truck.

A witness, Y. A. Puller, who was standing east of the driveway on the premises of M. & S. Co., testified that, when he heard brakes being applied and rocks striking metal, he looked to see the tractor-trailer turning from the highway toward the driveway. The front wheels of the tractor were then 3-4 feet from the edge of the highway in the right lane, and part of the trailer was in the left lane. The dump truck was turning in the same direction and almost parallel with the tractor-trailer. The left front wheel of the dump truck struck the trailer just forward of its rear wheels.

Joyce W. Saunders, a motorist traveling west on No. 70 in the passing lane, also observed the collision. She testified that after the tractor-trailer passed the dump truck it gave a right-turn signal and returned to the right lane in front of the dump truck; that the right-turn signal never went off, and the tractor-trailer immediately turned into the M. & S. Co. driveway; that, when the two trucks collided, Saunders' car was in the left lane beside the dump truck.

With reference to his damages, plaintiff's evidence tended to show: The cost of putting the truck in "A-1 order" after the collision would have been $1,293.47; the cost of repairing the damage caused by the accident, $991.38. Including the time required to get the parts, 3-4 weeks would have been required to make the repairs, but the work itself could have been done in 1½ weeks. The dump body, the power take-off, and the body hoist were not damaged, and these could have been transferred to another chassis in two days.

Plaintiff had been using the dump truck five days a week to haul gravel from the Nello Teer Quarry near Raleigh to the Research Triangle. In his opinion, the value of the truck immediately before the collision was $2,500.00; immediately after, $1,000.00. He made no effort to buy another truck. He tried to rent a dump truck from Greensboro Ford Company but was unable to obtain one there. The dump truck has not been repaired.

Over defendant's objection and exception, plaintiff testified that after the collision, he hauled ⅓ less gravel each day and that, prior

to the collision, his "approximate net earnings" from the damaged truck had been $50.00 a day. On cross-examination, he conceded that this figure was not based on any cost accounting, and that he had not considered the cost of oil, depreciation, repairs, insurance, or license fees in arriving at the truck's net earnings.

Defendant offered evidence which tends to show: Bost, driving defendant's tractor-trailer westerly passed the dump truck on the crest of a hill about 1500 feet from the point of collision. The dump truck was going about 30 MPH. As he started downgrade, Goldston flashed his lights, "the universal signal used by truck drivers" to inform the operator of the passing vehicle that it is "clear to pull back in." Bost then flipped on his right-turn signal and went back into the right lane at a point approximately 850 feet from M. & S. Co.'s driveway and 700 feet from the crest of the hill on which he had passed the dump truck. Back in the right lane, he turned off his right-turn signal and, "in a very short space of time," he put it on again to indicate a right turn. At that time, he was traveling about 43 MPH. He took his foot off the gas pedal to decelerate, but he did not apply his brakes until he was about 200 feet from the driveway, when his speed was 30-35 MPH. By the time he reached the driveway he had reduced his speed to 5 MPH, and his right-turn signal was still on. When he began to turn into the drive, the dump truck was 200 feet behind him in the right lane. He made a 90° turn, and his vehicle was completely straight in the driveway when he felt a heavy jolt. The dump truck had hit the right-rear wheel of the trailer at a point about 18 feet north of the highway. After the impact, the unit moved about 4 feet "to the left toward the north side" and stopped. As the dump truck left the pavement and went across the 20-foot shoulder into the driveway, it knocked down a highway sign. The tractor-trailer left no pressure marks on the highway. In Bost's opinion, at 45 MPH, the tractor-trailer would require a distance of 265 feet for an emergency stop.

J. C. Jeffries, an independent automotive damage appraiser, who examined plaintiff's 9-year-old dump truck after the collision, testified that, in his opinion, it could not be economically repaired. Repairs would have cost $991.38, and the truck, exclusive of the dump body, was worth only about $300.00 for salvage. There was, however, no damage to the dump body and power hoist, and these could have been easily transferred to another chassis in two-days' time at a cost of only $75.00. To purchase a 1957 Ford truck body on which the dump body could have been installed would have cost about $1,000.00. Subtracting the $300.00-salvage figure, the net cost of this acquisition and transfer would have been about $775.00.

Issues were submitted to the jury and answered as follows: "1. Was the property of the plaintiff damaged by the negligence of the defendant's agent as alleged in the complaint? ANSWER: Yes. 2. If so, did the plaintiff's agent by his negligence contribute to the damages of the plaintiff as alleged in the answer? ANSWER: No. 3. What amount, if any, is the plaintiff entitled to recover of the defendant for damages to his truck? ANSWER: $1,500.00. 4. What amount if any, is the plaintiff entitled to recover by reason of his loss of use of his truck? ANSWER: $1,200.00."

Defendant excepted to the submission of Issue No. 4.

From judgment entered upon the verdict that plaintiff recover of defendant the sum of $2,700.00 and the costs of the action, defendant appealed.

Boyce, Lake & Burns for plaintiff appellee.

Teague, Johnson, Patterson, Dilthey & Clay for defendant appellant.

SHARP, J. Plaintiff's evidence, viewed in the light most favorable to him, was sufficient to substantiate his allegations that defendant's violation of G.S. 20-154(a) and (b) was the proximate cause of the collision which damaged his dump truck. The evidence would permit the jury to find facts as follows: Proper care would have required Bost, who was familiar with the road and the location of his destination, to remain behind the dump truck instead of passing it so near the drive into which he intended to turn. Notwithstanding, he passed the dump truck and, after signaling his intention to do so, returned to the right lane in front of the truck. Then, with the right-turn signal still blinking — or, after having turned it off and straightway turned it on again —, he immediately made a right turn into the M. & S. Co.'s drive directly in front of the dump truck. Bost should have known (1) that, after having given a right-turn signal to indicate his intention to return to the right lane, a continuation of the signal, or its immediate reactivation, would not inform the driver of the dump truck that he intended to turn off the highway; and (2) that the dump truck was so close behind him that he could not safely make a 90° turn with the tractor-trailer, which was 50-52 feet in length.

Plaintiff's evidence was sufficient to establish defendant's actionable negligence, and it does not compel the conclusion that negligence on the part of Goldston was a proximate cause of the collision. Defendant's motions for nonsuit were therefore properly overruled. 3

Strong, N. C. Index, Negligence § 26 (1960). Its assignment of error No. 11 based thereon is likewise overruled.

Defendant assigns as errors: the submission of the 4th issue, which permitted the jury to award plaintiff damages for loss of use of the dump truck; the court's charge on this issue; and the admission of the evidence tending to show profits lost as a result of his deprivation of the truck. The charge on the 4th issue was as follows:

"Now, as to that issue, members of the jury, I instruct you that lost profits, that is profits lost from the loss of the use of a commercial vehicle, are a proper element of damages where such loss is the direct and necessary result of the defendant's wrongful conduct; and such profits are capable of being shown with a reasonable degree of certainty. Where the profits lost by the defendant's tortious conduct proximately and naturally flow from the defendant's wrongful act and are reasonably definite and certain they are recoverable. Those which are speculative and contingent are not recoverable; and I further instruct you, members of the jury, that it is the duty of the injured party to exercise ordinary care and diligence to avoid or lessen the damage; and for any part of the loss caused by his failure to do so he would not be permitted to recover.

"Now on that issue, you have heard the contentions of the counsel. Counsel have very ably argued to you each one of these issues and I will not go over the contention again.

"But briefly, the plaintiff contends that he lost some $50.00 a day by the loss of use of his truck, and that it would have taken at least some three or four weeks to get it repaired; and he contends that it would take much longer than that. He contends that he is entitled to some substantial amount for the loss of the use of the truck. The defendant, on the other hand, contends that first, you should not reach the issue, but if you do reach it you should not answer it in any substantial amount. The defendant contends that the plaintiff failed to exercise due care to keep the loss down; that the most economical means would have been to either get him a new vehicle or to transfer the one part of the damaged one to another, which could have been done in two days, as the defendant contends; and that it would have been more economical to do it that way. The defendant further contends that the figures given by the plaintiff are speculative and contingent and are not given with a reasonable degree of certainty, and the defendant contends that you ought not to answer that issue in any amount and that if you should answer it in any amount, that you should answer it in some very small amount.

"Now it is a question of fact for you to determine from the evidence as you find the facts to be and I instruct you on that issue

that you will answer it in such amount if any, as the plaintiff has satisfied you by the greater weight of the evidence that he has lost by the loss of use of his truck, as I have explained the law to you on that issue." (This paragraph was not assigned as error.)

Defendant's assignments of error bearing upon the 4th issue require an examination of the rules governing the right to recover damages for the loss of use of a motor vehicle.

When a plaintiff's vehicle is damaged by the negligence of a defendant, the plaintiff is entitled to recover the difference between the fair market value of the vehicle before and after the damage. Evidence of the cost of repairs or estimates thereof are competent to aid the jury in determining that difference. *Simrel v. Meeler,* 238 N.C. 668, 78 S.E. 2d 766; *Guaranty Co. v. Motor Express,* 220 N.C. 721, 18 S.E. 2d 116. When a vehicle is negligently damaged, if it can be economically repaired, the plaintiff will also be entitled to recover such special damages as he has properly pleaded and proven for the loss of its use during the time he was necessarily deprived of it. *Trucking Co. v. Payne,* 233 N.C. 637, 65 S.E. 2d 132. See also *Binder v. Acceptance Corp.,* 222 N.C. 512, 23 S.E. 2d 894. For a comprehensive discussion of the law governing the right of a plaintiff to recover for deprivation of use of a motor vehicle, see 25 C.J.S. Damages § 83c (1966), where the cases are collected. See also 6 Blashfield, Cyclopedia of Automobile Law & Practice §§ 3417-3420 (1945 Text & 1964 Cum. Supp.).

In general, the right to recover for loss of use is limited to situations in which the damage to the vehicle can be repaired at a reasonable cost and within a reasonable time. If the vehicle is totally destroyed as an instrument of conveyance or if, because parts are unavailable or for some other special reason, repairs would be so long delayed as to be improvident, the plaintiff must purchase another vehicle. In this situation, he would be entitled to damages for loss of use only if another vehicle was not immediately obtainable and, in consequence, he suffered loss of earnings during the interval between the accident and the acquisition of another vehicle. The interval would be limited to the period reasonably necessary to acquire the new vehicle. *Colonial Motor C. Corp. v. New York Cent. R. Co.,* 131 Misc. 891, 228 N.Y.S. 508 (Sup. Ct.); 8 Am. Jur. 2d *Automobiles and Highway Traffic* § 1049 (1963).

The fact that an owner, in lieu of repairing a vehicle which could have been economically repaired, "trades it in" on new equipment will not preclude him from recovering damages for loss of its use during the time reasonably required to purchase new equipment or to make the repairs, whichever is shorter. *Glass v. Miller,* 51 N.E. 2d

299 (Ohio App.). See *Hayes Freight Lines v. Tarver,* 148 Ohio St. 82, 73 N.E. 2d 192.

Ordinarily, the measure of damages for loss of use of a business vehicle is not the profits which the owner would have earned from its use during the time he was deprived of it; it is the cost of renting a similar vehicle during a reasonable period for repairs. *Drewes v. Miller,* 25 So. 2d 820 (La. App.); Annots., Damages to Commercial Vehicle, 169 A.L.R. 1074, 1087-1098 (1947), 4 A.L.R. 1350, 1351-1363 (1919). This limitation is an application of the rule that one who seeks to hold another liable for damages must use reasonable diligence to avoid or mitigate them. 2 Strong, N. C. Index, Damages § 8 (1959); Annot., Duty of one suing for damage to vehicle to minimize damages; 55 A.L.R. 2d 936 (1957); *National Dairy Products Corp. v. Jumper,* 241 Miss. 339, 130 So. 2d 922. Thus, before a plaintiff may recover lost profits resulting from the deprivation of his vehicle, he must show (1) that he made a reasonable effort to obtain a substitute vehicle for the time required to repair or replace the damaged one, and (2) that he was unable to obtain one in the area reasonably related to his business. In the absence of such a showing, he may not recover lost profits. *National Dairy Products Corp. v. Jumper, supra; Drewes v. Miller, supra;* 25 C.J.S. *Damages* § 83c (1966). When, however, he has carried the burden of proving that no substitute vehicle could be rented, a plaintiff may recover lost profits if he can establish the amount of the loss with reasonable certainty. See *Smith v. Corsat,* 260 N.C. 92, 131 S.E. 2d 894; *Johnson v. R. R.,* 140 N.C. 574, 53 S.E. 362; 8 Am. Jur. 2d *Automobiles and Highway Traffic* § 1050 (1963). If a plaintiff could have rented a substitute vehicle, the cost of hiring it during the time reasonably necessary to acquire a new one or to repair the old one is the measure of his damage even though no other vehicle was rented. The burden is on the plaintiff to establish the cost of such hire. 8 Am. Jur. 2d *Automobiles and Highway Traffic* § 1047 (1963).

Measured by the foregoing rules, it is apparent that the court's charge on the 4th issue (loss of use) did not meet the requirements of G.S. 1-180. According to plaintiff's evidence, the truck was worth $2,500.00 before the collision, $1,000.00 thereafter, and the damage could have been repaired for $991.38 within 3-4 weeks. Thus, the jury might have found that repairs could have been economically made. Upon this finding, plaintiff would have been entitled to recover as damages for loss of use the reasonable cost of hiring a substitute vehicle during the time required to repair the truck with reasonable promptness. Plaintiff, however, sought only to recover lost profits, and the court permitted him to do this without showing that a sub-

stitute vehicle was unavailable in the area. His statement that he was unable to rent one from Greensboro Ford Company fell far short of proving his inability to hire a similar truck in the Research Triangle area, where he was conducting his hauling operations. Plaintiff likewise offered no evidence tending to show the cost of hiring a substitute vehicle. He made no effort to purchase another truck or to acquire a chassis on which (according to defendant's uncontradicted evidence) he could have mounted the undamaged dump body and power hoist in two days at a cost of $75.00. At the time of the trial, plaintiff still had the wrecked truck and, although twenty months had elapsed since the collision, it had not been repaired.

Thus, plaintiff, who had the burden of proof, laid no foundation to recover either lost profits or the cost of hiring a substitute vehicle for the three or four weeks in which his evidence tended to show repairs could have been made. The court therefore committed prejudicial error (1) in permitting plaintiff to testify that the deprivation of his truck reduced his business by one-third and cost him a net profit of $50.00 a day, and (2) in submitting the 4th issue. Having submitted the issue, he erred in failing to direct the jury to answer it NOTHING. Assignments of error 1, 3, 9, and 18 are sustained.

Since the case goes back for a new trial we also consider assignment No. 14, which points out prejudicial error in the charge on the first issue. Plaintiff's allegations of negligence included, *inter alia,* an averment in the words of G.S. 20-140 that defendant's agent was guilty of reckless driving. Defendant excepted to the following portion of his Honor's charge, which was based upon that allegation:

"Now still another section that I want to call to your attention is a provision of General Statutes 20-140; and one part of that statute provides in substance that any person who drives a vehicle upon a highway without due caution and circumspection and at a speed, or in a manner so as to endanger or be likely to endanger any property, shall be guilty of reckless driving; and a violation of that subsection of the statute would be negligence, and if such negligence were a proximate cause of a collision and damages that would be actionable negligence; that is it would be negligence to drive any vehicle on a highway without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property."

As we pointed out in *Ingle v. Transfer Corp.*, 271 N.C. 276, 283-284, 156 S.E. 2d 265, 271, allegations of reckless driving in the words of G.S. 20-140, without more, do not justify a charge on reckless driving. To plead reckless driving effectively, a party must allege

facts which show that the other was violating specific rules of the road in a *criminally* negligent manner. Since a person is civilly liable for his ordinary negligence, allegations of reckless driving can rarely add anything to the case except an unnecessary hazard — as here demonstrated. Once the judge has given the jury the instructions which the pleadings and evidence require on the law of civil negligence, there is no need for him to superimpose an explanation of the law of criminal negligence. If plaintiff's evidence does not establish civil negligence, *a fortiori*, it will not prove reckless driving, which is criminal negligence. If, however, a party has properly pleaded reckless driving and the judge undertakes to charge upon it, G.S. 1-180 requires him to tell the jury what facts they might find from the evidence would constitute reckless driving. It is not sufficient for the judge to read the statute and then (as he did here) leave it to the jury to apply the law to the facts and to decide for themselves what defendant's driver did, if anything, which constituted reckless driving. Assignment of error No. 14 is also sustained.

We deem it unnecessary to consider defendant's other assignments of error. The questions they pose may not arise in the next trial.

New trial.

LAKE and HUSKINS, JJ., took no part in the consideration or decision of this case.

NOAH H. KEY AND BURLENE KEY MOORE, ADMINISTRATORS OF THE ESTATE OF ASTOR COLON KEY, v. MERRITT-HOLLAND WELDING SUPPLIES, INC.

(Filed 1 May 1968.)

1. Appeal and Error §§ 49, 50—

Error in respect to evidence rulings or portions of the charge relating to an issue answered in appellant's favor is not prejudicial to appellant.

2. Trial § 37—

The trial judge is not required to give the contentions of the litigants in his charge, but when he undertakes to state the contentions of one party, he must give the equally pertinent contentions of the opposing party.

3. Automobiles § 90—

In an action arising out of a collision which occurred while plaintiff was attempting to make a left turn and defendant was attempting to pass plaintiff's vehicle, where the court reviews extensively the defendant's

contentions that plaintiff was contributorily negligent in violating G.S. 20-154 by turning without signalling and without first ascertaining that such movement could be made in safety, it is prejudicial error for the court to fail to review the opposing contentions of plaintiff which are supported by evidence.

APPEAL by plaintiffs from *McConnell, J.*, September 11, 1967 Civil Session of MOORE.

This wrongful death action grows out of a collision that occurred December 18, 1964, about 12:15 p.m., on N. C. Highway No. 27, in Moore County, North Carolina, between a 1957 Chevrolet truck operated by Astor Colon Key (Key), plaintiffs' intestate, and a 1952 International truck owned by defendant and operated by defendant's agent, Bobby Godwin, in the course of his employment. Key died as a result of injuries caused by said collision.

The only evidence was that offered by plaintiffs. Uncontradicted portions thereof tend to show the facts summarized below.

N. C. Highway No. 27, where the collision occurred, is an asphalt road, with a center line dividing the two lanes of traffic, and runs generally east-west.

Both trucks had been proceeding east in the south (their right) traffic lane, the Chevrolet ahead of the International. For eastbound traffic, approaching the point of collision, No. 27 is straight for 1,500 feet and downgrade. The weather was clear and cold. The pavement was dry.

At the point of collision, a State-owned road, unpaved and unmarked, referred to as Rural Unpaved Road #1493, extended in one direction, north, from No. 27. It was "an unmarked intersection."

The Chevrolet truck, owned by Carlie Wendall Baxter, Key's employer, was loaded with coal. Key was to deliver the coal to a house on said unpaved road.

Defendant's truck, operated by Godwin, was loaded with butane gas tanks or drums.

When the collision occurred, Key was attempting to turn to his left across the north traffic lane and into the unpaved road; and Godwin, then in the north (his left) traffic lane, was attempting to pass. The right front of the International truck struck the front portion of the left side of the Chevrolet truck near the middle of the north lane, and thereafter both trucks went to the south side of No. 27 where the coal truck (Chevrolet) stopped on the shoulder and defendant's truck (International) went farther to the east, crossed the shoulder and went down the embankment. As a result of the collision, No. 27 was covered with debris consisting of coal and of butane tanks or drums.

Plaintiffs alleged Godwin was negligent in several respects, in-

cluding (a) excessive speed, (b) failure to keep a proper lookout, and (c) attempting to pass without giving an audible warning by horn.

Answering, defendant denied Godwin was negligent and, conditionally, alleged Key was (contributorily) negligent in several respects, including (a) failure to keep a proper lookout, (b) failure to yield the right of way to defendant's overtaking vehicle, notwithstanding defendant's driver had signaled his intention to pass, and (c) turning from a direct line of traffic without giving the signal required by law and without first ascertaining such movement could be made in safety.

Issues of negligence, contributory negligence and damages were submitted. The jury answered the negligence issue, "Yes," and answered the contributory negligence issue, "Yes," and left unanswered the issue as to damages. In accordance with the verdict, judgment was entered that plaintiffs recover nothing, that the action be dismissed and that plaintiffs be taxed with the costs.

Plaintiffs excepted and appealed.

Dock G. Smith, Jr., and John Randolph Ingram for plaintiff appellants.

Pittman, Staton & Betts for defendant appellee.

BOBBITT, J. Since the first (negligence) issue was answered in favor of plaintiffs, errors, if any, in respect of evidence rulings or of portions of the charge pertinent to that issue are harmless. *Wooten v. Cagle,* 268 N.C. 366, 370, 150 S.E. 2d 738, 740, and cases cited; *Watson v. Stallings,* 270 N.C. 187, 192, 154 S.E. 2d 308, 311; *Anderson v. Office Supplies,* 236 N.C. 519, 521, 73 S.E. 2d 141, 142, and cases cited. Decision depends on whether there was prejudicial error in the court's instructions with reference to the second (contributory negligence) issue.

G.S. 1-180 provides that "the judge shall give equal stress to the contentions of the plaintiff and defendant in a civil action, and to the State and defendant in a criminal action." Our decisions establish these propositions: "(A) trial judge is not required by law to give the contentions of litigants to the jury. *S. v. Colson,* 222 N.C. 28, 21 S.E. 2d 808; *Trust Co. v. Insurance Co.,* 204 N.C. 282, 167 S.E. 854. When, however, a judge undertakes to state the contentions of one party, he must give the equally pertinent contentions of the opposing party. *Brannon v. Ellis,* 240 N.C. 81, 81 S.E. 2d 196; *S. v. Kluckhohn,* 243 N.C. 306, 90 S.E. 2d 768; *In re Will of Wilson,* 258

N.C. 310, 128 S.E. 2d 601." Denny, C.J., in *Watt v. Crews,* 261 N.C. 143, 147, 134 S.E. 2d 199, 202.

Plaintiffs assign as error the failure of the court, when instructing the jury with reference to the contributory negligence issue, to review and stress their contentions equally with those of defendant.

Evidence pertinent to the contributory negligence issue includes the following:

T. S. Clark, the investigating State Highway Patrolman, testified that, in their first conversation, Godwin told him he was driving at approximately forty miles per hour when he came up behind the loaded coal truck; that he pulled out to pass it; and that he (Godwin) did not blow his horn. Clark testified that, in a later conversation, Godwin told him the coal truck was going at a slow speed, "about ten or fifteen miles per hour," when he came up behind it; that he (Godwin) told him he blew his horn, put on his (Godwin's) left turn signal to pass, and that as he (Godwin) "got up by the side of Key's truck, it made a left turn into his vehicle"; and that, in response to his (Clark's) question as to whether "he saw any signals or any lights on the back of the truck being operated by Mr. Key," Godwin "stated he did not see a signal."

There was evidence that the speed limit for trucks on this section of No. 27 was forty-five miles per hour, and evidence, consisting of physical facts and oral testimony, from which the jury could find defendant's truck when approaching the scene of collision and at the moment of impact was being operated in excess of this legal limit. There was also evidence that the right front portion of defendant's truck struck the front portion of the left side of the coal truck at the door of the cab and that this impact occurred near the middle of the north traffic lane.

A witness, Clyde Fouchee, testified he was traveling west on No. 27 at a point one-third of a mile away; that he "didn't see the vehicles come together" but "only saw them in the process of colliding, coming together"; and that, when he saw them, "they had already come together." Fouchee testified: "I did not see the coal truck give any signal. I didn't see any signal, I was too interested in looking at the wreck itself."

The portion of the charge in which the court reviewed the contentions of the parties is quoted in full below:

"Now, the defendant contends that the plaintiffs' intestate was negligent in that he failed to exercise due care, as I have heretofore defined for you; that if he had looked, he could have seen the other truck; that he failed to keep a proper lookout, and that he failed to keep his truck under proper control, and, further, that he violated

Section 20-154 of the General Statutes, which the attorneys have read to you, but I will restate it, which requires that 'The driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement.'

"The defendant contends that the plaintiffs' intestate made the turn before he ascertained that the same could be made in safety and where other vehicles were involved on the highway; that he did not give a turn signal.

"(The defendant contends that from the testimony of Mr. Clark the defendant's driver said he did not see a turn signal, and from Mr. Fouchee, that he said he did not see a signal as he came across the hill, although the plaintiffs contend that Mr. Fouchee did not have the opportunity to see or did not see the turn signal for other reasons, that he was looking at something else, or looking at the collision, but the defendant contends that from the evidence of Mr. Fouchee and the evidence of the patrolman and the conversation with the driver of the truck, that there was no signal given.)

"(The plaintiffs, of course, contend otherwise.)

"(The defendant further contends that from the evidence on the highway, the tracks which were apparent from the vehicles, that the defendant's truck was in the passing lane and was passing the truck, from the physical evidence there at the scene; that the plaintiffs' intestate's truck was turning into this rural unpaved road at a time when the vehicle of the defendant had already proceeded in the left-hand lane and was attempting to pass. Therefore, the defendant contends on this issue that the plaintiffs' intestate failed to exercise due care, failed to keep his truck under proper control; he failed to keep a proper lookout, and that he failed to see first that the turn could be made in safety, and failed to give a signal as provided under the statute, Section 20-154.)"

Plaintiffs excepted to the portions of the charge enclosed by parentheses.

The court properly instructed the jury the burden of proof was on defendant to establish that Key was contributorily negligent. Defendant's principal contentions with reference thereto were that Key acted in violation of G.S. 20-154 in that he made the left turn without exercising due care to ascertain that the movement could be made in safety *and* without first giving a signal prescribed by said statute of his intention to do so.

The court stated that defendant contended "from the evidence of Mr. Fouchee and the evidence of the patrolman and the conversation with the driver of the truck, that there was no signal given," and that plaintiffs, "of course," contended "otherwise." The only other reference to a contention by plaintiffs is that they contended "Mr. Fouchee did not have the opportunity to see or did not see the turn signal for other reasons, that he was looking at something else, or looking at the collision." The evidence disclosed Fouchee was traveling west, and was one-third of a mile away, when the collision occurred; and that when he first saw the trucks they were "in the process of colliding." Plaintiffs' primary contention was that Fouchee's testimony in this respect should have been disregarded as without probative value on the ground his own testimony disclosed he was not in position to observe whether Key, prior to the collision, had given a left turn signal prescribed by statute.

The court, in referring to defendant's contention that Key failed to give a signal for a left turn, referred to the testimony of the patrolman and of his conversation with Godwin, the driver of defendant's truck, as the basis for the contention. Of course, the patrolman gave no testimony on this aspect of the case except his testimony as to a statement made to him by Godwin. Obviously, Godwin was in position where he saw or should have seen whether Key gave a signal for a left turn. According to the patrolman, nothing was said one way or the other in their first conversation as to whether Key had given a signal for a left turn; and, in their later conversation, Godwin made no statement bearing upon this subject until asked specifically concerning the matter and then answered that he "did not see a signal." This equivocal statement falls far short of testimony that no signal was given. In addition, there was evidence that Key was proceeding slowly as he approached the unmarked intersection. The evidence was amply sufficient to justify contentions based thereon to the effect the jury should not find solely from the equivocal statement attributed to Godwin that Key, now deceased, did not give a signal for a left turn as prescribed by statute.

The court stated defendant contended "from the evidence on the highway, the tracks which were apparent from the vehicles, that the defendant's truck was in the passing lane and was passing the truck, from the physical evidence there at the scene, and that the plaintiffs' intestate's truck was turning into this rural unpaved road at a time when the vehicle of the defendant had already proceeded in the left-hand lane and was attempting to pass." There was ample evidence to support contentions by plaintiffs that Key's truck was being operated slowly as he approached the unmarked intersection;

that Godwin, proceeding at excessive and unlawful speed, overtook the coal truck after it had turned into and was in the north lane; that Godwin did not blow his horn (as to this, the evidence was conflicting) to indicate he would attempt to pass; that the two trucks were not running approximately side by side prior to collision but that Key had made his left turn and was proceeding slowly when the left side of his truck was struck by the front of the International truck. However, none of these contentions were referred to by the court.

We are constrained to hold that the extended review of defendant's contentions relating to the contributory negligence issue and the failure to review plaintiffs' contentions with reference thereto, albeit there was evidence on which to base such contentions, weighed too heavily against plaintiffs. In short, the court inadvertently failed to give equal stress to the contentions of plaintiffs and of defendant.

Since a new trial is awarded on the ground indicated, it is unnecessary to consider questions presented by plaintiffs' remaining assignments of error. These questions may not arise at the next trial.

New trial.

GRACE TAYLOR McRORIE and Husband, HOWARD S. McRORIE, and ELIZABETH TAYLOR BURGESS, Widow, v. BILLY RAY CRESWELL, (Widower).

(Filed 1 May 1968.)

1. Pleadings § 30—

Judgment on the pleadings is proper when the pleadings raise no issue of fact on any material proposition, but raise only questions of law for the court.

2. Wills § 32—

The Rule in *Shelley's* case applies where the words "heirs" or "heirs of the body" are used in their technical sense and are not *descriptio personarum* denoting children, issue, a particular class, or individual persons.

3. Wills § 33—

The doctrine of devise or bequest by implication applies in this State.

4. Same—

When property is limited to a devisee for life, with remainder to another if the devisee dies without issue, surviving issue of the devisee take, unless a contrary intent of the devisor is found from additional language or circumstances.

5. **Wills § 27—**

When necessary to accomplish the testator's intent as ascertained from the context of a will, the court may disregard improper use of capital letters, punctuation, misspelling and grammatical inaccuracies, especially where the will is written by an unlearned person.

6. **Wills § 33—**

A devise to testator's daughter for life, followed by a provision that if the daughter "has no heirs" the land should go to the testator's son for life and upon his death to his heirs, *is held* to convey only a life estate to the daughter, the Rule in *Shelley's* case being inapplicable since it is apparent that the word "heirs" was used to mean children or issue of the daughter, and at the death of the daughter her two children took the remainder in fee by clear implication.

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

Appeal by defendant from *Copeland, S.J.*, June 1967 Session of Cabarrus, docketed and argued at the Fall Term 1967 as Case No. 607.

Plaintiffs instituted this action to determine the title to a .60-acre tract of land in Cabarrus County known as the southern half of lot No. 1 of the George M. Misenheimer estate. This property is described by metes and bounds in paragraph 2 of the complaint. The allegations of the complaint, which are admitted by the answer plus additional averments in defendant's further answer, establish these facts:

Plaintiffs Grace Taylor McRorie and Elizabeth Taylor Burgess are the only children and heirs of Rosanna Misenheimer Taylor, who died intestate in Cabarrus County on 26 December 1965. Rosanna Misenheimer Taylor was the daughter of George M. Misenheimer, deceased, whose holographic will was probated in Cabarrus County in January 1907. Pertinent portions of the will, which devised the property in suit, are these:

"I want enough of land sold to pay my debts.

"I bequeath and give the balance of my land and other property, except my mill property, to my beloved wife, Sarah, and & daughter Rosanna Misenheimer — their lifetime. Provided Rosanna has no heirs, Then it shall go to C. W. Misenheimer my son, his life time and then to go to his heirs at his death.

"My interest in the mill property with what he owes me goes to C. W. Misenheimer."

On 29 January 1936, Rosanna Misenheimer Taylor and husband, George Taylor, by a deed which contained no covenants of warranty, conveyed her interest in the property in suit to Harry A. Martin. On 28 March 1936, Harry A. Martin and wife quitclaimed the property

to Oza Mae Creswell. From that date until her death in 1951 Mrs. Creswell exercised exclusive dominion over the land. Defendant Billy Ray Creswell, her son and heir, claims the property by inheritance from her. He went into possession of the land at her death and adds his possession to hers.

When the case came on for trial, plaintiffs moved for judgment on the pleadings. The court, being of the opinion that all material facts were established by the pleadings and that the controversy involved only a question of law, entered judgment "that the superior title and right to possession" of the property described in the complaint, as against defendant, ought to be, and the same is hereby decreed to plaintiffs, Grace Taylor McRorie and Elizabeth Taylor Burgess. Defendant excepted to the judgment and appealed.

Kenneth B. Cruse for plaintiff appellees.

Williams, Willeford & Boger and Robert H. Irvin for defendant appellant.

Sharp, J. The controversy between the parties to this action involves the interpretation of the will of George M. Misenheimer (testator). The pleadings raise no issue of fact on any material proposition. Thus, the rights of the parties must be determined as a matter of law on the undisputed facts contained therein. *Phillips v. Gilbert,* 248 N.C. 183, 102 S.E. 2d 771. It follows, therefore, that the trial court was empowered to render its judgment upon the pleadings. 3 Strong, N. C. Index, Pleadings § 30 (1960).

The trial court based its decision upon the following rationale: Testator devised to Rosanna Misenheimer (Taylor) a life estate in the land in suit and, by implication, he devised the remainder in fee to her children, the plaintiffs. Rosanna's deed to Martin, therefore, conveyed to him only her life estate in the property. Consequently, his quitclaim deed to Mrs. Creswell gave her only an estate *per autre vie,* and it was this estate which her son, defendant, inherited. Upon the death of Rosanna on 25 December 1965, plaintiffs' estate vested and defendant's terminated.

Defendant's contention is that under the Rule in *Shelley's* Case Rosanna acquired a fee defeasible upon her death without children. This same contention was made and held to be feckless in *Taylor v. Honeycutt,* 240 N.C. 105, 81 S.E. 2d 203. In that case, a controversy without action, Rosanna Misenheimer (Taylor), the mother of plaintiffs herein, and her husband sought to secure specific performance of their contract to convey to the defendant Honeycutt a fee simple title to the lands in suit here. Honeycutt declined to accept the plain-

tiff's tendered deed upon the ground that the title offered was only a life estate. Rosanna contended: (1) that testator devised the land to her for life with remainder (by implication) to her heirs; (2) that the word "heirs" was used in its technical sense; and (3) that this language vested the fee simple title in her under the Rule in *Shelley's* Case.

One of the prerequisites for the application of the Rule in *Shelley's* Case is that the words "heirs" and "heirs of the body" be used in their technical sense and not *descriptio personarum* denoting children, issue, a particular class, or individual persons. *Tynch v. Briggs,* 230 N.C. 603, 54 S.E. 2d 918; *Hampton v. Griggs,* 184 N.C. 13, 113 S.E. 501; 4 Strong, N. C. Index, Wills § 32 (1961). In *Taylor v. Honeycutt, supra,* the trial court rejected Rosanna's contention that the Rule in *Shelley's* Case operated to give her a fee. It ruled that by his use of the word "heirs" in the phrase "Provided Rosanna has no heirs," testator meant issue. In affirming the judgment for the defendant, this Court said: "When the testator, after devising a life estate to the *feme* plaintiff, added, 'provided Rosanna has no heirs,' the land was to go to his son, C. W. Misenheimer, for life, etc., the word 'heirs' referred plainly to children or issue of the *feme* plaintiff. . . . Rosanna could not die without heirs in a general sense as long as C. W. Misenheimer, her brother, or any of his lineal descendants, lived.

"Our decision is that the *feme* plaintiff (Rosanna) acquired and now owns a life estate in the land and that the judgment of the trial court must be affirmed." *Id.* at 109, 81 S.E. 2d at 206.

The Court pointedly refrained from further interpretation of the will because none of Rosanna's children (plaintiffs herein) or grandchildren and none of the children or grandchildren of C. W. Misenheimer, were parties to the case agreed, nor was there any representation of unborns who might have acquired an interest in the property upon the death of Rosanna. The judgment and decision in that case is binding only on the parties and those in privity. Notwithstanding the difference in parties, the well established legal principles which dictated the decision in *Taylor v. Honeycutt, supra,* control here. Rosanna's interest in the property was clearly a life estate, and when she died her two children (plaintiffs) took the remainder in fee by clear implication.

"[T]he doctrine of devise or bequest by implication is well established in our law." *Finch v. Honeycutt,* 246 N.C. 91, 98, 97 S.E. 2d 478, 484. The rule with us is succinctly stated in 3 Restatement of Property § 272 (1940) as follows: "When property is limited by an otherwise effective conveyance 'to B for life, and if B dies without

issue, then to C' or by other words of similar import, then, unless a contrary intent of the conveyor is found from additional language or circumstances, an inference is required that the conveyor has limited an interest in favor of the issue of B, in the event that B dies survived by issue." *Accord,* 1 Mordecai, Law Lectures pp. 494-495 (1916); 28 Am. Jur. 2d *Estates* § 202 (1966). See Annot., "Gift to issue, children, wife, etc., as implied from a provision over in default of such persons," 22 A.L.R. 2d 177 (1952).

In *Hauser v. Craft,* 134 N.C. 319, 46 S.E. 756, the testator devised and bequeathed certain personal property to his granddaughter, Katherine, "to be hers during her natural life only; and should the said Katherine Scott die without leaving any child or children, then the property which I have given to her to be divided among the rest of my heirs." The surviving children of Katherine claimed that they took the remainder in fee upon her death. The defendants claimed that Katherine took a fee defeasible upon her death without children. They asserted that, since children survived her, she had an absolute fee and (as here) claimed title by *mesne* conveyances from her. The Court, reasoning as follows, held that Katherine's children, by implication, took the remainder at her death:

"It will be observed that Katherine had only a life estate, and therefore at her death all of her interest ceased and determined. The heirs of the testator could not take unless she died without children, because it expressly provided by the will that they should take only upon the contingency of her dying without leaving children, and the fact that she died leaving children completely divested the testator's heirs of all right or title in the land. . . . If the estate of Katherine expired at her death, and the heirs cannot take because she left children, who, then, can take unless it be the children? . . . The implication is not only necessary, but irresistible, that in the situation of the parties, as now presented to us, and giving to the will of the testator a natural and reasonable construction, it was intended by him that the plaintiffs should be the objects of his bounty and should take the property in remainder after the death of their mother." *Id.* at 327-328, 46 S.E. at 759-60. *Cf. Whitfield v. Garris,* 134 N.C. 24, 45 S.E. 904.

To the same effect is *West v. Murphy,* 197 N.C. 488, 149 S.E. 731, where the testator devised land to his granddaughter, Bertie Hill, "so long as she should live, and if no children, then to her brother, Frank Hill." Bertie Hill died leaving her surviving a child. This Court held that the child took a remainder in the land by implication upon the termination of his mother's estate.

An examination of testator's holographic will leaves it uncertain

whether he placed a comma or a period after the phrase "Provided Rosanna has no heirs". Defendant's contention that "a period would seem to be the proper punctuation mark," and that the phrase should be disregarded as surplusage is untenable.

"That a will is couched in ungrammatical language and is incorrectly punctuated are facts of little importance in construing it. . . . Commas may be inserted for periods, or *vice versa,* in order to accomplish the paramount object, which is the ascertainment of the testator's will or meaning." *Hauser v. Craft, supra* at 323-24, 46 S.E. at 758. As Parker, J. (now C.J.), said in *Clayton v. Burch,* 239 N.C. 386, 389, 80 S.E. 2d 29, 31. "When necessary to accomplish the testator's intent as ascertained from the context of the will, the court may disregard improper use of capital letters, punctuation, misspelling and grammatical inaccuracies, especially where the will is written by an unlearned person."

We have noted that the pleadings in this case do not disclose whether Sarah Misenheimer, the wife of testator, is still alive. Although it was stipulated in *Taylor v. Honeycutt, supra* at 107, 81 S.E. 2d at 204, that she died prior to 1954, we cannot consider that fact as admitted in this case. Her existence, however, is immaterial to decision here. The judgment entered in the court below adjudicated plaintiffs' rights only as against defendant.

The judgment of the trial court is

Affirmed.

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

STATE OF NORTH CAROLINA v. PAUL THOMAS GAINEY, FREDERICK WARE INGRAM AND CHARLES HUNTLEY FORD.

(Filed 1 May 1968.)

1. Concealed Weapons § 1—

A person in his own automobile on a public highway is not on his own premises within the meaning of G.S. 14-269.

2. Same—

The purpose of G.S. 14-269 is to reduce the likelihood that a concealed weapon may be resorted to in a fit of anger.

3. Same—

To constitute a violation of G.S. 14-269, the weapon need not be concealed on the person of the accused, but must be in such position that he has ready access to it.

4. Concealed Weapons § 2—

Evidence that when officers stopped an automobile owned and driven by defendant and occupied by four other persons, the officers saw two of the passengers rearranging the rear seat, that a sawed-off rifle was found under the rear seat, and that unconcealed guns owned by defendant and by one of the passengers were found in the automobile, *is held* insufficient to be submitted to the jury on the issue of defendant's guilt of carrying the sawed-off rifle concealed about his person, there being no evidence that defendant knew of or participated in the concealment, and the rifle not being concealed within the reach and control of defendant.

5. Criminal Law § 9—

Where there is insufficient evidence to convict the principal defendant of carrying a concealed weapon, others may not be convicted of aiding and abetting the defendant in the concealment.

APPEAL by defendants from *McConnell, J.*, September 1967 Session, ANSON Superior Court.

The defendants, Charles Huntley Ford, Paul Thomas Gainey, and Frederick Ware Ingram, were charged in separate but identical warrants with the criminal offense of carrying concealed about his person and off his premises, a certain deadly weapon, to wit, a sawed off rifle. The warrants were made returnable before the Anson County Criminal Court. According to the record agreed to by the solicitor and defense counsel, verdicts of guilty and prison sentences of 6 months were entered in the Anson County Criminal Court against all defendants.

According to the addendum to the record, as certified by the Assistant Clerk of Superior Court, the sentences in the Anson County Criminal Court were prison sentences of 18 months against Ford and Gainey, and 8 months against Ingram. The sentences against Ford and Gainey were suspended on condition they pay a fine of $100 and costs and be of good behavior and that Ingram pay a fine of $75 and costs and be of good behavior. Each defendant appealed to the Superior Court.

In the Superior Court, the State called two officers as its only witnesses. Deputy Sheriff Dean testified that on the night of June 25, 1967, at about 1:00 a.m., the three defendants and two others were traveling Highway 74 near Wadesboro in a two-seated, two-door Chevrolet automobile. When first observed, the vehicle was traveling at 60 or more miles per hour. Ford, the owner, was under the wheel. One of the others was sitting beside him. Ingram and two others were on the rear seat. A 12 gauge shotgun, with the butt on the floorboard and the barrel against the front seat, was between the driver and the front seat passenger. Ford said the gun was his; that he carried it for protection.

Deputy Sheriff Hyatt joined Dean, and the two officers, with Ford's permission, searched the Chevrolet. One of the officers saw Ingram and another (not identified) apparently pushing or rearranging the rear seat. An automatic rifle, which Gainey said was his, was lying on the floorboard in front of the rear seat. The officers found a tear gas gun in a revolver holster hanging from the rear view mirror over the instrument board. When the officers removed the rear seat, they found under it a sawed off rifle. The jury convicted Ford for carrying this weapon concealed. Gainey and Ingram were convicted for aiding and abetting Ford in the concealment. No one admitted the ownership of the sawed off rifle. From the judgments imposed, all defendants appealed.

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

James E. Ferguson, II and W. B. Nivens for defendants appellants.

HIGGINS, J. G.S. 14-269 provides: "If anyone, except on his own premises, shall wilfully and intentionally carry concealed about his person any . . . pistol, gun, or other deadly weapon of like kind, he shall be guilty of a misdemeanor and shall be fined or imprisoned at the discretion of the Court."

Although Ford was in his own automobile at the time of his arrest, he was on the public highway and not on his own premises within the meaning of the statute. *State v. Perry,* 120 N.C. 580; *State v. Hewell,* 90 N.C. 705. The critical question is whether the evidence was sufficient to warrant the finding that Ford wilfully and intentionally carried the weapon concealed about his person. The purpose of the statute is to reduce the likelihood a concealed weapon may be resorted to in a fit of anger. In case of an altercation, one who has a pistol concealed about his person will be less likely to act with restraint than if he were unarmed. If both parties are unarmed, bloody noses, black eyes, and torn shirts are the principal dangers which grow out of a fight. If, however, one or each party has a concealed weapon, the result of an altercation may be a funeral and a homicide trial, or two funerals.

In this case, Ford was convicted of carrying the rifle concealed about his person. Gainey and Ingram were convicted of aiding and abetting Ford in that offense. To be criminal, the weapon must be concealed, not necessarily on the person of the accused, but in such position as gives him ready access to it. May we say from this evidence that the weapon was concealed about Ford's person?

The evidence indicates one of the officers saw Ingram and perhaps one of the others rearranging the seat after the automobile stopped. The implication is they were concealing the weapon beneath the seat. There is no evidence whatever that Ford knew of or participated in this concealment. The other weapons were out in the open. Why the sawed off rifle was concealed, or who concealed it, or when, does not appear with any degree of certainty. Ford claimed the shotgun, which was unconcealed. Gainey claimed the repeating rifle, which was unconcealed. The sawed off rifle may or may not have been in the open at the time Officer Dean intercepted the party.

The evidence was insufficient to warrant the conviction of Ford for carrying the rifle concealed about his person. He was in the driver's seat. The rifle was under the back seat. Three men were riding on that seat. Justice Merriman, in *State v. McManus,* 89 N.C. 555, stated our rule: ". . . The language is not 'concealed *on* his person,' but 'concealed about his person'; that is, concealed near, in close proximity to him, and within his convenient control and easy reach, so that he could promptly use it, if prompted to do so by any violent motive. . . . It makes no difference how it is concealed, so it is on or near to and within the reach and control of the person charged."

A detailed discussion and citation of authorities from many states dealing with concealment *on* or *about* the person may be found in 43 A.L.R. 2d, pp. 492 to 524, and in the New York University Law Review, Vol. 26, pp. 210 to 214.

The Attorney General, on the argument, quite frankly admitted that Ford's conviction may not be sustained unless this Court goes beyond any of its previously decided cases. The mere fact of five armed men speeding on the highway at 1:00 in the morning arouses suspicion as to the legitimacy of their plans. But we must not hurry the law to punish conduct that is not criminal. Punishment may be only for unlawful conduct. In determining what that is, we must construe the law strictly in favor of the accused. Under this rule, we hold the evidence was insufficient to warrant the conviction of Ford for carrying the sawed off rifle concealed about his person. Since his conviction was improper, the conviction of Gainey and Ingram for aiding and abetting him must also fail. *State v. Spruill,* 214 N.C. 123, 198 S.E. 611.

The convictions and judgments of the three appellants are
Reversed.

DIXIE CONTAINER CORPORATION OF NORTH CAROLINA v. W. E. DALE, T/A W. E. DALE CONSTRUCTION COMPANY.

(Filed 1 May 1968.)

1. Contracts § 14—

A third-party beneficiary to an existing contract *is held* not a party to the contract so as to come within its provisions incorporating the terms of a prior contract and making them operational as to "the parties" of the existing contract.

2. Indemnity § 2—

The primary purpose of the court in construing a contract of indemnity is to ascertain and give effect to the intention of the parties, and the ordinary rules of the construction of contracts apply.

3. Same—

A contract of indemnity will be construed to cover all losses, damages and liabilities which reasonably appear to have been within the contemplation of the parties, but it cannot be extended to cover any losses which are neither expressly within its terms nor of such character that it can reasonably be inferred that they were intended to be within the contract.

4. Contracts § 12—

A contract is to be construed as a whole and each provision therein must be appraised in relation to all other provisions.

5. Same—

Where a contractor specifically agrees to indemnify the owner of a building for any damages caused to its property during the course of construction, the tenant is thereby excluded from the protection afforded the owner, since it is reasonable to assume that had the parties intended to impose liability upon the contractor for damage to the tenant's property they would have made the provision applicable to him.

6. Same—

Ordinarily, the engagement in an indemnity contract is to make good and save the indemnitee harmless from loss or some obligation which he has incurred to a third party, and a provision in a construction contract whereby the contractor agrees to indemnify and save harmless the owner of a building and his tenant "against all loss, cost, including reasonable attorney's fees, or damage on account of injury to persons or property" is construed to impose liability upon the contractor only for such damages incurred by the owner or tenant to third persons.

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

APPEAL by plaintiff from *Riddle, S.J.*, in chambers in BURKE on 24 June 1967, docketed and argued as Case No. 364 at the Fall Term 1967.

Action for an alleged breach of contract heard on demurrer to the complaint. The facts alleged, except when quoted, are summarized as follows:

Plaintiff, a Delaware corporation, has its principal place of business in Morganton, North Carolina. In 1961 plaintiff owned a tract of land in Burke County upon which, pursuant to a contract entered into between plaintiff and defendant on 23 November 1961, defendant constructed an industrial building. A year later plaintiff conveyed the property to Delos Realty Corporation (Delos), which immediately leased it to plaintiff. Two years thereafter, plaintiff entered into a contract with Delos whereby Delos agreed to construct an addition to the leased building. To this end, Delos entered into a contract with defendant whereby it undertook to construct for Delos an addition to the building.

On 3 April 1965, while defendant's workmen were welding the steel beams in the roof of the new construction, they permitted molten metal to fall upon large rolls of paper stored below. The resulting fire destroyed much of plaintiff's stock and equipment, interrupted production for 8 weeks, and caused plaintiff to suffer damages in the sum of $163,266.95.

Defendant's contract with Delos contained the following provisions:

"PRESENT TENANCY — The contractor, Dale Construction, agrees to aid and facilitate all the operations of shipping, receiving and warehousing which Dixie Container Corporation of N. C., tenant in the existing building, will continue on the construction site during the progress of the work. Dale Construction will in no way interfere with these essential functions of the tenant, and Dale will be held to have informed itself of the details of this necessity. No extra cost or change in the work may be claimed by reason of the obligations of this article.

"Dale Construction Company shall indemnify and save harmless the Delos Realty Corporation and Dixie Container Corporation of N. C., and their principals against all loss, cost, including reasonable attorney's fees, or damages on account of injury to persons or property occurring in the performance of this contract and agreement.

"* * *

"TERMS AND CONDITIONS — The terms and conditions for the above work and governing this contract will be identical to the full contract between Dixie Container Corporation of N. C., and Dale Construction Company dated November 23, 1961. That contract is hereby incorporated fully into this agreement *as operational regarding the parties to this agreement.*" (Emphasis added.)

The above-quoted section of the contract, labeled *Terms and Conditions,* refers to the contract entered into by defendant and plaintiff

on 23 November 1961. That contract, *inter alia,* contained the following provision:

"Art. 11. PROTECTION OF WORK AND PROPERTY — The contractor shall continuously maintain adequate protection of all his work from damage and shall protect the owner's property from injury or loss arising in connection with this contract. He shall make good any such damage, injury or loss, except such as may be directly due to errors in the contract documents or caused by agents or employees of the owner. He shall adequately protect adjacent property as provided by law and the contract documents. The contractor shall take all necessary precautions for the safety of employees on the work and shall comply with all applicable provisions of Federal, State and Municipal safety laws and building codes to prevent accidents or injury to persons on, about or adjacent to the premises where the work is being performed. He shall erect and properly maintain at all times, as required by the conditions and progress of the work, all necessary safeguards for the protection of workmen and the public."

Under the foregoing provisions of the contract between defendant and Delos, plaintiff is a third-party beneficiary, and defendant is obligated to reimburse plaintiff for its losses in the amount of $163,266.95.

Defendant demurred to the complaint on the ground that the contract between defendant and Delos does not obligate defendant to reimburse plaintiff for the loss it suffered. Judge Riddle sustained the demurrer, and plaintiff appealed.

Simpson & Simpson and James C. Smathers for plaintiff appellant.

Carpenter, Webb & Golding; E. P. Dameron; Patton & Starnes for defendant appellee.

SHARP, J. This action is based, not upon allegations of defendant's actionable negligence, but upon the premise that plaintiff was a third-party beneficiary of a building contract between Delos and defendant in which defendant agreed to indemnify plaintiff, the tenant of Delos, for any damage to plaintiff's property resulting from the construction. Defendant concedes that under the terms of the contract, plaintiff would be entitled to indemnity for any sums it might be required to pay third parties as a result of defendant's performance of the contract. He denies, however, that the contract obligated it to reimburse plaintiff for the losses caused by the fire. Decision requires construction of the contractual provisions quoted in the preliminary statement.

Article 11, "Protection of Work and Property," of the 1961 con-

tract between plaintiff and defendant, incorporated by reference in the 1964 contract between defendant and Delos, obligated defendant to indemnify Delos for any damage to its property "arising in connection with this contract" unless the damage was due to errors in the contract documents or acts of the owner's employees. Under the facts alleged, it seems clear that defendant would be liable to Delos for its damages caused by the fire. The stipulation incorporating Article 11, however, expressly limited its application to "the parties to this agreement." Although a third-party beneficiary, plaintiff was not a *party* to the contract. It made no promise, assumed no obligation, undertook to do nothing. "In the United States there are various persons who are recognized as having enforceable rights created in them by a contract to which they are not parties and for which they give no consideration. They are called herein 'third party beneficiaries.'" 4 Corbin, Contracts § 774 (1951).

Defendant concedes that if it has any contractual obligation to indemnify plaintiff for the fire loss in suit, the liability arises out of the PRESENT TENANCY clause in which it agreed to "save harmless the Delos Realty Corporation and Dixie Container Corporation of N. C. and their principals against all loss, cost, including reasonable attorney's fees, or damages on account of injury to persons or property occurring in the performance of this contract and agreement." Plaintiff contends that this provision imposed absolute liability upon defendant to indemnify it for *any* damage to its property resulting from the performance of defendant's contract with Delos. Defendant contends that this clause obligated it to reimburse Delos and plaintiff only for the monetary damages either might be compelled to pay to third parties for personal injury or property damage resulting from the performance of defendant's construction contract.

As in the construction of any contract, the court's primary purpose in construing a contract of indemnity is to ascertain and give effect to the intention of the parties, and the ordinary rules of construction apply. 42 C.J.S. *Indemnity* § 8 (1944). It will be construed to cover all losses, damages, and liabilities which reasonably appear to have been within the contemplation of the parties, but it cannot be extended to cover any losses "which are neither expressly within its terms nor of such character that it can reasonably be inferred that they were intended to be within the contract." *Id.* § 12.

Defendant's contract with Delos must be construed as a whole and the "indemnify and save harmless" clause of the PRESENT TENANCY provision must be appraised in relation to all other provisions. *Atlantic Coast Line Railroad Company v. Norfolk Southern Railway Company*, 236 N.C. 247, 72 S.E. 2d 604; *Lumberton v.*

Hood, 204 N.C. 171, 167 S.E. 641; 1 Strong, N. C. Index, Contracts § 12 (1957). In Article 11 of the contract, defendant specifically and unequivocally agreed to indemnify Delos for any damages which defendant caused to its property during the course of construction. As heretofore pointed out, this section referred only to owner Delos and defendant contractor. Plaintiff, the tenant, was thus excluded from the specific protection therein afforded Delos. Had the parties intended to impose absolute liability upon defendant for any damage to plaintiff's property, it is reasonable to suppose that they would have done so by making this section likewise applicable to plaintiff. Instead they resorted to the different and unrelated terminology of the "indemnify and save harmless" clause, which included both plaintiff and Delos within its coverture. Having elsewhere clearly defined its liability to indemnify Delos for any damage to its property, there was no need to reiterate the same obligation in totally different language in another clause of the contract, and we do not assume that the parties intended to do so. Another commitment is manifested.

We think it is reasonably clear that in the "indemnify and save harmless" clause, defendant only bound itself to reimburse plaintiff for any damages it became obligated to pay third persons as a result of defendant's activity on the leased premises. Ordinarily, indemnity connotes liability for derivative fault. *Edwards v. Hamill,* 262 N.C. 528, 138 S.E. 2d 151. "In indemnity contracts the engagement is to make good and save another harmless from loss on some obligation which he has incurred or is about to incur to a third party. . . ." *Casualty Co. v. Waller,* 233 N.C. 536, 537, 64 S.E. 2d 826, 827. Indemnification for "damage on account of injury to persons or property" could not refer to plaintiff insofar as *personal* injuries are concerned. A corporation's property can be damaged, but a corporation cannot sustain personal injuries. Furthermore, the inclusion of attorney's fees and cost in the indemnification agreement seems to refer to the defense of third-party actions against plaintiff.

While more explicit exposition would no doubt have avoided this litigation, we think the meaning of the contract is sufficiently clear. We hold that the court below ruled correctly in sustaining the demurrer.

Affirmed.

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

IN THE MATTER OF: JANET B. WATSON, GENERAL DELIVERY, WEST JEFFERSON, NORTH CAROLINA 28694, S. S. NO. 241-56-6567, SPRAGUE ELECTRIC COMPANY, LANSING, NORTH CAROLINA AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RALEIGH, N. C.

(Filed 8 May 1968.)

1. Master and Servant § 97—
The public policy of the State in enacting the Employment Security Act is to provide for the compulsory setting aside of unemployment reserves for the benefit of persons unemployed through no fault of their own. G.S. 96-2.

2. Statutes § 5—
The controlling principle in the interpretation of a statute is that it must be given the meaning which the legislature intended it to have.

3. Same—
Where the legislature has erected within the statute itself a guide to its interpretation, that guide must be considered by the courts in the construction of other provisions of the act which, in themselves, are not clear and explicit.

4. Master and Servant § 97—
The Employment Security Act must be construed so as to provide its benefits to one who becomes involuntarily unemployed, who is physically able to work, who is available for work at suitable employment and who, though actively seeking such employment, cannot find it through no fault of his own. G.S. 96-13; G.S. 96-14.

5. Master and Servant § 105—
The term "suitable work", G.S. 96-14(3), relates primarily to the skills required, the compensation to be paid, and the risks incurred by the employee by reason of either the nature of the work to be done, or the environment or time in which it is to be done.

6. Same—
Although the job rejected by claimant for unemployment insurance benefits constituted "suitable work," her rejection of it does not necessarily disqualify her for benefits unless the rejection was "without good cause."

7. Statutes § 5—
Words of a statute are not to be deemed merely redundant if they can reasonably be construed so as to add something to the statute which is in harmony with its purpose.

8. Master and Servant § 105—
The "good cause" for rejection of tendered employment need not be a cause attributable to the employer. G.S. 96-14(3).

9. Statutes § 5—
Words in a statute are to be given their natural and ordinary meaning unless the context requires a different construction.

10. Master and Servant § 105—
Where the mother of a nine-year-old child is involuntarily discharged

from her job on the first shift in an electrical plant, and is thereafter tendered like work on the second shift, which she refused solely on the ground that she is unable to obtain adequate care and supervision for her child during the hours of the second shift, such rejection of the job was for good cause within the meaning of G.S. 96-14(3) and did not disqualify her for benefits otherwise payable under the Employment Security Act.

11. Same—

A worker in an electrical plant who is involuntarily discharged from her job on the first shift and who thereafter rejects the tender of a job on the second shift solely upon the ground that she is unable to obtain adequate care and supervision for her nine-year-old child during the hours of the second shift *is held* available for work within the purview of G.S. 96-13.

12. Same—

Personal circumstances which at all hours preclude a claimant from accepting employment make such person ineligible for the benefits of the Employment Security Act for the reason that such person is not available for work, but personal circumstances which leave an employee free to return to work during the hours of her former employment, which are the hours most people in her line of work are employed in the community, do not render her unavailable for work merely because they preclude her from accepting employment at an entirely different period of the day.

13. Master and Servant § 97; Parent and Child § 1—

Society, as well as the parent, has a very material interest in the supervision and care of children after their release from school at the end of the day, and, accordingly, the Employment Security Act should not be construed so as to deny its benefits to a mother who rejected a tender of employment on the sole ground that she is unable to obtain adequate care for her child during the working hours of the proffered employment.

APPEAL by Employment Security Commission of North Carolina from *Copeland, S.J.*, at the September 1967 Civil Session of ASHE.

Janet B. Watson, formerly employed by Sprague Electric Company, filed her claim with the Employment Security Commission for unemployment insurance benefits on account of involuntary unemployment commencing 17 March 1967. The claim was heard by a claims deputy of the commission, who determined that Mrs. Watson was eligible for such benefits from 17 March through 27 April 1967, but not thereafter. Mrs. Watson appealed from this determination. The appeals deputy determined that she was eligible for benefits to and including 1 June 1967. From this ruling the employer appealed to the chairman of the commission, who affirmed the decision of the appeals deputy. The employer thereupon appealed to the superior court, which reversed the decision of the chairman and remanded the proceeding to the commission for the entry of an order in accordance with the court's conclusion that Mrs. Watson was not entitled to benefits on and after 28 April 1967.

The facts, which are not in dispute, were found by the chairman of the commission to be as follows:

"1. The claimant filed a claim for unemployment insurance benefits on March 17, 1967, and had continued the same weekly up until the date of the hearing before the Appeals Deputy on June 9, 1967.

"2. The claimant was last employed by Sprague Electric Company of Lansing, North Carolina, and was laid off by such employer on March 16, 1967, by reason of no work available. The claimant had worked eleven years for this employer on the first shift as a bench assembler. On May 1, 1967, Sprague Electric Company offered the claimant a job doing identical work she had done prior to her layoff and at the same rate of pay but on the second shift. The claimant refused the offer of work because she is the mother of a nine-year-old son, and her husband works out of town during the week and she cannot make arrangements and has no one to care for her son during the hours of the second shift.

"3. In the labor market area where the claimant resides, approximately seventy per cent of the job opportunities for one of the claimant's vocation and abilities are found during the daytime hours. About thirty per cent of such job opportunities occur on the second shift.

"4. During the period the claimant has filed claims for benefits she has been physically able to work and has made an active search for work with potential employers in the area."

It further appears from the record that the claimant accepted employment with another employer as soon as work on the first shift became available to her.

R. B. Billings, D. G. Ball and H. D. Harrison, Jr., for appellant, Employment Security Commission.

Maupin, Taylor & Ellis for appellee, Sprague Electric Company.

LAKE, J. The sole question for determination on this appeal is this: When the mother of a nine year old child is laid off from her job on the first shift, without fault on her part, and is thereafter tendered like work on the second shift, which she refuses solely for the reason that she is unable to obtain adequate care and supervision for her child during the work hours of the second shift, is

she disqualified for unemployment insurance benefits? We conclude that the answer is, No.

The public policy of this State which gave rise to the Employment Security Act is thus declared in G.S. 96-2:

> "*As a guide to the interpretation and application of this chapter,* the public policy of this State is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. *Involuntary unemployment* is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. * * * The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons *unemployed through no fault of their own.*" (Emphasis added.)

It is elementary that the controlling principle in the interpretation of a statute is that it must be given the meaning which the Legislature intended it to have. *Highway Commission v. Hemphill,* 269 N.C. 535, 153 S.E. 2d 22; *Sale v. Johnson, Commissioner of Revenue,* 258 N.C. 749, 129 S.E. 2d 465; *Greensboro v. Smith,* 241 N.C. 363, 85 S.E. 2d 292; *Guano Co. v. Walston,* 187 N.C. 667, 122 S.E. 663. Thus, when the Legislature has erected within the statute, itself, a guide to its interpretation, that guide must be considered by the courts in the construction of other provisions of the act which, in themselves, are not clear and explicit. 82 C.J.S., Statutes, § 315. We, therefore, must interpret the provisions of the Employment Security Act, setting forth the prerequisites to eligibility for its benefits and circumstances which will disqualify one from receiving its benefits, to the extent that interpretation is required, in the light of the foregoing declaration by the Legislature of the policy to be accomplished by the act.

G.S. 96-13 prescribes the conditions for eligibility to benefits under the act. The portion pertinent to the present appeal is as follows:

> "An unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that * * *
>
> "(3) He is able to work, and is available for work: Provided that no individual shall be deemed available for work unless he

establishes to the satisfaction of the Commission that he is actively seeking work * * *."

G.S. 96-14 prescribes certain conditions which disqualify a claimant for benefits under the act. The pertinent portion of this section of the act is:

> "An individual shall be disqualified for benefits: * * *
>
> "(3) For not less than four, nor more than twelve consecutive weeks of unemployment * * * if it is determined by the Commission that such individual has failed *without good cause* * * * (ii) to accept suitable work when offered him; * * *
>
> "In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence. * * *" (Emphasis added.)

It is apparent that the Employment Security Act was not designed to provide the payment of benefits to a person who is physically unable to work or who, for any other personal reason, would at no time be in a position to accept any employment if it were tendered to him, however capable and industrious such person may be. It is equally clear that the act was not designed to provide payment of benefits to a person who is able to work but who prefers compensated idleness to work for higher wages. The act does not provide health insurance to the industrious worker stricken by accident or disease. It does not provide compensation to the industrious worker whose family responsibilities are such as to preclude the acceptance of any and all employment. It does not provide for payment of benefits to one who, through fear that he may be overtaken by honest work, erects around himself all manner of conditions precedent to his acceptance of employment so as to preclude any possibility of his contact with a job. On the other hand, the statute must be construed so as to provide its benefits to one who becomes involuntarily unemployed, who is physically able to work, who is available for work at suitable employment and who, though actively seeking such employment, cannot find it through no fault of his own.

The terms "able to work", "available for work" and "suitable employment" are not precise terms capable of application with mathematical precision. They are somewhat akin to the terms "reasonable man" and "due care," which continue to defy the best efforts of both the lexicographer and the professor of torts to define them satisfac-

torily and yet are applied with considerable success each day by juries through the application of common sense and experience. A large measure of administrative discretion must be granted to the Employment Security Commission in the application of these terms in the statute to specific cases. The key words in the guidance of this exercise of discretion are "through no fault of his own" and "without good cause." See, *In Re Abernathy,* 259 N.C. 190, 130 S.E. 2d 292, app. dism., 375 U.S. 161, 84 S. Ct. 274, 11 L. Ed. 2d 261. Admittedly these guiding phrases, themselves, are not precise terms. They do, however, focus attention back upon the legislative purpose to provide temporary income to one "involuntarily unemployed" who is physically able to work and desirous of work.

The statute, G.S. 96-14(3), prescribes certain matters which the commission "shall consider" in determining whether work tendered to a given individual is "suitable" for that individual. This statutory catalogue of matters to be considered is not all inclusive. Other circumstances may make a job, which is "suitable" for one person, "unsuitable" for another. Obviously, the statutory catalogue makes the test of suitability of a job dependent, in some measure, upon the personal qualifications and circumstances of the individual claimant. This is not to say that, to be "suitable," a job must be free from all inconvenience and completely satisfying to the claimant. Few, if any, find such work as that. Without attempting to define "suitable work," we think it clear that this term relates primarily to the skills required, the compensation to be paid, and the risks incurred by the employee by reason of either the nature of the work to be done, or the environment or time in which it is to be done.

In the present case, the job rejected by the claimant involved the same kind of work she had previously done in the same plant at the same wage. There is no suggestion that she, personally, would not have been as safe while at work, or while going to and from work, on the second shift as she had been on the first shift. We conclude, therefore, that the job she rejected was "suitable work." Nevertheless, her rejection of it does not necessarily disqualify her to receive benefits under the act to which she would otherwise be entitled. The statutory disqualification arises only if her rejection of suitable work offered her was "without good cause."

It is a well settled principle of statutory construction that words of a statute are not to be deemed merely redundant if they can reasonably be construed so as to add something to the statute which is in harmony with its purpose. *Jones v. Board of Education,* 185 N.C. 303, 117 S.E. 37. By the express language of the statute, the skills, experience, earning ability, health and safety of the employee on

and around the job relate to the question of whether the tendered job is "suitable work." Consequently, to determine what is "good cause" for rejecting suitable work, other matters must be taken into account.

In G.S. 96-14(1) it is provided that one is disqualified from receiving benefits under the act if he left work voluntarily "without good cause attributable to the employer." The disqualification imposed in G.S. 96-14(3) for failure to accept suitable work "without good cause" does not carry the qualifying phrase "attributable to the employer." It cannot be presumed that the omission of these qualifying words was an oversight on the part of the Legislature. Thus, the "good cause" for rejection of tendered employment need not be a cause attributable to the employer.

Words in a statute are to be given their natural, ordinary meaning, unless the context requires a different construction. *Byrd v. Piedmont Aviation, Inc.*, 256 N.C. 684, 124 S.E. 2d 880. In the light of the legislative declaration of policy contained in the Employment Security Act, we conclude that an employee, having been separated from his job through no fault of his own, rejects other tendered employment for "good cause" when his reason for such rejection would be deemed by reasonable men and women valid and not indicative of an unwillingness to work. It is difficult to imagine a better cause for rejection of employment in the late afternoon and evening than the responsibility of a mother for the care of a nine year old child who would otherwise be without supervision from the end of the school day until approximately midnight. The alarming increase in juvenile delinquency in recent years has made it abundantly clear that society, as well as the parent, has a very material interest in the supervision and care of children after their release from school. We, therefore, hold that the claimant's rejection of the job tendered to her for second shift work was for good cause, within the meaning of G.S. 96-14(3), and did not disqualify her for benefits otherwise payable under the Employment Security Act.

The remaining question is whether the claimant was "available for work," within the meaning of G.S. 96-13, in view of her inability to accept employment on the second shift. This Court held that a Seventh Day Adventist is available for work, within the meaning of this statute, notwithstanding the circumstance that her religious faith led her to impose as a condition of her employment that she not be required to work between sundown on Friday and sundown on Saturday, and thus precluded her employment on either the second or the third shift. *In Re Miller*, 243 N.C. 509, 91 S.E. 2d 241.

In the *Miller* case, the employee had been employed on the third

shift prior to her conversion to the faith of the Seventh Day Adventist denomination. She was discharged from that employment because she remained absent from work on Friday night, pursuant to her religious beliefs following her conversion to that faith. In the area where she resided, ninety-five per cent of all job openings for persons engaged in the work for which she was qualified were openings for third shift work. The Employment Security Commission concluded that the claimant had made herself unavailable for work and denied her benefits under the act. This Court reversed that determination, saying through Johnson, J.:

> "If the phrase, 'available for work,' as used in G.S. 96-13, is susceptible of the interpretation applied by the Commission, the logic of the thing would seem to be that the phrase may be applied so as to disqualify, or render ineligible for benefits, the vast majority of people who are not available for work on Sunday *or who do not work on any night.* If this be so, then the rationale of the statute would seem to be that in order to be eligible for benefits a claimant must be 'available for work' at any and all times, night and day, Sunday and week days alike." (Emphasis added.)

Here, as in the *Miller* case, we do not undertake to formulate an all-embracing rule for determining what constitutes being "available for work." Here, as there, we reject the contention that to be eligible for benefits under the act one must be available for work at any and all times. If, as we there held, one is not rendered unavailable for work by her unwillingness, by reason of moral convictions, to accept work during the period within which ninety five per cent of the jobs in her community are to be found, even though her moral standards are not accepted by the majority in the community, it surely follows that one, who actively seeks employment during the hours in which seventy per cent of the available jobs in the community in her line of work are normally found, is not rendered unavailable for work by her refusal of employment during other hours, which would require her to leave her nine year old child unattended and unsupervised.

It is abundantly clear from this record that this claimant was unemployed "through no fault of her own," that she imposed no fictitious or unreasonable conditions upon her reemployment by the same or a different employer, that she actively sought reemployment at the same type of work, in the same community and on the same shift as that upon which she was previously employed. To hold that she was unavailable for employment would give to the Employment

Security Act a harsh construction which would defeat the purpose of the Legislature in its enactment. Personal circumstances which at all hours preclude a claimant from accepting employment make such person ineligible for the benefits of the Employment Security Act for the reason that such person is not available for work, but personal circumstances which leave an employee free to return to work during the hours of her former employment, which are the hours during which most people in her line of work are employed in the community, do not render her unavailable for work merely because they preclude her from accepting employment at an entirely different period of the day. See: Freeman, Able to Work and Available for Work, 55 Yale Law Journal 123, 130; Menard, Refusal of Suitable Work, 55 Yale Law Journal 134.

The appellee-employer, in its brief, has directed our attention to numerous decisions from other jurisdictions denying claims for benefits under the statutes similar to, though not always identical with, the North Carolina Employment Security Act. In many of those cases the factual situation was substantially different from that now before us. In others, despite our great respect for the courts rendering the decisions, we do not find the reasoning persuasive. Since the factual situations in all those cases differ from each other and the reasoning of the respective courts also varies, it is not practicable, within the limits of this opinion, to discuss all of them in detail. We have, however, given careful consideration to each of these decisions from our sister states and shall refer briefly to those most frequently cited in other opinions.

In *Kut v. Albers Super Markets*, 146 Oh. St. 522, 66 N.E. 2d 643, a Seventh Day Adventist was denied unemployment compensation benefits on the ground that he was not "available for work" due to his unwillingness to work on Saturday. There was the further circumstance that he had also rejected the employer's offer to permit him to work on Sunday in lieu of Saturday. Furthermore, this was not a case in which the employee was laid off his old job and refused to take a new one, but was a case of the employee leaving his old job because he was unwilling to work during its customary hours, a circumstance discussed below. The Ohio court said that since the statute does not designate particular days of the week on which a claimant must be "available for work," the claimant "must be available for work on Saturday if this is required by his usual trade or occupation."

In *Ford Motor Co. v. Appeal Board of Michigan Unemployment Compensation Commission*, 316 Mich. 468, 25 N.W. 2d 586, the court quoted and relied upon the *Kut* case, *supra*, in denying the claim of

a mother who, having been laid off from a second shift job, was unwilling to take work on the first shift because of her desire to prepare breakfast for her two children and get them off to school. The Michigan statute required that the claimant be available for work "full-time," thus differing from the North Carolina act. The court held there was nothing in the Michigan statute to indicate a legislative intent that a claimant might limit his employment to certain hours of the day "where the work he is qualified to perform is not likewise limited."

To the same effect is *LeClerc v. Administrator,* 137 Conn. 438, 78 A 2d 550, denying the claim of a mother of two young children who, having been laid off from her second shift job, was unwilling to accept first shift work due to the necessity of caring for her children at those hours. The Connecticut court said that the claimant "must be exposed unequivocally to the labor market" in order to be "available for work."

In *Swanson v. Minneapolis-Honeywell Regulator Co.,* 240 Minn. 449, 61 N.W. 2d 526, in denying the claim of a mother of two small children, laid off from a shift starting at 8 a.m. and unwilling to accept employment requiring her to go to work earlier, due to the unavailability at such hour of the day nursery used by her, the court said, "A person is not available for work within the meaning of the statute unless he is accessible or attainable for work when suitable work is offered at such hours as are customary in the type of employment to which he is suited." This was followed in *Thompson v. Schraiber,* 253 Minn. 46, 90 N.W. 2d 915.

The foregoing cases from Ohio, Michigan, Connecticut and Minnesota rest upon an interpretation of "available for work" which was rejected by this Court in the *Miller* case, *supra.* Since that case was decided by this Court, the Supreme Court of the United States has held that the provisions of the First Amendment to the United States Constitution, incorporated into the Fourteenth Amendment by judicial decision, forbid a state to deny unemployment compensation to a Seventh Day Adventist discharged because of her refusal to work on Saturday. *Sherbert v. Verner,* 374 U.S. 398, 83 S. Ct. 1790, 10 L. ed. 2d 965. However, the decision of this Court in the *Miller* case did not rest upon constitutional grounds but upon this Court's construction of "available to work," as used in the North Carolina Employment Security Act. The interpretation there placed by this Court upon this phrase, as used in the North Carolina statute, is that one may be "available for work" notwithstanding his unwillingness, for personal reasons, to work at certain hours or on certain days. We adhere to our decision in the *Miller* case.

Another group of cases relied upon by the appellee-employer is illustrated by *Nurmi v. Vermont Employment Security Board*, 124 Vt. 42, 197 A. 2d 483. There, women previously employed on the night shift were laid off when that shift was discontinued. They were denied benefits under the Vermont statute because the necessity for caring for their children during the day precluded them from accepting daytime employment. The court said that such domestic situation was not "good cause" for rejecting the proposed new employment and, consequently, the claimants were not "available for work." The Vermont statute, like ours, disqualifies a claimant who quit his last job "voluntarily without good cause attributable to such employing unit." It also, like our statute, provides that a claimant would be disqualified for benefits if he refused to accept suitable work without "good cause." The court said that, by implication, "good cause" for rejecting proposed new employment must be a cause connected with the proposed work and, therefore, did not include domestic duties. Language to the same effect is found in *Buchko v. Unemployment Compensation Board of Review*, 196 Pa. Super. 559, 175 A. 2d 914, and *Watson v. Unemployment Compensation Board of Review*, 176 Pa. Super. 490, 109 A. 2d 215, although these cases actually turned upon a definition of "good cause" in the Pennsylvania act, which is not contained in the North Carolina statute and which expressly states that domestic obligations are not "good cause" wherever that phrase is used in the Pennsylvania act.

We are unable to concur in the view thus expressed by the Vermont and Pennsylvania courts. When, in two paragraphs of the same section of a statute, the legislature provides for disqualification of a claimant who leaves his old job without "good cause attributable to his employer" and for disqualification of one who rejects new work without "good cause," we think it evident that the legislature, for some reason satisfactory to it, intended to make the difference between the two situations which its language expresses. That is, a factual situation which may be "good cause" for rejecting a proposed new employment need not be connected with the proposed work itself. The wisdom of such distinction is for the legislature, our authority being merely to determine the meaning of the words it used.

In view of the above quoted legislative declaration of its purpose in the passage of this statute, incorporated in the statute "as a guide to the interpretation and application" of it, we think it clear that sections of the act imposing disqualifications for its benefits should be strictly construed in favor of the claimant and should not be enlarged by implication or by adding to one such disqualifying provision words found only in another.

We are also unable to concur in the conclusion of the Vermont court that one who, without "good cause," rejects a proposed new employment thereby establishes his unavailability for work. One who is not "available for work" is not eligible for benefits under this act so long as the unavailability continues, irrespective of whether the lack of availability is with or without "good cause." Rejection of a tendered employment without "good cause" disqualifies for benefits one who is "available for work," but only to the extent and for the period prescribed by the disqualifying section of the statute. The two provisions of the act are separate and distinct. The decision of this Court in the *Miller* case, *supra,* establishes that the requirement in the North Carolina act that the claimant be "available for work" does not mean that he must be willing and ready to accept work for which he is qualified, at whatever hour and on whatever day such work may be offered to him.

Another group of cases cited by the appellee-employer are distinguishable in that they dealt with claimants who had voluntarily quit their former job. In such situation the North Carolina Employment Security Act expressly provides disqualification for benefits unless the claimant left the former employment for "good cause attributable to the employer." G.S. 96-14(1). The statute construed in those cases contained a like provision. Obviously, domestic duties of the claimant would not qualify as "good cause attributable to the employer." In this group of cases are: *Huiet v. Schwob Mfg. Co.,* 196 Ga. 855, 27 S.E. 2d 743; *Hainzer v. Unemployment Compensation Board of Review,* 202 Pa. Super. 172, 195 A. 2d 842; *Stone Mfg. Co. v. South Carolina Employment Security Commission,* 219 S.C. 239, 64 S.E. 2d 644; *Judson Mills v. South Carolina Unemployment Compensation Commission,* 204 S.C. 37, 28 S.E. 2d 535; *Moore v. Commissioner of Employment Security,* 197 Tenn. 444, 273 S.W. 2d 703.

In *Unemployment Compensation Commission v. Tomko,* 192 Va. 463, 65 S.E. 2d 524, the court denied benefits under the Virginia statute to coal miners who, pursuant to a union directive, refused to work at their regular jobs more than three days a week pending negotiations between the union and the mine operators for a new contract, the mine operators offering employment five days a week. The Virginia court held that the claimants were not "available for work" because they had attached to their willingness to work restrictions which were not usual and customary in their occupation but which were desired by them because of their particular needs or circumstances. There is no similarity between that situation and the one now before us.

In other cases cited in the appellee-employer's brief, the domestic duties or physical condition of the claimant excluded her from all possibility of work during the only hours or at the only places where work she was qualified to do was available. *Valenti v. Board of Review of Unemployment Compensation Commission,* 4 N.J. 287, 72 A. 2d 516; *Salavarria v. Murphy,* 266 App. Div. 933, 43 N.Y.S. 2d 899; *Schubauer v. Unemployment Compensation Board of Review,* 197 Pa. Super. 600, 179 A. 2d 661. Obviously, in such cases the claimant is not "available for work," for, as the New Hampshire court has said, "Where the claimant attaches such restrictions on the time or type of work he will accept that there is no market for his services as offered, he is not considered available." *Goings v. Riley,* 98 N.H. 93, 95 A. 2d 137. That is not the situation where, as here, the claimant, after working many years on the first shift, was laid off through neither fault nor choice of her own, and actively seeks employment on the same shift, which is the shift on which 70 per cent of the jobs she is qualified to do are held in her community.

The conclusions of the superior court that the claimant is not entitled to benefits under the Employment Security Act during the period in question in this proceeding, that the claimant was not available for work, and that she did not have good cause for refusing the offer of second shift employment were erroneous. The judgment of the superior court is, therefore, reversed and this matter is remanded to the superior court with direction to enter a judgment affirming the order of the Employment Security Commission.

Error and remanded.

STATE v. JACK SELLERS.

(Filed 8 May 1968.)

1. Criminal Law § 127—

A motion in arrest of judgment on the ground the indictment is fatally defective may be made for the first time in the Supreme Court on appeal.

2. Burglary and Unlawful Breakings § 3—

In an indictment under G.S. 14-54, the building allegedly broken and entered must be described sufficiently to show that it is within the language of the statute and to identify it with reasonable particularity so that defendant may prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense.

3. Same—

An indictment charging a non-burglarious breaking and entry of "a certain storehouse, shop, warehouse, dwelling and building" occupied by a named corporation is not fatally defective in failing to identify the type of structure broken into, although the better practice is to identify the subject premises by some clear description and designation to set the subject premises apart from like and other structures set forth in G.S. Chapter 14, Art. 14, defendant's remedy being a motion for a bill of particulars if he desires more information as to the identity of the building.

4. Indictment and Warrant § 7—

The signature of the prosecuting officer is not essential to the validity of a bill of indictment.

5. Criminal Law § 25—

A plea of *nolo contendere* admits for the purpose of the particular case all the elements of the offense charged and gives the court power to sentence the defendant for such offense, and no other proof of guilt is required.

6. Same—

A plea of *nolo contendere* will support the same punishment as a plea of guilty.

APPEAL by defendant from *Snepp, J.*, September 1967 Criminal Session of MECKLENBURG.

Defendant was prosecuted on the following bill of indictment:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Jack Sellers, late of the County of Mecklenburg, on the 2nd day of July, 1967, with force and arms at and in the County aforesaid, a certain storehouse, shop, warehouse, dwelling house and building occupied by one Leesona Corporation, a corporation being well kept, unlawfully, willfully and feloniously did break and enter with intent to steal, take and carry away the merchandise, chattels, money, valuable securities of the value of more than $200.00, of the said Leesona Corporation against the form of the Statute in such case made and provided and against the peace and dignity of the State."

Defendant was represented by Charles V. Bell who was privately employed by him. Defendant entered a plea of *nolo contendere*. After defendant entered a plea of *nolo contendere,* he was sworn and made the following answers to the questions propounded to him by the court:

"1. Are you able to understand my statements and questions?

ANSWER: Yes.

"2. Are you under the influence of any alcohol, drugs, narcotics or other pills?

ANSWER: No.

"3. Do you understand what you are charged with in this Case?

ANSWER: Yes.

"4. Do you understand that upon your plea of *Nolo Contendere* you could be imprisoned for as much as ten (10) years?

ANSWER: Yes.

"5. Has the Solicitor, or your lawyer, or any policeman, law officer or anyone else, made any promise to you to influence you to plead *Nolo Contendere* to this case?

ANSWER: No.

"6. Has the Solicitor, or your Lawyer, or any policeman, law officer or anyone else made any threat to you to influence you to plead *Nolo Contendere* in this case?

ANSWER: No.

"7. Have you had time to confer and have you conferred with your Lawyer about this case?

ANSWER: Yes.

"8. Do you authorize and instruct your Lawyer to enter a plea of *Nolo Contendere?*

ANSWER: Yes.

"9. How do you plead to the charge?

ANSWER: *Nolo Contendere.*

"10. Have these questions been read to you and explained to you?

ANSWER: Yes.

"I have read or heard all the above questions and answers, and the answers shown are the ones that I gave in open court, and they are true and correct.

/s/ JACK SELLERS

"Subscribed and sworn to
before me, this............day
of............................, 1967.

....
Notary Public
My Commission Expires:
Charles V. Bell, Attorney

/s/ RALEIGH L. PITTS
Clerk Superior Court,
Mecklenburg County,
North Carolina."

After this affidavit had been executed by defendant, the judge filed among the papers of the case the following statement signed by himself:

"1. That the above-named defendant was sworn in open court and the questions were asked him as set forth in the foregoing transcript, and the answers given thereto by the said defendant are as set forth therein.

"2. That the defendant Jack Sellers was represented by Charles V. Bell, who was privately employed, pleaded *Nolo Contendere* to the felony, Felonious Breaking and Entering, as charged in the Bill of Indictment, and in open Court, under oath, further informs the Court that he is and has been:

(1) fully advised of his rights and the charges against him;
(2) the maximum punishment for said offense charged, and for the offense to which he pleads *Nolo Contendere;*
(3) that he is guilty of the offense to which he pleads *Nolo Contendere;*
(4) that he authorizes his attorney to enter a plea of *Nolo Contendere* to said charge;
(5) that he has ample time to confer with his attorney, and to subpœna witnesses desired by him;
(6) that he is ready for trial;
(7) that he is satisfied with the counsel and services of his attorney.

"And after further examination by the Court, the Court ascertains, determines and adjudges that the plea of *Nolo Contendere* by the defendant is freely understandingly and voluntarily made, and was made without undue influence, compulsion or duress, and without promise of leniency. It is therefore ordered that his plea of *Nolo Contendere* be entered in the record, and that this transcript and adjudication be filed herein."

From a judgment of imprisonment for a term of not less than six years, defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General Bernard A. Harrell for the State.
Charles V. Bell for defendant appellant.

PARKER, C.J. Defendant did not make a motion in the trial court for arrest of judgment on the ground the indictment was defec-

tive. For the first time in this Court he moved "for arrest of judgment on the ground that the identity of the building alleged to have been broken and entered into by the defendant is not alleged with reasonable particularity to enable the defendant to plead his plea of '*nolo contendere*' as a bar to further prosecution for the same offense." A motion in arrest of judgment predicated upon some fatal error or defect appearing on the face of the record proper may be made at any time in any court having jurisdiction of the matter. This is true even though the motion is made for the first time in the Supreme Court at the hearing of the appeal from the judgment of the Superior Court. *S. v. Johnson,* 226 N.C. 266, 37 S.E. 2d 678; *S. v. Bradley,* 210 N.C. 290, 186 S.E. 240; *S. v. Baxter,* 208 N.C. 90, 179 S.E. 450; *S. v. McKnight,* 196 N.C. 259, 145 S.E. 281; *S. v. Marsh,* 132 N.C. 1000, 43 S.E. 828.

The indictment is based upon the following language of G.S. 14-54:

> "If any person, with intent to commit a felony or other infamous crime therein, shall break or enter either the dwelling house of another otherwise than by a burglarious breaking; or any storehouse, shop, warehouse, bankinghouse, countinghouse or other building where any merchandise, chattel, money, valuable security or other personal property shall be; or any uninhabited house, he shall be guilty of a felony, and shall be imprisoned in the State's prison or county jail not less than four months nor more than ten years. Where such breaking or entering shall be wrongfully done without intent to commit a felony or other infamous crime, he shall be guilty of a misdemeanor."

The indictment in the instant case charges a felonious breaking and entry into "a certain storehouse, shop, warehouse, dwelling house and building occupied by one Leesona Corporation, a corporation. . . ."

This is said in 42 C.J.S. Indictments and Informations § 166:

> "It is a well settled rule of criminal pleading that, when an offense against a criminal statute may be committed in one or more of several ways, the indictment or information may, in a single count, charge its commission in any or all of the ways specified in the statute. So, where a penal statute mentions several acts disjunctively and prescribes that each shall constitute the same offense and be subject to the same punishment, an indictment or information may charge any or all of such acts conjunctively as constituting a single offense."

See also *S. v. Davis,* 203 N.C. 47, 164 S.E. 732, cert. den. 287 U.S. 645, 77 L. Ed. 558; 27 Am. Jur. Indictments and Informations § 104.

This is said in *S. v. Williams,* 210 N.C. 159, 185 S.E. 661:

> " 'As a general rule, it is sufficient in framing an indictment upon a statute to use the very words of the statute; but this rule is not without exception, for where a statute, in enumerating offenses, charging intent, etc., uses the disjunctive *or,* it is common to insert the conjunctive *and* in its stead in the bill of indictment, for alternative or disjunctive allegations make the bill bad for uncertainty. . . . It is common to insert several counts in order to meet the different views which may be presented by the evidence, but alternative allegations in the same count make it bad for uncertainty.' *S. v. Harper,* 64 N.C. 129."

S. v. Knight, 261 N.C. 17, 134 S.E. 2d 101, was a criminal prosecution on a three-count indictment charging the defendants with (1) non-burglariously breaking and entry, (2) larceny of a metal safe, of $75,000 in U. S. currency, and of stock and securities of the value of $100,000, and (3) receiving. The defendants pleaded not guilty. From a verdict of guilty and a sentence of imprisonment, they appealed to the Supreme Court. Defendants assigned as error the denial of their motion to quash the indictment, made in apt time before pleading to the indictment. They contended that the indictment should be quashed for this reason, *inter alia,* that the first count charges them with a non-burglariously breaking and entry into "a certain storehouse, shop, warehouse, dwelling house and building occupied by one Dr. D. W. McAnally," etc., which does not give them any specific information as to the type of structure they are charged with breaking into. The Court held that this assignment of error was without merit. In its language the Court said:

> "The first count charging a non-burglariously breaking and entry charges the breaking and entry into certain buildings specified in G.S. 14-54, which creates the offense. The first count in the indictment charges all the essential ingredients of the offense created by G.S. 14-54, and is good. Where an indictment correctly charges all the essential elements of the offense, but is not as definite as the defendant may desire for his better defense, his remedy is by a motion for a bill of particulars, G.S. 15-143, and not by a motion to quash. *S. v. Everhardt,* 203 N.C. 610, 166 S.E. 738. When a bill of particulars is furnished, it limits the evidence to the transactions or items therein stated. *S. v. Williams,* 211 N.C. 569, 190 S.E. 898."

The exact point presented on this appeal was presented in *S. v. Burgess,* 1 N.C. App. 142, 160 S.E. 2d 105, in an opinion filed 27

March 1968. In that case the defendant was charged in a bill of indictment with the felony of breaking and entering a certain storehouse, shop, warehouse, dwellinghouse, bankinghouse, countinghouse and building occupied by one Dreame A. Glover wherein merchandise, *et cetera,* were being kept, and in a second count with the felony of larceny. Defendant, through his counsel, tendered a plea of guilty to the felonies of housebreaking and larceny as set forth in the bill of indictment. From a sentence of imprisonment, defendant appealed. In its opinion the Court said:

> "In an addendum to his brief, defendant contends that the indictment is fatally defective for that it does not properly identify the premises, and he makes a motion in arrest of judgment. The first count in the indictment charges that the defendant did feloniously break and enter 'a certain storehouse, shop, warehouse, dwelling house, bankinghouse, countinghouse and building occupied by one Dreame A. Glover. . . .'
>
> "We think that this case is clearly distinguishable from the case of *State v. Smith,* 267 N.C. 755, 148 S.E. 2d 844, relied on by the defendant. In the *Smith* case the court held that the description of the property in the bill of indictment, 'a certain building occupied by one Chatham County Board of Education, a Government corporation,' was fatally defective because under the general description of ownership, it could have been any school building or property owned by the Chatham County Board of Education. Obviously, the Board of Education of Chatham County owns more than one building. The ownership of the personal property in this case is alleged to be in an individual and the premises described, among other things, as the dwelling house occupied by Dreame A. Glover. *In the light of the growth in population and in the number of structures (domestic, business and governmental), the prosecuting officers of this State would be well advised to identify the subject premises by street address, highway address, rural road address or some clear description and designation to set the subject premises apart from like and other structures described in G.S. Chap. 14, Art. 14.* Nevertheless, in this case we hold that the indictment sufficiently described and designated the premises. The defendant's motion in arrest of judgment on the first count is denied." (Emphasis ours.)

We approve of the language of the Court of Appeals emphasized in the above quotation in respect to the particular identification of the building alleged to have been broken into and entered.

The facts in *Wright v. Commonwealth,* 155 Ky. 750, 160 S.W. 476, are not on all-fours, but are apposite. At the November term, 1912, an indictment was returned by the grand jury of Graves County, Kentucky, accusing B. W. Wright, L. A. Perkins, and Wood Gordon of the crime of banding themselves together for the felonious purpose of burning a warehouse and tobacco house, in pursuance of which conspiracy they did set fire to and burn and destroy a "warehouse and tobacco house," which was the property of G. R. Allen and W. A. Usher, and which was in the possession of B. W. Wright, who was doing business for himself and V. E. Allen, and upon which warehouse and tobacco house there was at the time insurance. The Court in its opinion said:

> "His first ground of complaint is that the indictment is defective. The indictment charges the burning of 'a warehouse and tobacco house belonging to G. R. Allen and W. A. Usher, and occupied by B. W. Wright, who was doing business for B. W. Wright and V. E. Allen.' So far as this record shows there was but one building answering this description, and that is the one for the burning of which appellant was indicted. He argues that the indictment charges two separate offenses in using the words 'warehouse and tobacco house'; that he was charged with burning two separate and distinct buildings. But the language of the entire description should be considered. The building which was burned was used for the storage of tobacco. It was both a tobacco house and a warehouse. Webster defines the latter as 'a storehouse for wares or goods.' This was a storehouse for tobacco — a tobacco warehouse. Appellant was entitled to be informed of the nature and cause of the accusation against him; and such certainty was required in the indictment as would enable him to prepare for trial, and to know exactly what he had to meet. This requirement, we think, the indictment herein conformed to in all respects. Appellant could not have been misled by the words 'warehouse and tobacco house,' for the same were qualified by the further description, 'belonging to G. R. Allen and W. A. Usher, and occupied by B. W. Wright, who was doing business for B. W. Wright and V. E. Allen.' Appellant knew without doubt what building he was charged with burning. He has failed to show how he was or could have been misled by this description of the building which was burned, and we are unable to understand how he could have been prejudiced thereby. Taking the indictment in its entirety, we think appellant's contention in that respect is without merit."

In *Ciccarelli v. People,* 147 Colo. 413, 364 P. 2d 368, reh. den. 11 September 1961, defendant was charged with the burglary of the Fred Harsch Lumber Co. of Longmont, Colorado. Following a jury verdict of guilty and a sentence of imprisonment, defendant appealed. The opinion of the Court states:

> "The information charged that the defendant did '* * * break and enter the office, shop and warehouse of Fred Harsch, with intent then and there to commit therein the crime of larceny.'
>
> * * *
>
> "Although the information would appear to have been drafted with reference to the old statute, it nevertheless sufficiently describes the offense of burglary. The amendment to C.R.S. '53, 40-3-6 (1957 Supp.) had a curative purpose. It was designed to broaden, not to restrict the scope of the offense. It now declares that any 'building, railroad car, or trailer' can be the subject of a burglary. The present information alleges that the defendant did break and enter an office, shop and warehouse. Therefore, the question is whether this language served to describe the Fred Harsch Lumber Company. In answering this question, we note that our decisions hold an information to be sufficient if it advises the defendant of the charges he is facing so that he can adequately defend himself and be protected from further prosecution for the same offense. *Johnson v. People,* 110 Colo. 283, 133 P. 2d 789; *People v. Warner,* 112 Colo. 565, 151 P. 2d 975.
>
> "In *Sarno v. People,* 74 Colo. 528, 223 P. 41, it was held that the information need not charge in the exact language of the statute; that the information is sufficient if the charge is in language from which the nature of the offense may be readily understood by the accused and jury.
>
> "To the same effect are *Tracy v. People,* 65 Colo. 226, 176 P. 280 and *Wright v. People,* 116 Colo. 306, 181 P. 2d 447.
>
> "In the case at bar, there is ample evidence establishing that the lumber company structure here involved was a building, and we must also conclude that an office, shop and warehouse describes a building. We are unable, therefore, to perceive that any prejudice arose from this discrepancy in wording. Consequently, this contention is of the trivial technical character which we have on numerous occasions held to be nonprejudicial. *Compton v. People,* 84 Colo. 160, 268 P. 577; *Grandbouche v. People,* 104 Colo. 175, 89 P. 2d 577; *Rogers v. People,* 104 Colo. 594, 94 P. 2d 453."

In an indictment under G.S. 14-54 punishing the breaking and entering of buildings, a building must be described as to show that it is within the language of the statute and so as to identify it with reasonable particularity so as to enable the defendant to prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense. *S. v. Banks,* 247 N.C. 745, 102 S.E. 2d 245; 12 C.J.S. Burglary § 35(e). The indictment here charges all the essential elements of the offense created by G.S. 14-54 in substantially the language of part of the statute and is good. *S. v. Wilson,* 270 N.C. 299, 154 S.E. 2d 102; *S. v. Brown,* 266 N.C. 55, 145 S.E. 2d 297; *S. v. Vines,* 262 N.C. 747, 138 S.E. 2d 630; *S v. Knight, supra; S. v. Mumford,* 227 N.C. 132, 41 S.E. 2d 201; *S. v. Goffney,* 157 N.C. 624, 73 S.E. 162; *S. v. Burgess, supra.* Defendant could not have been misled by the words "a certain storehouse, shop, warehouse, dwelling house and building," for the same were qualified by the further specific description "occupied by one Leesona Corporation, a corporation." Undoubtedly, a storehouse, a shop, a warehouse, and a dwelling describe a building. Reading the indictment it does not charge the defendant with feloniously breaking into several separate buildings because the one building broken into is specifically described as "occupied by one Leesona Corporation, a corporation." Defendant apparently knew without a doubt what building he was charged with breaking and entering, because he was present with his counsel, who was a lawyer of large experience in criminal cases, and pleaded *nolo contendere.* If the defendant or his counsel had been in doubt as to the identity of the building he was charged with having feloniously broken into and entered, he could have called for a bill of particulars. Defendant relies solely upon the case of *S. v. Banks, supra,* which was an arson case. In the *Banks* case the bill of indictment was clearly defective in that there was no allegation of ownership or of possession, or any other descriptive language tending to give the building a fixed location. In the *Banks* case the Court said this: "From the foregoing decisions it appears that an allegation of ownership or of possession suffices to meet the requirements of identity." Nothing we have said in this opinion is at variance with what is held in the *Banks* case. In our opinion the indictment with its lanquage "occupied by one Leesona Corporation, a corporation" suffices to give the defendant sufficient notice to have prepared his defense if he had pleaded not guilty instead of *nolo contendere* and to enable him to plead former conviction or former acquittal to a second indictment for the same offense, and the indictment supports the sentence of imprisonment. Defendant's motion in arrest of judgment is overruled.

According to the record before us the indictment is not signed by the prosecuting officer or by anyone, but this is not mentioned in defendant's brief. According to the record before us made up by the defendant, it is stated, "This bill was returned: A 'True Bill.'" There is no statute in North Carolina requiring the signature of the solicitor to an indictment. It is not essential in this jurisdiction to the validity of the indictment that it should be signed by the prosecuting officer. *S. v. Doughtie,* 238 N.C. 228, 77 S.E. 2d 642; *S. v. Shemwell,* 180 N.C. 718, 104 S.E. 885; *S. v. Arnold,* 107 N.C. 861, 11 S.E. 990; *S. v. Mace,* 86 N.C. 668; *S. v. Vincent,* 4 N.C. 105.

This is said in 42 C.J.S. Indictments and Informations § 56:

> "In the absence of statute it is generally held that while it is proper, and the better practice, for the prosecuting attorney to sign the indictment, the signature of the public prosecutor or someone acting for him to an indictment or special presentment forms no part of it and is not essential to its validity, and that, where an indictment is signed by anyone without authority, the signature is mere surplusage and cannot vitiate it."

The burden is on the defendant to prepare the statement of the case on appeal and to show, if he can, error. G.S. 1-282. The defendant has not seen fit to place in the record any of the evidence in the case, if evidence was introduced. Defendant entered a plea of *nolo contendere.* A plea of *nolo contendere* will support the same punishment as a plea of guilty. *S. v. Payne,* 263 N.C. 77, 138 S.E. 2d 765; *S. v. Cooper,* 238 N.C. 241, 77 S.E. 2d 695; *S. v. Burnett,* 174 N.C. 796, 93 S.E. 473. Even if no evidence was offered by the State, it was not incumbent upon the State to offer proof of defendant's guilt. This is so because his plea of *nolo contendere* admits for the purpose of the particular case all the elements of the offense charged against the defendant and gives the court complete power to sentence the defendant for such offense. *S. v. Cooper, supra; S. v. Beasley,* 226 N.C. 580, 39 S.E. 2d 607; *S. v. Ayers,* 226 N.C. 579, 39 S.E. 2d 607; 22 C.J.S. Criminal Law § 425(4). Incidentally, a plea of guilty also relieves the prosecution of the duty to prove the facts. *S. v. Miller,* 271 N.C. 611, 157 S.E. 2d 211; *S. v. Wilson,* 251 N.C. 174, 110 S.E. 2d 813; 21 Am. Jur. 2d Criminal Law § 495; 22 C.J.S. Criminal Law § 424(4).

The judgment of the lower court is

Affirmed.

STATE v. OTT BOWERS.

(Filed 8 May 1968.)

1. Larceny §§ 3, 10—

Larceny from the person in any amount is a felony punishable by imprisonment for as much as ten years. G.S. 14-72.

2. Larceny § 4—

In prosecutions for the felony of larceny from the person, the solicitors are advised to include in the bill of indictment the words "from the person."

3. Criminal Law § 26—

Upon an appeal from a conviction of misdemeanor larceny in a county court, the election of the State to try defendant upon the warrant in the Superior Court for misdemeanor larceny precludes the State from retrying defendant for felonious larceny in the event a new trial is granted, although the evidence at the first trial would support a charge of felonious larceny.

4. Larceny § 1—

Larceny is the taking and carrying away of the personal property of another without his consent, with felonious intent at the time of the taking to deprive the owner of his property and to appropriate it to the taker's use, and the act of taking must involve either an actual trespass or a constructive trespass in fraudulently acquiring possession through some trick or artifice.

5. Larceny § 7—

Evidence of the State that defendant obtained a $20.00 bill from the prosecuting witness upon his representation that he wanted the money temporarily and solely for the purpose of showing the prosecuting witness a trick, and that defendant refused to return the money but kept it and appropriated it to his own use, *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of larceny by trick.

6. Criminal Law § 170—

An instruction by the court, upon being informed that the jury was divided 11 to 1, that the jury should confer again and that "You have to reach a verdict" *is held* to constitute prejudicial error, since the jurors may have considered the court's statement as a mandatory and unequivocal directive to reach a verdict.

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

Criminal prosecution on a warrant charging that defendant, on or about July 21, 1967, "did unlawfully, willfully and feloniously take, steal and carry away $20.00 in valid U. S. Currency, the property of Larry Honeycutt, by trick, in violation of 14-72, against the form of the Statute in such cases made and provided," etc.

Defendant was first tried on said warrant in the Rowan County Court. He was adjudged guilty. Judgment imposing a prison sentence of thirty days, suspended upon conditions *inter alia* that he "pay back to Mr. Honeycutt the sum of $20.00" and that he pay a fine of $50.00 and the costs, was pronounced. Defendant appealed.

In the superior court, when the case came on for trial *de novo,* and before the jury was selected and impaneled, it was stated by the prosecutor, the defense counsel and the court that defendant was being placed on trial for misdemeanor larceny. Defendant pleaded not guilty. Thereupon the jury was selected and impaneled. Evidence was offered by the State and by defendant.

In brief summary, the evidence most favorable to the State tended to show defendant obtained a $20.00 bill from Honeycutt on his representation he wanted to use it solely to show Honeycutt a trick and thereafter he would return it to Honeycutt; that, after taking the bill in his hand, moving it around "a little bit," and folding it up "a little bit," defendant "pulled it back out," exhibited it to Honeycutt and said, "Is this the $20.00 you *gave* me?" (Our italics.) Honeycutt answered, "Yes." Thereupon, defendant said, "Thank you," put the $20.00 bill in his pocket, kept it and appropriated it to his own use, notwithstanding Honeycutt's repeated but unsuccessful efforts to regain possession thereof.

The jury returned a verdict of guilty as charged. Thereupon, the court pronounced judgment that defendant "be confined in Common Jail of Rowan County for a period of 12 months and assigned to do labor as provided by law."

Defendant excepted and appealed.

Attorney General Bruton, Deputy Attorney General Lewis and Trial Attorney Smith for the State.

Graham M. Carlton for defendant appellant.

BOBBITT, J. Defendant contends the accusations in the warrant in effect charge him with a felony, to wit, larceny from the person.

At common law, both grand larceny and petit larceny were felonies. Now, by virtue of G.S. 14-72, the larceny of property "of the value of not more than two hundred dollars" *is* a misdemeanor and the punishment therefor is in the discretion of the court. However, G.S. 14-72, according to its express provisions, has no application where "the larceny is from the person." *State v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91, and cases cited.

Admittedly, the punishment for larceny from the person may include imprisonment for a term of ten years. *State v. Stevens,* 252

N.C. 331, 113 S.E. 2d 577; *State v. Acrey,* 262 N.C. 90, 136 S.E. 2d 201; G.S. Chapter 14, Article 1, consisting of G.S. 14-1, G.S. 14-2 and G.S. 14-3, being a codification of Chapter 1251, Session Laws of 1967.

In the absence of a bill of indictment, defendant contends the present prosecution should be dismissed.

In *State v. Stevens, supra,* the indictment charged defendants with the larceny of $104.00 in cash. When arraigned thereon, each defendant entered a plea of *nolo contendere* "of larceny from the person." Judgments imposing prison sentences of 3-8 years and of 3-5 years, respectively, were pronounced. Seemingly, Stevens stands for the proposition that an indictment charging the larceny of property of the value of two hundred dollars or less is a sufficient basis for a conviction of larceny from the person or a plea of guilty or *nolo contendere* to larceny from the person. The present appeal does not necessitate reconsideration of the decision in *Stevens.* However, solicitors would do well to include in bills of indictment the words "from the person" if and when they intend to prosecute for the felony of larceny from the person.

It is noted that G.S. 14-72, according to its express provisions, has no application where "the larceny is . . . from the dwelling or any storehouse, shop, warehouse, banking house, counting house, or other building where any merchandise, chattel, money, valuable security or other personal property shall be, by breaking and entering." Where an indictment charges larceny of property of the value of two hundred dollars or less, but contains no allegation the larceny was from a building by breaking and entering, this Court has held the crime charged is a misdemeanor for which the maximum prison sentence is two years, notwithstanding all the evidence tends to show the larceny was accomplished by means of a felonious breaking and entering. *State v. Fowler,* 266 N.C. 667, 147 S.E. 2d 36; *State v. Ford,* 266 N.C. 743, 147 S.E. 2d 198; *State v. Morgan,* 268 N.C. 214, 222, 150 S.E. 2d 377, 383; *State v. Smith,* 266 N.C. 747, 147 S.E. 2d 165.

Defendant was not tried upon a bill of indictment but on said warrant. The Rowan County Court, having jurisdiction of misdemeanors, treated the warrant as charging simple larceny of $20.00, adjudged defendant guilty of that misdemeanor and pronounced judgment therefor. In the superior court, defendant was put on trial for the simple larceny of $20.00, a misdemeanor; and upon conviction sentence imposed by the judgment pronounced was well within the statutory limit for a misdemeanor.

The State, having affirmatively elected to treat the accusation set forth in the warrant as a charge of simple larceny of $20.00,

could not and cannot prosecute for the felony of larceny from the person on account of what transpired between Honeycutt and defendant on July 21, 1967. The State was not required to prosecute for the felony. It elected, and had a right to do so, to restrict the prosecution to an accusation of and trial for a misdemeanor. Having done so, we are of opinion, and so decide, that defendant can be retried only for the simple larceny of $20.00, a misdemeanor.

Analogous factual situations are involved in cases where the solicitor, having elected at *first* trial not to prosecute for rape, *State v. Pearce,* 266 N.C. 234, 145 S.E. 2d 918, or for murder in the first degree, *State v. Dove,* 222 N.C. 162, 22 S.E. 2d 231, or for burglary in the first degree, *State v. Locklear,* 226 N.C. 410, 38 S.E. 2d 162, is precluded, in the event of the second trial, from prosecuting for the capital felony.

Defendant's motion to dismiss for insufficiency of the evidence to warrant submission to the jury was properly overruled.

"Generally speaking, to constitute larceny there must be a wrongful taking and carrying away of the personal property of another without his consent, and this must be done with felonious intent; that is, with intent to deprive the owner of his property and to appropriate it to the taker's use fraudulently. It involves a trespass either actual or constructive. The taker must have had the intent to steal at the time he unlawfully takes the property from the owner's possession by an act of trespass. Actual trespass, however, is not a necessary element when possession of the property is fraudulently obtained by some trick or artifice." *State v. Griffin,* 239 N.C. 41, 45, 79 S.E. 2d 230, 232. Accord: *State v. MacRae,* 111 N.C. 665, 16 S.E. 173; *State v. Lyerly,* 169 N.C. 377, 85 S.E. 302; 32 Am. Jur., Larceny § 28; 52 C.J.S., Larceny § 32.

The words, "by trick," apprised defendant of the State's contention that defendant obtained possession of the $20.00 bill fraudulently by trick rather than by actual trespass. The evidence most favorable to the State is to the effect the trick used by defendant was defendant's representation to Honeycutt that he wanted the $20.00 bill temporarily and solely for the purpose of using it to show Honeycutt a trick.

In *State v. Lyerly, supra,* the court considered a factual situation similar to that presently before us. The opinion of Brown, J., states succinctly: "The case is properly made to turn upon the theory that the defendant was guilty of a trick or device in gaining possession of the $50,00, with a present felonious purpose to deprive the owner of his money and to convert it to the defendant's own use." In *Lyerly,* as pointed out by defendant, the prosecution was on a bill

of indictment charging the larceny of a $50.00 bill. However, when Lyerly was tried (1914) the simple larceny of goods of the value of more than $20.00 was a felony. See *State v. Cooper, supra,* for successive statutory modifications.

After having deliberated, the jury returned to the courtroom where one of the jurors reported they had been unable to reach a verdict. Thereupon, according to the record before us, the following occurred:

"THE COURT: Are you going to speak for everybody?

"JUROR: Yes, sir.

"THE COURT: I am going to ask you some questions, but I don't want you to answer any of them until I get through. I am going to ask you a very simple question and I want it answered in this manner. I don't want to know whether you're for conviction or acquittal. I want to know simply how you are divided. Now, don't answer. Whether it's 11-1 or 6-6 or 7-5. Just give me two numbers.

"JUROR: You want—

"THE COURT: If you don't understand me, I want somebody who does. I've made it as clear as I know how to.

"JUROR: Eleven-to-one.

"THE COURT: Go back and confer among yourselves. *You have to reach a verdict.*" (Our italics.)

Defendant excepted to and assigns as error the statement: "You have to reach a verdict."

It seems clear *to us* that this remark attributed to the distinguished and experienced trial judge was intended only to inform the jury there could be no verdict unless all jurors consented thereto. However, it seems probable the jurors may have considered the challenged statement as a mandatory and unequivocal directive to reach a verdict. Hence, in accordance with decisions cited and reasons stated in the recent case of *State v. Roberts,* 270 N.C. 449, 154 S.E. 2d 536, defendant is entitled to a new trial. The Attorney General frankly concedes the present case cannot be distinguished from the *Roberts* case.

New trial.

INSURANCE CO. v. SURETY CO.

Case below: 1 N.C.App. 9.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 30 April 1968.

GRANT v. INSURANCE CO.

Case below: 1 N.C. App. 76.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 30 April 1968.

SIGMUND STERNBERGER FOUNDATION, INC. v. LEAH LOUISE B. TANNENBAUM, JEANNE LOUISE TANNENBAUM, SUSAN MERLE TANNENBAUM, SIDNEY J. STERN, JR., GUARDIAN OF THE ESTATE OF NANCY BAACH TANNENBAUM, A MINOR; SIDNEY J. STERN, JR., GUARDIAN OF THE ESTATE OF SIGMUND IAN TANNENBAUM, A MINOR; NORMAN BLOCK, EXECUTOR OF THE ESTATE OF SIGMUND STERNBERGER, DECEASED; WADE BRUTON, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA; THE CHASE MANHATTAN BANK, NEW YORK, NEW YORK, TRUSTEE, AND THE UNIVERSITY OF NORTH CAROLINA.

(Filed 22 May 1968.)

1. Appeal and Error § 26—

An exception to the signing and the entry of the judgment presents the question whether error of law appears on the face of the record proper, which includes whether the facts found or admitted support the judgment and whether the judgment is regular in form, but the exception does not present for review the findings of fact or the sufficiency of the evidence to support them.

2. Declaratory Judgment Act § 2—

In this proceeding under the Declaratory Judgment Act the pleadings and the findings of fact *are held* to show a *bona fide* controversy justiciable under the Act and that all interested persons are made parties to the action.

3. Wills § 15—

Beneficiaries under a prior paper writing are persons interested within the purview of G.S. 31-32 and are entitled to file a caveat to a subsequent instrument probated in common form, notwithstanding they are not heirs of the deceased and are not named as beneficiaries in the writing they seek to nullify.

4. Executors and Administrators § 33—

The provisions of a will or testamentary trust may be modified by a family settlement agreement only where there exists some exigency or emergency not contemplated by the testator.

5. Infants § 1—

The courts of this State in their equity jurisdiction have inherent authority over the property of infants and will exercise this jurisdiction whenever necessary to preserve and protect children's estates and interests.

6. Executors and Administrators § 33—

The court will look closely into contracts or family settlements materially affecting the rights of infants.

7. Same—

A *bona fide* agreement by one interested in the estate of a testator to refrain from contesting the will and to permit its admission to probate is valid.

8. Trusts § 6—

Trustees of a charitable trust created by will have the authority to enter into a settlement contract beneficial to the trust whereby potential

caveators withdraw their opposition to the will and permit its admission to probate.

9. Trusts § 4; Executors and Administrators § 33—

Where there is a threat to file a caveat which, if successful, would result in severe if not fatal reduction of the *corpus* of a charitable trust provided for in the will, a settlement which preserves a very large part of the estate for the beneficient purposes for which the trust was created is properly approved, since under the circumstances the threat to file the caveat creates an unseen exigency not contemplated by the testator, and the settlement is, therefore, advantageous to the trust.

10. Executors and Administrators § 33; Infants § 1

Judgment of the court approving a settlement which resulted from a *bona fide* threat to file a caveat is held for the best interests of the defendant infant beneficiaries.

11. Trusts § 4; Attorney General; State § 4—

The State, as *parens patriæ*, through its Attorney General, has the common law right and power to protect the beneficiaries of charitable trusts and the property to which they are or may be entitled.

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

APPEAL by defendants T. Wade Bruton, Attorney General of North Carolina, and Sidney J. Stern, Jr., guardian of the estates of Nancy Baach Tannenbaum and Sigmund Ian Tannenbaum, minors from *Lupton, S.J.*, 11 September 1967 Civil Session of GUILFORD County — Greensboro Division. Docketed and argued as Case No. 695, Fall Term 1967, and docketed as Case No. 687, Spring Term 1968.

Civil action instituted by Sigmund Sternberger Foundation, Inc., under the provisions of the N. C. Uniform Declaratory Judgment Act, G.S. 1-253 *et seq.*, and under the equitable powers of the court in respect to the estates and wills of deceased persons, the estates and interests of minors, the protection of charities, and the settlement of controversies involving such matters, in which plaintiff asked the court for a declaration and decree to determine certain questions arising from a settlement agreement entered into among the parties hereto, except by the Attorney General, in respect to a proposed caveat to the last will and testament of Sigmund Sternberger, deceased, including a codicil thereto, both dated 26 December 1963, which will and codicil have been admitted to probate in common form before the clerk of the Superior Court in Guilford County, North Carolina, on 22 July 1964.

All parties to this proceeding waived trial by jury, and agreed that the judge could find the facts, state his conclusions of law, and render judgment thereon. G.S. 1-184 *et seq.* Further, in open court,

T. Wade Bruton, Attorney General of the State of North Carolina, waived the provisions of G.S. 36-35 respecting notice of the trial of this action.

Judge Lupton's findings of fact, conclusions of law, and judgment based thereon appear on 21½ pages of the record. From a judgment approving and confirming the proposed settlement in all respects entered into among the parties hereto, except by the Attorney General, the details of which settlement will be set out in the opinion, T. Wade Bruton, Attorney General of the State of North Carolina, and Sidney J. Stern, Jr., guardian of the estates of Nancy Baach Tannenbaum and Sigmund Ian Tannenbaum, minors, appeal to the Supreme Court.

Attorney General T. Wade Bruton and Staff Attorney Mrs. Christine Y. Denson, defendant appellant, pro se.

Stern, Rendleman & Clark by Sidney J. Stern, Jr. and David M. Clark for defendant appellant Sidney J. Stern, Jr., Guardian.

Cooke & Cooke by Arthur O. Cooke and William Owen Cooke for plaintiff appellee Sigmund Sternberger Foundation, Inc.

Jordan, Wright, Henson & Nichols by Welch Jordan for defendant appellee Norman Block, Executor of the Estate of Sigmund Sternberger, Deceased.

McLendon, Brim, Brooks, Pierce and Daniels by Hubert Humphrey for defendant appellees Leah Louise Tannenbaum, Jeanne Louise Tannenbaum, and Susan Merle Tannenbaum.

PARKER, C.J. Judge Lupton entered judgment in this proceeding in which, after reciting that all parties to this proceeding are present in court with their respective counsel of record, and after further reciting that he had heard all the evidence offered by the parties, and had examined all the various stipulations and exhibits introduced into evidence by the parties and had heard argument of counsel, he made the following findings of fact, which we summarize: (1) The nature of the proceeding; (2) all parties are properly before the court; (3) Sigmund Sternberger Foundation, Inc., is a nonprofit charitable corporation, incorporated pursuant to the provisions of Chapter 55A of the General Statutes, and that the said corporation was organized for broad charitable purposes, including the funding of scholarship grants, and the making of pecuniary contributions to churches, educational institutions, community funds, and other charitable organizations, as set forth in its charter; (4) subsequent to its organization, the Sigmund Sternberger Foundation, Inc., was duly approved by the United States Internal Revenue Service as a tax-exempt charitable foundation; (5) Leah Louise B.

Tannenbaum is a niece of the late Sigmund Sternberger and is a resident of Guilford County, and that Jeanne Louise Tannenbaum, Susan Merle Tannenbaum, Nancy Baach Tannenbaum, and Sigmund Ian Tannenbaum are all the children of Leah Louise B. Tannenbaum, and are citizens and residents of Guilford County, and that Jeanne Louise Tannenbaum and Susan Merle Tannenbaum are over 21 years of age, and Nancy Baach Tannenbaum is 18 years of age, and Sigmund Ian Tannenbaum is 16 years of age, and that said minors are represented by their duly appointed, qualified, and acting guardian, Sidney J. Stern, Jr; (6) Norman Block is the duly appointed, qualified, and acting executor of the last will and testament, including the codicil thereto, of Sigmund Sternberger, deceased, and that said Norman Block is a citizen of Guilford County and a licensed attorney; (7) that Wade Bruton is the duly elected, qualified, and acting Attorney General of the State of North Carolina; (8) The Chase Manhattan Bank is a banking corporation organized and existing under the laws of the State of New York, and that said bank is vested with fiduciary powers and is trustee under an *inter vivos* trust agreement executed by and between Sigmund Sternberger and said bank; and (9) the University of North Carolina is a body politic and corporate established by the General Assembly of the State of North Carolina.

After these preliminary findings of fact, Judge Lupton found in substance as follows (the numbering of the paragraphs being ours):

(1) Sigmund Sternberger died on 19 July 1964 at the age of 77 years, a resident of Guilford County, North Carolina, leaving a last will and testament including a codicil thereto, both dated 26 December 1963. The said will and codicil were admitted to probate in the office of the clerk of the Superior Court of Guilford County, North Carolina, on 22 July 1964.

(2) The gross estate of Sigmund Sternberger valued for Federal estate tax purposes as of one year from the date of his death amounted to $5,617,252.76, and consisted of real estate @ $85,000 (A stipulation executed by all counsel in the case states that the value of the real estate was $185,000. The recital in the judgment of $85,000 is manifestly a typographical error.); stocks and bonds @ $4,525,485.71; mortgages, notes, and cash @ $358,494.57; insurance @ $517,850.75; and miscellaneous property @ $30,421.73.

(3) The corporate charter of Sigmund Sternberger Foundation, Inc., granted on 29 April 1955 designated Sigmund Sternberger, Rosa Sternberger Williams (his sister), Jeannette Sternberger Baach (his sister — now deceased); Louis Baach (his brother-in-law — now deceased); and Leah Louise B. Tannenbaum (his niece) as incor-

Block as his attorney, with The Chase Manhattan Bank as trustee. Thereafter, Sigmund Sternberger revoked the two revocable *inter vivos* trusts created by him on 3 November 1962. The trust agreement of 14 December 1963 created six separate trusts with life income beneficiaries for each trust being: Leah Louise B. Tannenbaum, Jeanne Louise Tannenbaum, Susan Merle Tannenbaum, Nancy Baach Tannenbaum, Sigmund Ian Tannenbaum, and Sula B. Davis. The remainder interest in each of these trusts was given to Sigmund Sternberger Foundation, Inc., to hold the same in trust and to use the income therefrom for purposes for which the Foundation was created. Said gifts of the remainder of each trust were made subject to a contingent gift thereof to the University of North Carolina at Chapel Hill, North Carolina, in the event the Sigmund Sternberger Foundation, Inc., should not be a tax-exempt organization so as to make its receipt of said remainder tax deductible. The terms and provisions of said *inter vivos* trust agreement are as set forth in Exhibit 8 which was received in evidence at the trial.

(9) On 26 December 1963 Sigmund Sternberger executed a last will and testament, together with a codicil thereto, bearing the same date, both of which were prepared for him by Norman Block as his attorney. Said will and codicil of 26 December 1963 revoked the will and codicil of 7 November 1962. Said will and codicil of 26 December 1963 bequeathed legacies of two hundred thousand dollars ($200,000) to each of the six *inter vivos* trusts created by Sigmund Sternberger on 14 December 1963, and after providing for certain specific legacies, bequeathed his entire residuary estate, now having a value in excess of $2,750,000, to Sigmund Sternberger Foundation, Inc., to hold the same in trust and use the income therefrom for its corporate purposes. Said legacy of the residuary estate was made subject to a contingent legacy thereof to the University of North Carolina at Chapel Hill, North Carolina, in the event Sigmund Sternberger Foundation, Inc., should not be a tax-exempt organization so as to make its receipt of said residuary estate tax deductible. Norman Block was designated as the executor of said last will and testament.

(10) In November, 1964, after the will and codicil of 26 December 1963 were admitted to probate on 22 July 1964, Leah Louise B. Tannenbaum, on her own behalf and on behalf of her children, employed William H. Holderness of the firm of McLendon, Brim, Holderness and Brooks of Greensboro, North Carolina, to make an investigation and advise them as to whether a caveat should be filed to said will. Holderness, after investigating the facts and the law, advised Leah Louise B. Tannenbaum and her children that in his

opinion they had a good basis for caveating the will of 26 December 1963, and a substantial likelihood for success.

(11) Between November of 1964 and April of 1965, William H. Holderness conferred several times with Norman Block, executor, in respect to the contentions of the prospective caveators. During this period of time, Norman Block was advised by Holderness that the prospective caveators would abandon their claim upon the payment to them of the sum of $1,000,000 from the assets of the Sigmund Sternberger estate.

(12) Following the death of William Holderness in midsummer of 1965, Norman Block conferred with members of the firm of McLendon, Brim, Brooks, Pierce and Daniels (formerly McLendon, Brim, Holderness and Brooks), in respect to the proposed caveat proceeding. As a result of these conferences, Norman Block, as executor, employed the firm of Jordan, Wright, Henson and Nichols of Greensboro, North Carolina, to represent him in his capacity as executor of the estate of Sigmund Sternberger, having previously requested that firm to make no commitment which would prevent them from representing him in such capacity.

(13) On 25 March 1966 Messrs. Arthur O. Cooke and William Owen Cooke, attorneys of the firm of Cooke and Cooke, Greensboro, North Carolina, were employed by the Directors as attorneys for the Foundation. At this time, the Board of Directors consisted of Rosa S. Williams, Norman Block, A. L. Meyland, and Robert B. Lloyd, Jr. (Exhibit 17).

(14) On 30 August 1966 Norman Block, A. L. Meyland, Robert B. Lloyd, Jr., Rosa Sternberger Williams, and Leah Louise B. Tannenbaum, each as a member, if a member, and as a director, if a director, and as an officer, if an officer, of the Sigmund Sternberger Foundation, Inc., adopted corporate resolutions duly accepting and approving Rabbi Joseph Asher, Bryce R. Holt, and L. Richardson Preyer as members of Sigmund Sternberger Foundation, Inc., and duly electing each of said persons as a director thereof. Thereupon, said Norman Block, A. L. Meyland, Robert B. Lloyd, Jr., Rosa Sternberger Williams, and Leah Louise B. Tannenbaum each resigned as a member, if a member, as a director, if a director, and as an officer, if an officer, of Sigmund Sternberger Foundation, Inc. Since 30 August 1966, and at the present time, Rabbi Joseph Asher, Bryce R. Holt, and L. Richardson Preyer constitute the only members and all of the officers and directors of the Sigmund Sternberger Foundation, Inc. (Exhibit 18.)

(15) The new Board of Directors of the Foundation (Messrs. Preyer, Holt, and Asher) were promptly advised by counsel for the Foundation of the controversy existing between Norman Block, executor, and Leah Louise B. Tannenbaum and her children in respect to the validity of the will and codicil of 26 December 1963, and the *inter vivos* trusts of 14 December 1963, and the effect the success or failure of litigation involving such controversy could have on the Sigmund Sternberger Foundation, Inc. Said Directors were advised by the Foundation's counsel that any decision reached by the executor and his attorney in regard to the existing controversy would be submitted to them for their consideration and approval in view of the fact that the Foundation was directly and primarily concerned as the residuary beneficiary of the estate of Sigmund Sternberger, and as remainderman of the trust created under the agreement of 14 December 1963.

(16) On 25 November 1966 Welch Jordan, attorney for the executor, wrote to counsel for the prospective caveators, with copy to the Foundation's attorneys (Exhibit 19), indicating that since the interests of the Foundation were directly and primarily concerned, it should determine what course of action ought to be taken by the Foundation in respect to the threatened caveat, with its decision in this respect to be subject to the executor's approval. Thereupon, counsel for the Foundation and its Directors immediately undertook a thorough and detailed appraisal of the merits of the proposed caveat proceeding. Conferences were held by counsel for the Foundation with both counsel for the prospective caveators and counsel for the executor, during which the contentions of each of said parties and the evidence available to them in support of their respective contentions were made available. Meetings of the Foundation's Directors were held at which information obtained by its counsel was presented in detail, discussed, and evaluated. In addition, the Directors of the Foundation and their counsel met separately with counsel for the prospective caveators and counsel for the executor at which meetings the positions of each were reviewed in detail. Thereafter, several meetings of the Directors of the Foundation were held at which legal questions involved in the controversy were considered and all the information theretofore made available to them and their counsel was fully discussed and evaluated. This information included statements of medical witnesses, medical reports, detailed hospital records, numerous documents, tax computations and the contentions of the prospective caveators and the executor.

(17) If the propounder prevailed in the threatened caveat pro-

ceeding, the Foundation would receive the entire residuary estate of Sigmund Sternberger, in trust, under the will of 26 December 1963, now valued in excess of $2,750,000, together with a vested remainder in $1,200,000, likewise in trust, under the *inter vivos* trust of 14 December 1963. If the caveators prevailed in the threatened caveat proceeding and also established the will and codicil of 7 November 1962 as the last will and testament of Sigmund Sternberger, the Foundation would receive only $50,000 (a gift to be made from income during the administration of the estate). If the will and codicil of 26 December 1963 were held to be invalid, and will and codicil of 7 November 1962 were not established as the last will and testament of Sigmund Sternberger, then the estate of Sigmund Sternberger would be distributed to his heirs in accordance with the laws of North Carolina relating to intestate succession. The heirs of Sigmund Sternberger, if he had died intestate, would have been Rosa S. Williams (his sister), Jeannette S. Baach (his sister), Elizabeth S. Weinstein (a niece), and Mildred S. Shavlan (a niece), the latter two being the children of Meyer Sternberger (a brother of Sigmund Sternberger who predeceased him). Jeannette S. Baach died on 17 February 1966. Leah Louise B. Tannenbaum is the daughter of said Jeannette S. Baach. In the event of intestacy, the Sigmund Sternberger Foundation, Inc., would receive nothing from the estate of Sigmund Sternberger.

(18) In the event a caveat proceeding were instituted by the prospective caveators, numerous parties, not parties to this action, would have been necessary parties thereto. The cost of such a proceeding, regardless of the outcome, including attorneys' fees for counsel for the numerous parties, would be borne by the estate of Sigmund Sternberger. Such litigation, in view of the evidence before the court, would be protracted, hotly contested, and undoubtedly result in a substantial diminution of the assets of the estate of Sigmund Sternberger. This cost would result in substantial diminution of the residuary estate ultimately received by the Sigmund Sternberger Foundation, Inc., even though the propounder prevailed.

(19) In the event no settlement had been reached in respect to the controversy relating to the validity of the will and codicil of 26 December 1963, a proceeding to caveat said will would have been instituted by Leah Louise B. Tannenbaum and her children.

(20) The information contained in findings of fact Nos. 16 through 19 above was available to and considered by counsel for the Sigmund Sternberger Foundation, Inc., and by all of its Directors during the period said Directors and counsel for the Foundation un-

dertook to evaluate the position of the Foundation in respect to the existing claim of the prospective caveators and determine what course of action would be in the best interest of the Foundation.

(21) As a result of all the information available to them relating to the position of the Sigmund Sternberger Foundation, Inc., as it might be affected by a caveat proceeding involving the will and codicil of 26 December 1963, the Directors of the Foundation unanimously reached the conclusion that the best interests of the Foundation would be served by a settlement of the existing controversy provided such settlement could be achieved upon a basis commensurate with the best interests of the Foundation under all the circumstances as they then existed.

(22) After careful and deliberate consideration of all of the factors involved, the Board of Directors of the Foundation unanimously authorized the attorneys for the Foundation to transmit a proposal for settlement to counsel for the prospective caveators. The terms of said proposal were as set forth in Exhibit 30 which was introduced in evidence at the trial. This proposal for settlement was made with the understanding that unless such proposal were acceptable substantially as made, the prospective caveators could proceed with the institution of a caveat proceeding. The proposal contemplated the execution of a contract under the terms of which the Foundation bought its peace directly with the prospective caveators, thereby eliminating the institution of a caveat proceeding.

(23) The time within which a caveat proceeding involving the will and codicil of 26 December 1963 could be instituted and maintained terminated on 22 July 1967, as to all persons *sui juris*. Except for the minor parties to this action, no other persons are known to exist who may now challenge the validity of said will and codicil.

(24) The proposal for settlement made by the Directors of the Foundation was modified by an agreement relating to income produced after 1 July 1967 on the five $200,000 requests to the *inter vivos* trusts, and on the $400,000 payment to the prospective caveators. As modified, it was accepted by the prospective caveators and consented to and approved by the executor and The Chase Manhattan Bank, trustee. The terms and conditions of said settlement agreement were incorporated into a settlement contract, dated 1 July 1967 (Exhibit 31), which is now before this court for approval. The terms and conditions of said contract are as set forth in Exhibit 31 which was introduced in evidence at the trial.

(25) Each of the Directors of the Foundation is of the opinion

that the execution and performance of said contract in accordance with its terms is for the best interest of the Foundation.

(26) The performance of the settlement contract before the court results in the estate of Sigmund Sternberger being administered and distributed in accordance with the terms and provisions of the will and codicil executed by him on 26 December 1963, except for the modifications relating to the disposition of a part of the net residuary estate after it is received by the Sigmund Sternberger Foundation, Inc., as provided in said contract. The execution and performance of said contract avoids the trial of a caveat proceeding and, insofar as the relatives of testator are concerned, including the minor parties to this action, lays to rest forever the need for public disclosure of matters of an intra-family nature which are best left unexposed.

(27) Sidney J. Stern, Jr., as guardian of the estates of Nancy Baach Tannenbaum and Sigmund Ian Tannenbaum, conferred with counsel for the Foundation, counsel for the prospective caveators, and counsel for the executor in order to familiarize himself thoroughly with the controversy which existed. In addition, he reviewed all of the medical evidence and documents relating to said controversy, including computations reflecting the various results insofar as his wards were concerned which would be achieved by a successful caveat, an unsuccessful caveat, or a settlement of the controversy in accordance with the provisions of the contract. In the event a caveat were successful and the will and codicil of 7 November 1962 were established as the last will and testament of sigmund Sternberger, and the *inter vivos* trusts of 3 November 1962 became effective, each of said minor children would receive one-sixth of the net residuary estate, less one-sixth of the cost of the caveat proceeding (which would be paid by the estate), such legacy being subject to the trust of 3 November 1962, and valued at some amount less than $350,000. In the event the propounder prevailed, each minor child would receive a life income interest in $200,000, with the remainder interest in the *corpus* belonging to the Sigmund Sternberger Foundation, Inc. Should the result of litigation be such that the estate of Sigmund Sternberger be distributed in accordance with the North Carolina laws of intestate succession, said minor children would receive nothing from said estate. Under the terms of the settlement contract, each such child retains his or her interest in the $200,000 trust and received $100,000 in addition thereto. As a result of his detailed investigation, Sidney J. Stern, Jr., as guardian, is of the opinion that the execution and performance of said contract is in the

best interest of each of his wards. Said guardian is a highly competent and experienced attorney who has been practicing at the Greensboro Bar for approximately thirty years.

(28) The parents of the minor parties hereto are of the opinion that the execution and performance of the settlement contract is for the best interest of their said minor children, and such approval was evidenced after full discussion of said settlement with their counsel and the guardian of the estates of said minor children.

(29) In order that this court might be advised of the nature, extent, and character of the controversy regarding the will and codicil thereto of Sigmund Sternberger, dated 26 December 1963, evidence pertaining thereto was introduced by the prospective caveators and by the executor. The executor introduced evidence, including expert medical opinions, tending to show that Sigmund Sternberger had sufficient mental capacity to execute a will on 26 December 1963. The executor also introduced evidence tending to show that no undue influence was exerted upon Sigmund Sternberger by any person at any time, that all documents executed by him were his free and voluntary act and deed, and they were all prepared in accordance with his directions and reflected in every respect his individual wishes and desires. The prospective caveators, on the other hand, introduced evidence, including expert medical opinions, which tended to show that at the time said will and codicil were executed by Sigmund Sternberger, he did lack sufficient mental capacity to execute a will and that said will and *inter vivos* trust agreement of 14 December 1963 resulted from undue influence exercised upon Sigmund Sternberger. Additionally, the prospective caveators contended that a presumption of undue influence by his attorney arose as a matter of law from the facts as disclosed by evidence before the court. The evidence introduced by the prospective caveators and the evidence introduced by the executor was in sharp conflict and would have been available to each in the trial of a caveat proceeding if such had been filed.

(30) The controversy which existed between Leah Louise B. Tannenbaum and her children, on the one hand, and said executor and Foundation, on the other, was genuine and was a *bona fide* controversy. If a caveat had been filed to the will and codicil thereto of Sigmund Sternberger dated 26 December 1963, the outcome of such caveat proceeding would have been in doubt to such an extent that it is advisable for Nancy Baach Tannenbaum, minor, Sigmund Ian Tannenbaum, minor, Sigmund Sternberger Foundation, Inc., as trustee of a charitable trust and as a charitable corporation and The

Chase Manhattan Bank as trustee under the agreement dated 14 December 1963 to accept the benefits which each will receive under the terms and provisions of said contract of settlement rather than to run the risk of the more serious consequences that would result from a verdict adverse to them in a caveat proceeding.

(31) The settlement proposed by the terms and provisions of the contract of settlement presented to this court for approval will promote the best interest of Nancy Baach Tannenbaum and Sigmund Ian Tannenbaum, respectively, and their respective estates. It also will promote the best interest of the Sigmund Sternberger Foundation, Inc., as the trustee of a charitable trust and as a charitable corporation, and the best interest of The Chase Manhattan Bank as the trustee of the trusts created by said agreement of 14 December 1963, and the best interest of the public at large, and the best interest of the estate of Sigmund Sternberger.

(32) The settlement proposed by the terms and provisions of the contract of settlement presented to this court for approval is fair and reasonable insofar as the interests of the parties to said contract are concerned and insofar as the interests of the public at large are concerned.

Based upon his findings of fact, Judge Lupton made the following conclusions of law, which we quote verbatim:

> "(1) That this court has jurisdiction of the subject matter of this action and of the parties to this action.
>
> "(2) That the settlement contract which is before this court for approval and which was introduced in evidence at the trial of this action as Exhibit 31 is a valid and enforceable contract.
>
> "(3) That Sigmund Sternberger Foundation, Inc., is a charitable, nonprofit corporation and as such has the power and authority to enter into and perform, according to its terms, said settlement contract.
>
> "(4) That Sigmund Sternberger Foundation, Inc., in its fiduciary capacity as a trustee of a charitable trust, has the power and authority to enter into and perform, according to its terms, said settlement contract.
>
> "(5) That it is proper and permissible for Sigmund Sternberger Foundation, Inc., both as a charitable, nonprofit corporation and in its fiduciary capacity as a trustee of a charitable trust, to enter into and perform, according to its terms, said settlement contract.

"(6) That the execution and performance of said settlement contract is for the best interest of Sigmund Sternberger Foundation, Inc.

"(7) That Sidney J. Stern, as guardian of the Estates of Nancy Baach Tannenbaum and Sigmund Ian Tannenbaum, minors, has the power and authority to enter into, execute, and perform, according to its terms, said settlement contract on behalf of his minor wards.

"(8) That it is proper and permissible for Sidney J. Stern, Jr., as Guardian of the Estates of Nancy Baach Tannenbaum and Sigmund Ian Tannenbaum, minors, to enter into, execute, and perform, according to its terms, said settlement contract on behalf of his minor wards.

"(9) That the execution and performance of said settlement contract by Sidney J. Stern, Jr., as Guardian of the Estates of Nancy Baach Tannenbaum and Sigmund Ian Tannenbaum, minors, is for the best interest of each of said minors and their respective estates.

"(10) That The Chase Manhattan Bank, Trustee of the *inter vivos* trusts created by Sigmund Sternberger, dated December 14, 1963, has the power and authority to execute, consent to, and approve the execution and performance of said settlement contract.

"(11) That the execution, consent, and approval of said settlement contract is in the best interest of The Chase Manhattan Bank Trustee of the *inter vivos* trusts created by Sigmund Sternberger, dated December 14, 1963.

"(12) That Norman Block, as Executor of the Last Will and Testament, including the Codicil thereto, of Sigmund Sternberger, dated December 26, 1963, has the power and authority to enter into and execute and perform said settlement contract.

"(13) That the execution and performance of said settlement contract by Norman Block, Executor, is proper and permissible.

"(14) That the execution and performance of said settlement contract by Norman Block, Executor, is for the best interest of the Estate of Sigmund Sternberger.

"(15) That the execution and performance of said settlement contract is for the best interest of the Attorney General of

North Carolina as the designated representative of the public at large and for the best interest of the public at large."

Based upon his findings of fact and conclusions of law, Judge Lupton ordered, adjudged, and decreed as follows; which we quote verbatim:

"(1) The settlement contract introduced in the trial of this action as Exhibit 31 is hereby, in all respects, approved and confirmed.

"(2) The execution of said settlement contract by the Sigmund Sternberger Foundation, Inc., is hereby, in all respects, approved and confirmed and said Sigmund Sternberger Foundation, Inc., is authorized and empowered to perform said settlement contract according to its terms.

"(3) The execution of said settlement contract by Sidney J. Stern, Jr., as Guardian of the Estates of Nancy Baach Tannenbaum and Sigmund Ian Tannenbaum, respectively, is hereby, in all respects, approved and confirmed and said Guardian is hereby authorized and empowered to perform said settlement contract according to its terms on behalf of each of his minor wards.

"(4) The execution of said settlement contract by the Chase Manhattan Bank as Trustee of the *inter vivos* trust created by Sigmund Sternberger on December 14, 1963, is hereby, in all respects, approved and confirmed and said Trustee is authorized and empowered to perform said settlement contract according to its terms.

"(5) The execution of said settlement contract by Norman Block as Executor of the Estate of Sigmund Sternberger, deceased, is hereby, in all respects, approved and confirmed and said Executor is authorized and empowered to perform said settlement contract according to its terms.

"(6) The costs of this action to be taxed by the Clerk shall be paid by the Sigmund Sternberger Foundation, Inc."

In this case there are two appellants, Sidney J. Stern, Jr., guardian of the estates of Nancy Baach Tannenbaum and Sigmund Ian Tannenbaum, minors, and the Attorney General of the State of North Carolina. Sidney J. Stern, Jr., guardian, has one assignment of error and that is to the signing and entry of the judgment. The Attorney General of the State of North Carolina has one assign-

ment of error and that is to the signing and the entry of the judgment.

The sole assignment of error of Sidney J. Stern, Jr., guardian, and of the Attorney General of the State of North Carolina present the question whether error of law appears on the face of the record proper, which includes whether the facts found or admitted support the judgment, and whether the judgment is regular in form. The sole assignment of error here for each appellant does not present for review the findings of fact or the sufficiency of the evidence to support them. *Highway Com. v. Reynolds Co.*, 272 N.C. 618, 159 S.E. 2d 198; *Trust Co. v. Buchan*, 256 N.C. 142, 123 S.E. 2d 489; *Moore v. Owens*, 255 N.C. 336, 121 S.E. 2d 540; 1 Strong, N. C. Index 2d, Appeal and Error, § 26.

Sidney J. Stern, Jr., guardian of the two infant appellants, states in his brief: "As we view the case, three basic questions are raised by this record: (1) Whether the contract is valid and enforceable; (2) whether the contract is fair and in the best interests of the infant parties to it; and (3) whether the directors of a charitable corporation may enter and perform such a contract?"

The Attorney General in his brief contends that the Sigmund Sternberger Foundation, Inc., has no power to use charity funds to "buy its peace" in this case.

The pleadings here and the findings of fact show a *bona fide* controversy justiciable under our Declaratory Judgment Act. It appears that the trustees and all parties interested are made parties to the action. *Haley v. Pickelsimer*, 261 N.C. 293, 134 S.E. 2d 697; *Johnson v. Wagner*, 219 N.C. 235, 13 S.E. 2d 419. The Attorney General in his brief admits the existence of a *bona fide* controversy between the parties.

No one of the Tannenbaums with whom the settlement was made would have been an heir of Sigmund Sternberger if he had died intestate. According to the findings of fact, Sigmund Sternberger, prior to the execution of his last will and testament and codicil thereto, both executed on 26 December 1963 and probated in common form, executed on 3 November 1962 two revocable *inter vivos* trust agreements in which Leah Louise B. Tannenbaum and her four children were beneficiaries, and also on 7 November 1962 executed a last will and testament and a codicil thereto in which Leah Louise B. Tannenbaum was a beneficiary among others, which will he later revoked. Leah Louise B. Tannenbaum, on her own behalf and on behalf of her children, threatened to file a caveat to Sigmund Sternberger's will and codicil executed on 26 December 1963 and if she prevailed in that suit, she threatened to publish the last will and codicil of 7

November 1962 as the last will and testament of Sigmund Sternberger. The Tannenbaums were empowered to file a caveat in this proceeding for the reason, as held in *In re Will of Belvin,* 261 N.C. 275, 134 S.E. 2d 225, that beneficiaries under a prior paper writing are persons interested within the purview of G.S. 31-32 and are entitled to file a caveat to a subsequent instrument probated in common form, notwithstanding they are not heirs of the deceased and are not named as beneficiaries in the writing they seek to nullify.

The contract of settlement here changes to some extent the dispositive provisions of the testator's last will and testament and codicil thereto. "A will is not an instrument, however, to be amended or revoked at the instance of devisees who are merely dissatisfied with its provisions." *Wagner v. Honbaier,* 248 N.C. 363, 103 S.E. 2d 474.

The contract of settlement here relates to a testamentary trust, and the rights of infants are affected. The following basic legal conclusions are controlling: (1) The will creating the trust is not to be treated as an instrument to be amended or revoked at the desire of the devisees or to be sustained *sub modo* "after something has been sweated out of it for the heirs at law." *Redwine v. Clodfelter,* 226 N.C. 366, 38 S.E. 2d 203; *Bailey v. McLain,* 215 N.C. 150, 1 S.E. 2d 372. The power of the court should not be used to direct the trustee to depart from the express terms of the trust, except in cases of an overriding and compelling reason to preserve the trust estate. *Lichtenfels v. Bank,* 268 N.C. 467, 151 S.E. 2d 78; *Cocke v. Duke University,* 260 N.C. 1, 131 S.E. 2d 909; *Penick v. Bank,* 218 N.C. 686, 12 S.E. 2d 253. (2) The courts of this State in their equity jurisdiction have inherent authority over the property of infants and will exercise this jurisdiction whenever necessary to preserve and protect children's estates and interests. The court looks closely into contracts or settlements materially affecting the rights of infants. *O'Neil v. O'Neil,* 271 N.C. 106, 155 S.E. 2d 495; *Redwine v. Clodfelter, supra; In re Reynolds,* 206 N.C. 276, 173 S.E. 789; 4 Strong, N. C. Index 2d, Infants § 1. (3) "A court of equity will not modify or permit the modification of a trust on technical objections, merely because its terms are objectionable to interested parties or their welfare will be served thereby. It must be made to appear that some exigency, contingency, or emergency has arisen which makes the action of the court indispensable to the preservation of the trust and the protection of infants. *Reynolds v. Reynolds, supra* [208 N.C. 578, 182 S.E. 341]; *Cutter v. Trust Co., supra* [213 N.C. 686, 197 S.E. 542]; 65 C.J. 683, sec. 549." *Redwine v. Clodfelter, supra.*

The provisions of a will or testamentary trust may be modified

by a family settlement agreement only where there exists some exigency or emergency not contemplated by the testator. *Rice v. Trust Co.,* 232 N.C. 222, 59 S.E. 2d 803; *Redwine v. Clodfelter, supra.* "Here, the alleged unforeseen exigency or emergency is the filing of the caveat with resulting expensive litigation and drastic and adverse effects upon defendants in the event the 'Will' should not be established." *O'Neil v. O'Neil, supra.* In *O'Neil v. O'Neil,* 271 N.C. 741, 157 S.E. 2d 544, the Court said:

> "After certification of our decision on former appeal, the cause was again heard by Judge McConnell, at which time evidence was offered, which evidence is set forth in the present record, sufficient in our opinion to sustain the finding in the present judgment that '(t)here is a *bona fide* controversy regarding the validity of the paper writing dated October 7, 1964, purporting to be the last will and testament of John C. Barron.' In view of this factual finding, and predicated thereon, we are of opinion, and so decide, that the judgment entered by Judge McConnell on August 31, 1967, approving the 'family settlement agreement' dated January 24, 1967, and modifying in accordance therewith the dispositive provisions of the paper writing dated October 7, 1964, probated in common form as the last will and testament of John C. Barron, deceased, should be, and it is hereby, affirmed."

A contract made by parties, competent to contract honestly, prudently, and in good faith, who are interested, some in establishing the will in question and others in resisting its admission to probate, which is made with the full knowledge of the facts, and without misrepresentation, fraud or deceit, by which the parties agree to withdraw opposition to the will and to permit its admission to probate is generally upheld. This applies to trustees of a private trust. *Wagner v. Honbaier, supra; Hunter v. Trust Co.,* 232 N.C. 69, 59 S.E. 2d 213; *Redwine v. Clodfelter, supra; Bailey v. McLain, supra; Latta v. Trustees of the General Assembly of the Presbyterian Church,* 213 N.C. 462, 196 S.E. 862; *Brewer v. University,* 110 N.C. 26, 14 S.E. 644; *Bailey v. Wilson,* 21 N.C. 182; 4 Page on Wills § 1759 (Lifetime Ed.); 57 Am. Jur., Wills, § 998; 1 Williston on Contracts § 135B (3rd Ed., Jæger); 1 Corbin on Contracts § 140.

This is said in an annotation in 55 A.L.R. 811: "By the great weight of authority, a *bona fide* agreement by one interested in the estate of a testator, to refrain from contesting the will, is valid. It is not void as against public policy, since it lessens litigation; and the forbearance to sue, being a detriment to the promisee, is a suffi-

cient consideration to support promise." Among the numerous cases cited to support the text is our case of *Bailey v. Wilson, supra.*

This is said in III Scott on Trusts § 192 (3rd Ed.):

> "But where it is reasonably prudent to compromise a claim, the trustee has power to do so. It is only where he acts in bad faith or imprudently in making such a compromise that he thereby commits a breach of trust. If it is prudent to do so, the trustee can properly submit such claims to arbitration.
>
> * * *
>
> "If the trustee is in doubt whether he should sue or should compromise or submit to arbitration claims which he holds in trust, he can apply to the court for instructions. The court has power to approve compromise or arbitration agreements which in its opinion are beneficial to the trust."

This is said in IV Scott on Trusts § 380 (3rd Ed.):

> ". . . The trustees of a charitable trust, like the trustees of a private trust, can properly compromise or submit to arbitration claims by or against third persons."

The proposed settlement according to the unchallenged detailed findings of fact was caused by a threatened filing of a caveat to Sigmund Sternberger's last will and testament and codicil thereto dated 26 December 1963 and probated in common form, which was an unseen exigency or emergency because the filing of a caveat would result in expensive and protracted litigation and heavy cost to the Sigmund Sternberger Foundation, Inc., and drastic, if not annihilating, effects upon the property of the Foundation in the event that Sigmund Sternberger's last will and testament and codicil thereto should not be established in the trial. According to the unchallenged finding of fact "the performance of the settlement contract before the court results in the estate of Sigmund Sternberger being administered and distributed in accordance with the terms and provisions of the Will and Codicil executed by him on December 26, 1963, except for the modification relating to the disposition of a part of the net residuary estate after it is received by the Sigmund Sternberger Foundation, Inc., as provided in said contract." In our opinion, and we so hold, from the unchallenged findings of fact in the record, the Directors of the Sigmund Sternberger Foundation, Inc., had authority to enter into and perform the contract settlement, that the contract settlement was valid and enforceable, and that it was manifestly for the best interests of the Sigmund Sternberger Foundation, Inc., for the reason that it preserves a very large part of the estate for

the beneficent purposes for which the Foundation was created, which settlement has been approved by the trial court.

An unchallenged finding of fact is:

> ". . . In the event a caveat were successful and the Will and Codicil of November 7, 1962, were established as the Last Will and Testament of Sigmund Sternberger, and the *inter vivos* trusts of November 3, 1962, became effective, each of said minor children would receive one-sixth of the net residuary estate, less one-sixth of the cost of the caveat proceeding (which would be paid by the Estate), such legacy being subject to the trust of November 3, 1962, and valued at some amount less than $350,000.00. In the event the propounder prevailed, each minor child would receive a life income interest in $200,000.00, with the remainder interest in the *corpus* belonging to the Sigmund Sternberger Foundation, Inc. Should the result of litigation be such that the estate of Sigmund Sternberger be distributed in accordance with the North Carolina laws of intestate succession, said minor children would receive nothing from said estate. Under the terms of the settlement contract, each such child retains his or her interest in the $200,000.00 trust and received $100,000.00 in addition thereto. As a result of his detailed investigation, Sidney J. Stern, Jr., as Guardian, is of the opinion that the execution and performance of said contract is in the best interest of each of his wards. Said Guardian is a highly competent and experienced attorney who has been practicing at the Greensboro Bar for approximately thirty (30) years."

It is our opinion, and we so hold, from a careful examination and study of the unchallenged findings of fact, the conclusions of law, and the judgment that the settlement approved by the trial judge was for the best interests of the infant defendants, and protects their interests.

This is also stated as an unchallenged finding of fact:

> "The parents of the minor parties hereto are of the opinion that the execution and performance of the settlement contract is for the best interest of their said minor children, and such approval was evidenced after full discussion of said settlement with their counsel and the Guardian of the Estates of said minor children."

We are confirmed in our opinion by the eminence of experienced counsel and others who participated in the proposed settlement. The present Directors of the Sigmund Sternberger Foundation, Inc., are

Rabbi Joseph Asher; L. Richardson Preyer, a former judge of the Superior Court of this State and a former United States District Judge who resigned to run for Governor; and Bryce R. Holt, a lawyer of great experience and a former United States District Attorney. The lawyers who participated in the proposed settlement, Cooke & Cooke; Norman Block; McLendon, Brim, Brooks, Pierce & Daniels; Jordan, Wright, Henson & Nichols; Smith, Moore, Smith, Schell & Hunter; Stern, Rendleman & Clark — all counsel of record in the trial court, and many of counsel here — are among the foremost lawyers in North Carolina for character and professional ability. The record is replete with their careful protection of the interests of their clients, and we are confident that none of them would have participated in a settlement that did not protect the interests of the infant defendants.

In fairness to Sidney J. Stern, Jr., we quote the last paragraph from his brief, which is as follows:

> "The result of the contract in the case involved here is substantially to preserve the charitable trust intact against a proposed dangerous caveat which, if successful, would destroy the trust and, even if unsuccessful, might well end in costing the Foundation more than does the fulfillment of the contract. There is nothing in the corporate charter, by-laws, or other governing documents of the corporation which would prevent the fulfillment of the contract if court approval is obtained. We believe that this contract is so manifestly in the best interests of the charitable corporation that the directors not only had the power and authority to enter into the contract, but they would have been derelict in their duty had they not done so. However, because of the extreme importance of this matter to the parties and to the public generally, we feel that the contract should receive the approval of this Court."

We agree with Mr. Stern's statement that because of the extreme importance of this matter to the parties and to the public generally the contract of settlement should receive the approval of this Court.

The Attorney General in his brief raises the question as to his right to intervene in this proceeding to approve a settlement where a charitable trust is the main beneficiary. G.S. 36-35 provides that where an action is pending against a trustee of a charitable trust, the Attorney General must be notified before disposition may be made of the case. It is not necessary for us to determine the question the Attorney General raises here to reach a decision in this case. It seems that the State as *parens patriæ*, through its Attorney General,

has the common law right and power to protect the beneficiaries of charitable trusts and the property to which they are or may be entitled. Tudor, Charitable Trusts at 323; *Cook v. Duckenfield,* 2 Atk. 562, 26 Eng. Rep. 737 (1743).

This is said in 15 Am. Jur. 2d, Charities, § 119:

> "Because of the public interest necessarily involved in a charitable trust or gift to charity and essential to its legal classification as a charity, it is generally recognized that the attorney general, in his capacity as representative of the state and of the public, is the, or at least a, proper party to institute and maintain proceedings for the enforcement of such a gift or trust."

If the Attorney General is not a necessary party, he surely is a proper party.

The trial judge's unchallenged detailed findings of fact support his conclusions of law, which are correct, and his findings of fact and conclusions of law amply support his judgment, and his judgment is in proper form. No error of law appears on the face of the record proper.

The judgment below is in all respects

Affirmed.

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

MARION DILDAY, BERL B. RESPESS AND ROBERT E. MOORE v. BEAUFORT COUNTY BOARD OF EDUCATION, A BODY CORPORATE, AND THE INDIVIDUAL MEMBERS THEREOF: W. B. VOLIVA, CHAIRMAN; RALPH HODGES, JR., JASPER WARREN, CARMER WALLACE, W. L. GUILFORD, W. F. VEASEY, SECRETARY; AND BEAUFORT COUNTY COMMISSIONERS, CONSISTING OF: SAM MOORE, CHAIRMAN; CECIL LILLEY, JAKE VAN GYZEN, ALTON CAYTON, AND WALTON BROOME AND JAY M. HODGES, BEAUFORT COUNTY TREASURER AND AUDITOR.

(Filed 22 May 1968.)

1. Counties § 6—

G.S. 153-107 places no limitation upon the legal right to transfer or allocate funds from one project to another within the general purpose for which county bonds were issued, but it does prevent funds obtained for one general purpose from being transferred and used for another general purpose.

2. Schools §§ 4, 7; Counties § 3—

To effectuate a transfer of school bond funds from one project to an-

other, the county board of education must, by resolution, request such reallocation and apprise the county commissioners of the conditions necessitating the transfer, and the board of county commissioners must then make an investigation and record their findings upon their official minutes, and authorize or reject the proposed reallocation.

3. Schools § 7; Counties § 3—

The board of county commissioners may reallocate school bond funds in accordance with a request of the county board of education upon finding (1) that conditions have so changed since the bonds were authorized that the funds are no longer necessary for the original purpose, or that the proposed new project will eliminate the necessity for the originally contemplated expenditure and better serve the district involved, or that the law will not permit the original purpose to be accomplished in the manner intended, and (2) that the total proposed expenditure for the changed purpose is not excessive.

4. Same; Taxation § 12— County commissioners' approval of reallocation of county school bond funds held insufficient to dissolve temporary restraining order.

A school bond issue was approved by the voters prior to the enactment of the Civil Rights Act of 1964. The county board of education proposed to take funds from the bond issue which had been allocated for the improvement of Negro high schools in the district and add them to the allocation for the consolidation of three schools attended exclusively by white pupils in order to build a central school for all high school pupils in the district, and thus integrate the high school in conformity with federal requirements. *Held:* Approval of the proposed reallocation by the county commissioners upon a general finding that "the total proposed expenditure for the changed purpose is not excessive" is insufficient to warrant the dissolution of a temporary restraining order preventing the expenditure of funds for the revised purpose, it being necessary for proper approval that the board of county commissioners make positive and specific findings as to the buildings planned for the proposed school and the sufficiency of available funds for such construction.

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

APPEAL by defendants from *Bundy, J.*, May 1967 Session of BEAUFORT, docketed and argued as No. 39 at Fall Term 1967.

At Spring Term 1966, in *Dilday v. Board of Education,* 267 N.C. 438, 148 S.E. 2d 513, this Court, on plaintiffs' appeal, reversed a judgment entered by His Honor, R. I. Mintz, at May 2, 1966 Civil Session of Beaufort Superior Court, which had dissolved a temporary restraining order issued April 22, 1966, by His Honor, Joseph W. Parker, and reinstated Judge Parker's said order.

It was stipulated that the entire record on said former appeal "shall be part of the record of this case on appeal."

Reference is made to the preliminary statement and to the opinion of Sharp, J., in connection with our decision on former appeal,

for a full statement of the facts then before the Court. A brief review is set forth below.

On November 3, 1964, the voters of Beaufort County approved a county bond issue of $1,400,000.00 for school construction, of which $741,580.00 was allotted to the Beaufort County School Administrative Unit and $658,420.00 to the Washington City School Administrative Unit; and on the same day the voters of North Carolina, pursuant to Chapter 1079, Session Laws of 1963, approved a State bond issue of $100,000,000.00 for school construction, of which $475,-275.66 was allocable to the Beaufort County School Administrative Unit and $390,337.38 to the Washington City School Administrative Unit.

On September 11, 1964, the Beaufort County Board of Education (School Board) adopted a resolution showing the proposed allocations to specific building projects of the $1,216,855.66 to become available to the Beaufort County School Administrative Unit if the bond issues were approved. The allocations included: $780,000.00 for "Central High School on the North side of the River"; $105,000.00 for "Beaufort County High School, four classrooms, gymtorium, vocational shop"; and $90,000.00 for "Belhaven High School, four classrooms and assembly room." According to the proposed allocations, and the publicity incident thereto, prior to the bond elections on November 3, 1964, two high schools in the area, namely, the Beaufort County High School (at Pantego) and the Belhaven High School, then attended exclusively by Negro students, were to be continued, and a new consolidated school, "Central High School," was to be constructed and attended exclusively by white students who had previously attended Pantego High School, Bath High School and Wilkinson High School of Belhaven.

On April 20, 1965, to comply with Title VI of the Federal Civil Rights Act of 1964, the School Board departed from the pre-referendum allocation of September 11, 1964, in that, instead of consolidating only the three high schools for white students, it proposed to consolidate all of the five high schools in District III into one central high school; and on August 24, 1965, the School Board resolved "(t)hat the $105,000.00 allocated for additional construction at the Beaufort County High School and the $90,000.00 allocated to build additional facilities at the Belhaven High School be added to the allocation of the $780,000.00 previously planned for the construction for the central consolidated high school." On November 4, 1965, the State Board of Education approved the School Board's "School Improvement Program," which included the consolidation of all five high schools in District III.

On February 9, 1966, the School Board submitted to the Commissioners a resolution requesting their approval of the plan to omit the improvements originally intended for the Beaufort County and Belhaven high schools and to use these funds to finance an enlarged central high school with a capacity of nine hundred pupils instead of six hundred. The Commissioners, being advised by their attorney the School Board had sufficient authority to proceed without further action by the Commissioners, did not act upon the School Board's request. On March 8, 1966, the School Board, based upon recitals set forth therein, unanimously adopted a resolution that it proceed immediately with the "construction of a central high school on the site already purchased in the Yeatesville area for a high school plant of 900 or more students to replace the Bath High School, Beaufort County High School, Belhaven High School, John A. Wilkinson High School, and Pantego High School."

Judge Mintz held the construction of the planned central high school to replace the five schools was proper and valid and dissolved the temporary restraining order. In reversing the judgment of Judge Mintz, and in reinstating the temporary restraining order issued April 22, 1966, this Court stated: "Since defendant Board of County Commissioners has not acted upon defendant School Board's request that it approve a reallocation of the funds in question, the latter has no authority, acting alone, to make the reallocation. Until defendant Commissioners approve the request, defendant School Board may not proceed."

Our decision on former appeal was filed June 16, 1966. On July 5, 1966, the Commissioners, in their regular monthly meeting, deferred consideration of the School Board's said resolution and request until a special meeting to be held July 23, 1966. At their meeting on July 23, 1966, the Commissioners adopted unanimously resolutions summarized as follows: (1) The funds available were insufficient to permit the building of a high school sufficient to accommodate all students attending the five separate high schools now in operation on the north side of the Pamlico River; and (2) the construction of the proposed central high school could not be accomplished without further investigation since in at least two of the communities in which a discontinuance of the high school was proposed there was a prospect of population growth due to phosphate development. The record shows no further action until after the persons elected commissioners in November, 1966, took office.

When this action was instituted and when the former appeal was heard, the County Commissioners of Beaufort County (Commissioners) were the persons named as such in the caption, to wit: Sam

Moore, Chairman; Cecil Lilley; Jake Van Gyzen; Alton Cayton; and Walton Broome. The present Commissioners, who took office December 5, 1966, pursuant to the general election held in November, 1966, are: Jake Van Gyzen, who was elected chairman in January, 1967; Alton Cayton; Walton Broome; J. A. Hackney, Jr.; and W. H. Page. The record does not disclose any change in the membership of the School Board or in the official status of defendants Veasey and Hodges.

On December 21, 1966, the School Board, all members being present and voting therefor, adopted a resolution providing, after recitals, "that the request be re-submitted to the Board of County Commissioners of Beaufort County to approve the reallocation of $105,000.00 originally planned for construction at the Beaufort County High School and $90,000.00 originally planned for construction at the Belhaven High School to the cost of constructing the proposed central high school."

At their meeting on January 3, 1967, after consideration of the School Board's said request, the Commissioners appointed a committee, consisting of James A. Hackney, Jr., and of Jake Van Gyzen, "to make a study and investigation of the entire matter." An unsigned report, *submitted* by Mr. Hackney and referred to as the Hackney report, was filed.

There appears in the record a certified copy of a resolution adopted by the Commissioners on March 6, 1967, quoted in full below.

"The Board finding as a fact, after an investigation, that it is to the best interest of the citizens of Beaufort County that $195,000 be transferred in accordance with the request of the Beaufort County Board of Education from Beaufort County High School and Belhaven High School, to the construction of the proposed consolidated school. Upon motion of James A. Hackney, Jr., seconded by William H. Page, it is resolved that the County Commissioners reallocate the funds as requested by the County School Board.

Voting For	*Voting Against*
James A. Hackney, Jr.	Alton Cayton
William H. Page	

Abstaining: W. A. Broome

"The chairman then ruled that the motion carries, and it is so ordered."

There also appears in the record a certified copy of a resolution adopted by the Commissioners on April 3, 1967, quoted in full below.

"The Board of Commissioners of Beaufort County, after investigation, find the following facts:

"(1) That since the school bonds were authorized by the Board of Commissioners that conditions have so changed that certain of the funds are no longer necessary for the original purpose, and that a transfer of $105,000.00 from Beaufort County High School and $90,000 from Belhaven High School to the central high school on the North side of the river will better serve the educational interests of that district of Beaufort County, and the Board further finds that the law will not permit the original purpose to be accomplished in the manner intended, and

"(2) That the total proposed expenditure for the changed purpose is not excessive but is necessary in order to maintain the constitutional school term, and

"(3) In accordance with the opinion of the N. C. Supreme Court in the case of *Marion Dilday, et al., v. Beaufort County Board of Education, et al.*, it is therefore resolved:

"That the sum of $105,000 originally intended for improvements to Beaufort County High School and the sum of $90,000 originally intended for improvements to Belhaven High School be and the same is hereby reallocated toward the construction of the central high school on the North side of the river, and such sums are hereby added to the $780,000 originally allocated for the construction of the central high school.

"Motion for the adoption of the foregoing resolution was made by J. A. Hackney, Jr., seconded by William H. Page.

Voting For:

J. A. Hackney, Jr.
William H. Page
Jake Van Gyzen

Voting Against:

Alton Cayton
W. A. Broome."

On April 11, 1967, defendants filed a motion that said temporary restraining order signed by Judge Parker on April 22, 1966, be vacated. The hearing before Judge Bundy was on defendants' said motion to vacate.

On April 28, 1967, pursuant to an order of the clerk and without objection by defendants, counsel for plaintiffs conducted adverse examinations of defendants Van Gyzen, Voliva and Veasey.

Although the record is silent with reference thereto, defendants, in their brief, assert *they* offered in evidence (1) the School Board's resolution of December 21, 1966, (2) the Hackney report, and (3)

the Commissioners' resolutions of March 6, 1967, and of April 3, 1967. All other evidence in the record, including transcripts of the adverse examinations of Van Gyzen, Voliva and Veasey, and affidavits of Alton Cayton, W. A. Blount, Jr., Dr. W. T. Ralph and Walter F. Canady, was offered in evidence by plaintiffs and received in evidence without objection.

Apart from said motion to vacate, *no pleading has been filed by any defendant.*

Judge Bundy entered judgment in which, after recitals and extensive findings of particular facts, this final (seventeenth) finding of fact was made, to wit: "That the action of the Board of Commissioners in undertaking to approve the reallocation of funds without making a proper and thorough investigation of the financial aspects of such reallocation constitutes an abuse of discretion vested in them as public officers." Whereupon judgment was entered as follows:

"WHEREFORE, upon the above findings of fact and upon a consideration of the whole record, the Court concludes as a matter of law that the resolution adopted at the March meeting of the Board of County Commissioners of Beaufort County and supported by the so-called finding of facts adopted one month later at the April meeting of the Board forms no sufficient basis for the lifting of the restraining order heretofore entered in this cause. The motion of the defendants that such restraining order be lifted is therefore denied."

Defendants entered twelve exceptions. Nine are addressed to specific findings of fact made by Judge Bundy. Exceptions 10, 11 and 12 are directed generally to the court's legal conclusion and the signing of the judgment. Defendants' gave notice of appeal in open court.

John A. Wilkinson for plaintiff appellees.

W. P. Mayo for defendant Beaufort County Board of Education, appellants.

L. H. Ross for defendant Beaufort County Board of Commissioners, appellants.

Attorney General Bruton and Deputy Attorney General Moody for the State, amicus curiæ.

BOBBITT, J. Reference is made to the opinion of Sharp, J., on former appeal, for a full statement, in accordance with statutes and decisions cited, as to the respective functions and responsibilities of the School Board and the Commissioners in providing for the educational needs of the children of the county. Specific reference is made to G.S. 153-107 which, as construed in *Atkins v. McAden,* 229 N.C. 752, 756, 51 S.E. 2d 484, 487, "does not place a limitation upon the

legal right to transfer or allocate funds from one project to another included within *the general purpose* for which bonds were issued, (our italics) but does prevent the transfer and use of funds obtained for one *general* purpose for another *general* purpose.

The opinion on former appeal sets forth that, to effectuate a transfer of funds from one project to another certain facts must appear, and certain preliminary steps must be taken, *viz.:* (1) The School Board must, by resolution, request the reallocation of funds and apprise the Commissioners of the conditions which bring about the need for the transfer; (2) the Commissioners must then investigate the facts upon which the School Board's request is based; and (3) the Commissioners, after making their investigation, "must, by resolution, record their findings upon their official minutes and authorize or reject the proposed reallocation of funds." The opinion then gives the explicit directive quoted in the following paragraph.

"If the commissioners find (1) that, since the bonds were authorized, conditions have so changed that the funds are no longer necessary for the original purpose, or that the proposed new project will eliminate the necessity for the originally-contemplated expenditure and better serve the educational interests of the district involved, or that *the law will not permit the original purpose to be accomplished in the manner intended,* and (2) *that the total proposed expenditure for the changed purpose is not excessive,* but is necessary in order to maintain the constitutional school term, the commissioners may then legally reallocate the funds in accordance with the request from the board of education. *Without such affirmative findings, however, the commissioners have no authority to transfer funds previously allocated to another purpose.* And, without authority from the commissioners, the county board of education itself has no power to reallocate the funds." (Our italics.)

The School Board's original proposal, publicized prior to the bond elections of November 3, 1964, was to spend $780,000.00 to construct a new consolidated school, "Central High School," exclusively for *white* students who had previously attended Pantego High School, Bath High School and Wilkinson High School of Belhaven. After said election, it became manifest, as set forth in opinion on former appeal, that the School Board could "no longer legally impose segregation of the races in any school." Thus, the original proposal could not be lawfully accomplished in the manner intended.

The School Board then proposed to consolidate all of the five high schools in District III, to wit, Pantego High School, Bath High School, Wilkinson High School of Belhaven, Beaufort County High School at Pantego and Belhaven High School, into one central high

school, to be located on a site in the Yeatesville area. The School Board requested the Commissioners to approve the reallocation of the $105,000.00 originally designated for construction at the Beaufort County High School at Pantego and of the $90,000.00 originally designated for construction at the Belhaven High School for use, together with the $780,000.00 originally designated for the construction of a central high school for all students theretofore attending the five high schools in District III.

The failure of the Commissioners to act on the School Board's said request, and the necessity for such action by the Commissioners before reallocations could be made, were considered fully on former appeal.

The Commissioners who had refused to act on the School Board's said request were in office at the time of our decision on former appeal. In their resolution of July 23, 1966, adopted unanimously, they determined, *inter alia,* that funds were not available to permit the building of a high school sufficient to accommodate all the students then attending the five separate high schools in District III. Defendants did not except to Judge Bundy's finding of fact that "(t)he undisputed evidence shows that this action was concurred in by the defendant Board of Education."

Three of the five Commissioners who participated in said determination of July 23, 1966, namely, Van Gyzen, Cayton and Broome, were re-elected. Cayton and Broome adhered to said determinations of July 23, 1966. The affidavit of Cayton sets forth the facts on which he based his opinion. Van Gyzen, who had voted for said resolution of July 23, 1966, joined with the two new members, Hackney and Page, in adopting in 1967 the vague and anemic resolutions on which defendants based their motion to vacate the temporary restraining order issued April 22, 1966.

It was the duty of the Commissioners, in passing upon the School Board's resubmitted request, to investigate the matter sufficiently to determine all pertinent facts and to base their decision on their declared factual findings. Since the primary ground on which Judge Bundy refused to vacate the temporary restraining order was that "the action of the Board of Commissioners in undertaking to approve the reallocation of funds without making a proper and thorough investigation of the *financial* aspects of such allocation" constituted "an abuse of discretion vested in them as public officers," we deem it appropriate to deal specifically with this feature of the case. (Our italics.)

The School Board's resolution of December 21, 1966, contains no reference to plans for or cost of the central high school then pro-

posed. The Commissioners' resolution of April 3, 1967, contains a general finding that "the total proposed expenditure for the changed purpose is not excessive," but contains no specific findings bearing upon what building or buildings were planned for the proposed central high school or upon whether the cost thereof would exceed available funds.

The Hackney report contains no factual statements bearing upon the cost of the proposed central high school.

Mr. Van Gyzen testified under adverse examination he did not "have the vaguest idea of the cost of this proposed school."

There was evidence to the effect that the cost of a central high school to accommodate 900-1,000 students would cost as much as $1,800,000.00. It would seem Judge Bundy took a conservative view of the evidence as to costs when he made the following findings of fact, to wit:

"13. An examination of the testimony of W. B. Voliva, Chairman of the Beaufort County Board of Education, and that of W. F. Veasey, Superintendent of the Beaufort County Schools . . ., discloses that the amount of money available for the construction consisted of the $780,000 originally allocated for the construction of a three-school consolidated high school housing between 500 and 600 students and an additional $195,000 originally contemplated to be spent at the Beaufort County High School in Pantego and the Belhaven High School in Belhaven, both of which are Union Schools serving largely Negro students from grades 1 through 12. The evidence of both the Chairman and the Secretary of the School Board discloses that neither of these schools presently have a gymnasium nor an auditorium. The testimony of the Chairman, W. B. Voliva, discloses that the student body of the Belhaven School, both high school and elementary students, use a nearby church as an auditorium. The evidence further discloses that the Board of Education, after having requested that the $195,000 allotted to these two schools be transferred to the central school project, further requested the County Commissioners at the January 1967 meeting to allocate additional funds for a part, at least, of the very purposes originally contemplated at these schools. The evidence discloses that this request was denied by the Commissioners on the grounds of a lack of available funds. The only evidence bearing even indirectly upon the probable cost of the school was furnished by the Chairman of the Board of Education, Mr. Voliva, who testified that it was his opinion that the probable cost would be $1,300 per student and that the original figure of $780,000 was arrived at by multiplying the estimated number of students that would attend the three-school consolidated high

school by such figure. The Court finds that the estimate of a probable attendance at a five-school consolidated high school is between 900 and 1,000 students. If these figures are correct, then the cost of the school would be between $1,170,000 and $1,300,000. If Mr. Voliva's figures concerning the matter of money available are correct, the maximum amount after the transfer of funds allocated to the construction and repair at the two Union schools serving largely Negro children would be approximately $975,000. Therefore, the only evidence, sketchy as it is, tends to disclose that the cost of the building is excessive in relation to the funds available and that the building cannot be built with presently available funds. The Court does not find this as a fact because the evidence is too sketchy to support any conclusion concerning it, but it does find as a fact that there is nothing in the record that would have supported a conclusion by the County Board of Commissioners that the total proposed expenditures for the changed purpose is not excessive or, indeed, that it could presently be accomplished.

"14. Further examination of the testimony of Mr. Voliva and Mr. Veasey discloses that no other firm plans have yet been made by the Beaufort County Board of Education concerning the size of the proposed high school. As the over-all record in this matter discloses, it was originally intended to build a high school to accommodate students from three high schools, the John A. Wilkinson High School in Belhaven, Pantego High School and Bath High School. The record further discloses that these schools largely served white children, but all had some Negro students at the beginning of the 1965-66 school year and all still have such students. The over-all record further discloses that the North Carolina Board of Education brought about a change of plan and that the school authorities in Raleigh directed that the consolidated high school be enlarged to accommodate the students of the Belhaven High School and the Beaufort County High School at Pantego, both of which largely served Negro students. It was contemplated that those two high schools would be discontinued and a resolution was adopted abolishing their high school districts. The testimony of Mr. Voliva and Mr. Veasey now discloses the likelihood that the high school department of one or both of these schools will be retained. The size of the resulting consolidated school has not been determined either in the number of students or the amount of construction contemplated. Attention is invited to the testimony of the witnesses Voliva and Veasey, who said that, under existing conditions, such a determination could not now be reached. This evidence is unchallenged and uncontradicted. The Court therefore finds as a fact that the size and, consequently,

the cost of the school proposed to be constructed is presently undetermined and unknown."

The findings of fact to which defendants excepted, including those quoted above, are amply supported by the evidence. The Commissioners made no finding and the evidence would not support a finding that a central high school sufficient to accommodate all students in District III could be built with funds presently available for that purpose. Hence, the conclusion reached is that the evidence was insufficient to compel or warrant dissolution of the temporary restraining order.

If defendants seek to proceed with the construction of a consolidated (five high schools) central high school, they must make positive and specific factual findings with reference to the building(s) for the proposed central high school *and* with reference to the sufficiency of available funds for construction thereof.

As indicated above, defendants have not filed answers. The only question before us is whether Judge Bundy erred in denying defendants' motion to vacate the temporary restraining order. We hold that he did not. Hence, the order entered by Judge Bundy is affirmed.

Affirmed.

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

STATE v. JIMMY DEXTER COVINGTON.

(Filed 22 May 1968.)

1. Criminal Law § 166—

Assignments of error not set out in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Criminal Law § 66—

A witness who was present at defendant's unlawful arrest is not thereby precluded from making a courtroom identification of defendant as the person who robbed him where the identification is based on the robbery itself and not on what occurred during the arrest, and where evidence before the jury of what occurred at the time of defendant's arrest was first elicited and thereafter developed by defense counsel's cross-examination of State's witnesses.

3. Arrest and Bail §§ 3, 5; Criminal Law § 84—

Where police officers who have no arrest warrant or search warrant forcibly enter a motel room and arrest the occupant, the officers having a reasonable belief that he has committed a felony but not having first de-

manded and been denied admittance into the motel room, the entry is unlawful, G.S. 15-44, and articles discovered and seized as a result of the unlawful entry are inadmissible into evidence.

4. Robbery § 5—

An instruction to the effect that defendant might be convicted of armed robbery if the jury should find that he took personal property from the prosecuting witness by the use of force or intimidation sufficient to create an apprehension of danger is erroneous in failing to instruct the jury as to the elements of armed robbery as distinguished from common law robbery, since to convict for armed robbery the jury must find that the life of the victim was endangered or threatened by the use or threatened use of firearms or other dangerous implement or means. G.S. 14-87.

5. Same—

In a prosecution for three separate offenses of armed robbery, an instruction to the effect that both defendants would be guilty if either defendant robbed either of three named victims, such instruction not being predicated upon a jury finding that defendants were acting in concert before one would be responsible for the criminal acts of the other, is erroneous since a verdict of guilty in response to such instruction would leave undetermined the jury's findings as to what each defendant had done and which victims had been robbed.

6. Criminal Law § 23—

Where one of two codefendants, in the absence of the jury, withdraws his pleas of not guilty at the conclusion of the State's evidence and enters pleas of guilty, the continuation of the trial and instruction of the jury as if both defendants remained on trial is approved.

APPEAL by defendant Jimmy Dexter Covington from *Bailey, J.*, September 1967 Criminal Session of DURHAM.

Criminal prosecutions on three bills of indictment, each charging that Jimmy Dexter Covington and Bobby Devon McDougald on July 26, 1967, committed the crime of armed robbery as set forth therein, *viz.*:

In No. 11073, the indictment charged Covington and McDougald with "unlawfully, wilfully and feloniously having in his *(sic)* possession and with the use and threatened use of firearms, and other dangerous weapon, implement and means, to wit: a pistol, whereby the life of David E. Whitfield, was threatened and endangered, did unlawfully, forcibly and feloniously take, steal and carry away, the sum of $22.00 in cash money from the person of David E. Whitfield," etc.

In No. 11074, the indictment charged Covington and McDougald with "unlawfully, wilfully and feloniously having in his *(sic)* possession and with the use and threatened use of firearms, and other dangerous weapon, implement and means, to wit: a pistol, whereby the life of Calvin Roberson, was threatened and endangered, did unlaw-

fully, forcibly and feloniously take, steal and carry away, the sum of $50.00 in money of the value of $50.00 in good U. S. Currency, from the person of Calvin Roberson," etc.

In No. 11075, the indictment charged Covington and McDougald with "unlawfully, wilfully and feloniously having in his *(sic)* possession and with the use and threatened use of firearms, and other dangerous weapon, implement and means, to wit: a pistol, whereby the life of Walter J. Cross, an employee of South State Motels, Inc., trading as Voyager Inn of Durham, was threatened and endangered, did unlawfully, forcibly and feloniously take, steal and carry away, the sum of $474.00 in money of the value of $474.00 in U. S. Currency from the South State Motels, Inc., trading as Voyager Inn of Durham," etc.

Each defendant pleaded not guilty to each of said three bills of indictment. The three cases were consolidated for trial.

At the conclusion of the State's evidence, McDougald, in the absence of the jury, with reference to each of the three bills of indictment, withdrew his plea of not guilty and tendered a plea of guilty of common law robbery, which pleas were accepted by the State. However, the trial continued in all respects as if both defendants were on trial.

The State's evidence, in brief summary, tends to show the facts narrated below.

About 1:30 a.m., Wednesday, July 26, 1967, Covington and McDougald, with pistols, forced Walter J. Cross, the desk clerk at Voyager Inn in Durham, to deliver to them the contents ($74.35) of the cash drawer at the counter in the lobby, also to open the safe in the back office and to deliver to them the contents ($400.00) of two cash drawers taken therefrom, all of the money being the property of Cross's employer, South State Motels, Inc., the operator of said Voyager Inn. Then they made Cross face the wall. While in this position, Cross was struck on the back of the head and rendered unconscious.

Soon thereafter David E. Whitfield, accompanied by Calvin Roberson, drove to said Voyager Inn to see a business associate. Upon finding he was not in his motel room, Whitfield drove to the lobby to ask whether a message had been left for him. A "reddish maroon" 1965 Chevrolet Impala, two-door hardtop, with a North Carolina license tag, was parked in the driveway under the canopy at the motel entrance. The right rear corner thereof was damaged. When Whitfield "tooted his horn," the 1965 Chevrolet was pulled to the left. This enabled Whitfield to "pull up under the canopy."

Whitfield saw no one when he entered the lobby. Soon thereafter

he was confronted by Covington and McDougald with the words, "Put your hands up." McDougald took $22.00 from Whitfield's wallet. McDougald went outside and brought Roberson into the motel lobby where Covington and McDougald took $50.00 from Roberson's wallet. They made Whitfield and Roberson lie on the floor. Then they backed out of the motel lobby, got in said 1965 Chevrolet and left. Whitfield and Roberson found Cross in the back office on the floor, "in a groggy condition." Soon thereafter Cross called the police.

When Cross was robbed and when Whitfield and Roberson were robbed, *McDougald* had the pistol identified and admitted in evidence as State's Exhibit No. 4 *or* one that looked "exactly like" it, and Covington had "a chrome or nickel-plated revolver."

Additional facts, including those relating to the arrest of Covington and McDougald about 5:00 a.m., Friday, July 28, 1967, and the finding of State's Exhibit No. 4 (pistol), will be set forth in the opinion.

Neither Covington nor McDougald testified.

Evidence offered by Covington tended to show that he and McDougald were together on the night of July 26, 1967, from about 7:30 p.m. until midnight, at a card party in the home of one Manly Mitchell; and that Covington then purchased the gun identified as State's Exhibit No. 4 or "one very similar to it in all respects" from one Raymond Bynam.

At the conclusion of the evidence, the court instructed the jury as if both Covington and McDougald were then on trial. As to Covington, the jury returned a verdict of "guilty as charged" with reference to each of the three bills of indictment. After accepting the jury's verdicts as to Covington, the court explained to the jury McDougald's earlier plea and on account thereof the jury would not return a verdict as to McDougald in any of the three cases.

In No. 11073, as to Covington, the court pronounced judgment imposing a prison sentence of thirty years.

In No. 11074, as to Covington, the court pronounced judgment imposing a prison sentence of not less than one nor more than ten years, this sentence to commence upon expiration of the sentence in No. 11073.

In No. 11075, as to Covington, the court pronounced judgment imposing a prison sentence of thirty years, this sentence to run concurrently with the thirty-year sentence imposed in No. 11073.

Covington excepted to said judgments and appealed. As to McDougald, judgments were pronounced. McDougald did not except or give notice of appeal and is not a party to the present appeal.

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

C. C. Malone, Jr., and C. E. Johnson for defendant appellant.

BOBBITT, J. Appellant, Covington, assigns as error the denial of his motion for judgment as in case of nonsuit. This assignment is not set out in his brief and is deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810. There was ample evidence to require submission to the jury and to support a verdict of guilty as to the charge of armed robbery set forth in each of the three bills of indictment.

Appellant, Covington, assigns as error the rulings on evidence discussed below.

A pistol, marked for identification as State's Exhibit No. 4, was presented to Cross, a State's witness, during direct examination. Defendants objected and, in the absence of the jury, "moved to suppress the evidence of the weapon on the grounds that it was obtained by reason of an illegal search."

In the absence of the jury, Ralph D. Seagroves, a Durham Police Officer, testified in substance as narrated below.

On Friday, July 28, 1967, between 4:45 and 5:00 a.m., Seagroves, accompanied by other police officers, went to the Holiday Inn, Downtown, on Chapel Hill Street in Durham. Seagroves had seen a 1965 Chevrolet, "red or burgundy," in the parking lot. After talking with the night clerk, the officers got in touch with Whitfield; and, at the request of the officers, Whitfield accompanied the officers to separate but adjoining motel rooms to see if Whitfield could identify either of the occupants as a participant in the Voyager Inn robberies of July 26th.

The officers knocked on the door of the motel room occupied by McDougald. When McDougald came to the door, bright lights from the police car were thrown on him and Whitfield said, "That is one of them."

After entering and staying briefly in McDougald's room, the officers proceeded from the sidewalk to the outside door of the adjoining motel room. It was "chain locked." The officers pushed open the door as far as the chain would permit. Big lights from the police car were directed through this opening into the room. Through this opening Whitfield identified the person lying on the bed as the other man involved in the Voyager Inn robberies. It was Covington. Unable to gain entrance, the officers "just pulled out" the chain, thereby breaking the chain lock, and entered Covington's room. Covington was getting out of bed. State's Exhibit No. 4 was on a table near Coving-

ton's bed. The officers seized and retained it. Covington and McDougald, having been identified in this manner by Whitfield, were arrested and taken into custody.

None of the victims of the robberies knew either Covington or McDougald by name. The officers were armed. The officers had no warrant of arrest and had no search warrant.

The court, after hearing said testimony of Seagroves, made no findings of fact. The court overruled said motion to suppress and recalled the jury. Thereupon, before the jury, the direct examination of Cross was resumed. Cross testified *inter alia* that the pistol exhibited to him, marked for identification as State's Exhibit No. 4, "looks exactly like the gun *McDougald* held on him on the 26th day of July, 1967." (Our italics.)

Whitfield, a State's witness, when asked on direct examination if he could identify the two men who had robbed him, touched the shoulder of Covington and of McDougald. Thereupon, in the absence of the jury, each defendant moved "to suppress any identification by this witness as *(sic)* for the reason that the identification here being made is identification made as a result of an illegal arrest." The motion(s) were overruled and defendants excepted.

On direct examination, Whitfield was not asked and did not testify as to what occurred at the Holiday Inn on July 28th when Covington and McDougald were arrested. He did testify on direct examination that, on July 26th when he and Roberson were robbed, *McDougald* had the pistol marked for identification as State's Exhibit No. 4 "or one like it."

On cross-examination of Whitfield, defense counsel elicited *for the first time in the presence of the jury* testimony as to what occurred on July 28th at said Holiday Inn when Covington and McDougald were arrested. Under cross-examination, and without objection or motion to strike, Whitfield testified in substance as follows: On July 28, 1967, around 4:30 a.m., he received a call from the Police Station "that two suspects fitting the description he had given had just checked into the Holiday Inn," and that the police officers wanted him to come down and identify them. Upon arrival at the Holiday Inn around 5:00 a.m. he saw "an automobile resembling the one he saw at the Voyager Inn," and was told that the car "belonged to the suspects." In response to a knock on his door, McDougald opened the door and thereupon he (Whitfield) identified McDougald as one of the participants in the Voyager Inn robberies of July 26th. The door to Covington's room was closed. Police Officers opened it "with their shoulders." He did not recognize Covington "until his door had been opened."

Roberson, a State's witness, testified "he recognizes State's Exhibit Four." Roberson gave no other testimony with reference thereto.

The State offered Seagroves who testified, in the presence of the jury, in substance as follows: On July 28, 1967, around 5:00 a.m., he, with "Lt. Evans, Officer Roop, Officer Clayton, Officer Lewis and Mr. Whitfield went to the Holiday Inn, Downtown."

The court, apparently *ex mero motu*, instructed the jury Seagroves' further testimony was received "solely for the purpose of corroborating Mr. Whitfield and only to that extent." Thereupon, Seagroves testified both on direct and on cross-examination to what happened on July 28th at said Holiday Inn, without objection and without motion to strike except as follows: Defendants objected to the statement of Seagroves that "he saw State's Exhibit Four on the morning of the 28th."

The testimony of Seagroves in the presence of the jury, both on direct and on cross-examination, is in substantial accord with the testimony of Whitfield as to what occurred on July 28th at said Holiday Inn with these exceptions: Seagroves testified he "turned the latch" on Covington's door and "it opened"; that when the "spotlights" were turned into Covington's room, Whitfield said, "That is the other one"; that thereafter he "hit the door and it unlocked"; and that the officers then entered Covington's room.

On recross-examination, Seagroves testified that "the manager of Holiday Inn reported to him the fact that persons of the description he (Seagroves) had given him earlier were there."

There is no merit in appellant's contention that Whitfield was precluded from testifying *at trial* as to the identity of the men who robbed him on July 26th on account of asserted unlawful conduct of the officers on July 28th in forcibly opening the door and entering his motel room. Whitfield did not identify Covington *at trial* on the basis of what occurred on the morning of July 28th at the Holiday Inn but on the basis of what he saw at the Voyager Inn on the morning of July 26th. Moreover, the evidence before the jury as to what occurred on the morning of July 28th at the Holiday Inn was first elicited by defense counsel in the cross-examination of Whitfield and was thereafter developed in detail by defense counsel in the further cross-examination of Whitfield and in the cross-examination of Seagroves.

The only serious question is whether the court should have sustained defendants' objections to the admission in evidence of State's Exhibit No. 4 on the ground the officers seized it as the result of an illegal search. This question must be resolved in the light of statutory provisions discussed below.

G.S. 15-41 provides: "A peace officer may *without warrant* arrest a person: (1) When the person to be arrested has committed a felony or misdemeanor in the presence of the officer, or when the officer has reasonable ground to believe that the person to be arrested has committed a felony or misdemeanor in his presence; (2) When the officer has reasonable ground to believe that the person to be arrested has committed a felony and will evade arrest if not immediately taken into custody." (Our italics.)

All the evidence is to the effect that no arrest was made until after the officers had *forced their way* into Covington's motel room. Articles in Covington's motel room, specifically State's Exhibit No. 4, if discovered and seized by means of an unlawful forcible entry, would not be admissible on the theory of discovery and seizure incidental to a lawful arrest.

Whether forcible entry by the officers into Covington's motel room was lawful must be considered and determined with reference to G.S. 15-44, which provides: "*If a felony* or other infamous crime *has been committed*, or a dangerous wound has been given *and there is reasonable ground to believe that the guilty person is concealed in a house*, it shall be lawful for any sheriff, coroner, constable, or police officer, *admittance having been demanded and denied*, to break open the door and enter the house and arrest the person against whom there shall be such ground of belief." (Our italics.)

There was evidence tending to show: The robberies of Cross-South State Motels, Inc., Whitfield and Roberson at the Voyager Inn on July 26th by two men had been reported to the officers. Whitfield had given the officers a description of each of the two men and also of the car they had used at the time of the robberies. The officers had passed this information to the night clerk at the Holiday Inn. The night clerk notified the officers that two men answering these descriptions were occupying adjoining motel rooms. A 1965 Chevrolet in the parking lot resembled closely the car Whitfield had described. McDougald opened the door to his motel room in response to a knock on his door and was identified immediately by Whitfield as one of the two men involved in the robberies at Voyager Inn on July 26th.

With five armed officers present, Covington's opportunity for escape was minimal. It would have been appropriate for the officers to have obtained a warrant for the arrest of the registered occupant of the room or a search warrant. However, under the circumstances, the evidence was sufficient to support a finding that the officers had reasonable ground to believe the occupant of the room adjoining that of McDougald was the other man involved in the Voyager Inn rob-

beries of July 26th. Even so, there is no evidence whatever that admittance to Covington's motel room had "been demanded and denied." Under G.S. 15-44 admittance, in the absence of hostile action from inside the dwelling prior to such demand, must be "demanded and denied" before a forcible entry is lawful where, as here, there is neither a search warrant nor a warrant for the arrest of an occupant or supposed occupant. Indeed, *State v. Mooring,* 115 N.C. 709, 20 S.E. 182, seems to support the view that this requirement would apply even though the officers have a search warrant or warrant of arrest. See 15 N.C.L.R. 101, 125. Compliance with this requirement serves to identify the official status of those seeking admittance. The requirement is for the protection of the officers as well as for the protection of the occupant and the recognition of his constitutional rights.

Since a new trial is awarded for reasons stated below, we need not determine whether the admission in evidence of State's Exhibit No. 4 was of such prejudicial impact as to constitute ground for a new trial. Indeed, the probative value thereof is questionable. State's Exhibit No. 4 added little, if anything, by way of identification of defendants as the men who perpetrated the robberies at the Voyager Inn. Defendants were positively identified by Cross and by Whitfield and by Roberson. While the probative value of State's Exhibit No. 4 seems unimpressive, the actual display of the pistol as an exhibit during the progress of the trial might well have been a prejudicial circumstance.

Finally, we consider assignments of error relating to the court's charge.

The court's final instruction with specific reference to armed robbery as charged in the three bills of indictment was as follows:

"So, ladies and gentlemen of the jury, I charge you that *(sic)* you find from the evidence and beyond a reasonable doubt, the burden being upon the State of North Carolina to so satisfy you that the defendants — that *either* the defendant McDougald *or* the defendant Covington — took personal property *either* from Mr. Whitfield *or* from Mr. Roberson *or* from the South State Motel, Incorporated, *or* either of them, that at the time of the taking *either* Mr. Covington *or* Mr. McDougald used force or intimidation sufficient to create *an apprehension of danger* in the person from whom the property was taken, and if you further find that at the time of the taking *either* Mr. Covington *or* Mr. McDougald had the intent permanently to deprive *either* Mr. Whitfield *or* Mr. Roberson *or* the South State Motel of its property permanently and to convert it to the use of *either* Mr. McDougald *or* Mr. Covington, *or* both of them; and if

you further find from the evidence and beyond a reasonable doubt, the burden being upon the State of North Carolina in all of these things to so satisfy you that at the time of the taking *either* of the accused was in the possession of and threatened, or used to threat, some dangerous weapon, I say if you have found all of those things as to Mr. McDougald, it would be your duty to return a verdict of guilty as charged in the bill of indictment." (Our italics.)

Defendant excepted to and assigns as error the quoted excerpt from the charge.

Immediately following the quoted excerpt, the court instructed the jury as follows:

"Now, if you have found all of those things as to Mr. Covington, it would be your duty to return a verdict as to him of guilty as charged in the bill of indictment.

"Now, if you fail to find all of those things as to *either* of the defendants, you will then consider whether or not that defendant might be guilty of common law robbery. The only difference between common law robbery and armed robbery is that in common law robbery there is no consideration as to the use of a weapon. That is to say that if you find that *either* accused took personal property from another, or in his presence, that they used force or intimidation sufficient to create *an apprehension of danger,* and that at the time of the taking, *they* had the felonious intent to permanently deprive the owner of the property, but you do not find the use of a weapon, then you would have found that accused guilty of common law robbery. You will consider this only if you find the accused not guilty of armed robbery." (Our italics.)

Near the beginning of the charge, the court read to the jurors the statute on which the three indictments are based, to wit, G.S. 14-87, which provides:

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

Prerequisite to conviction for armed robbery as charged in each bill of indictment, the jury must find from the evidence beyond a

reasonable doubt that the *life* of the victim was *endangered* or *threatened* by the *use* or *threatened use* of "firearms or other dangerous weapon, implement or means." A conviction of "Guilty as charged" may not be based on a finding that the accused "used force or intimidation sufficient to create an apprehension of danger." This is a critical distinction between armed robbery as defined in G.S. 14-87, which is punishable by imprisonment for not less than five nor more than thirty years, and common law robbery, which is punishable by imprisonment not exceeding ten years. *State v. Keller,* 214 N.C. 447, 199 S.E. 620; *State v. Stewart,* 255 N.C. 571, 122 S.E. 2d 355; *State v. Ross,* 268 N.C. 282, 150 S.E. 2d 421.

The challenged instruction was also erroneous in the respect discussed below.

The challenged instruction is not predicated on a finding by the jury that Covington and McDougald were acting in concert, each aiding and abetting the other, before one would be responsible for the criminal acts and conduct of the other. The challenged instruction is that both defendants would be guilty if *either* Covington *or* McDougald robbed either Cross-South States Motels, Inc., *or* Whitfield, *or* Roberson. A verdict of guilty in response to this instruction would leave undetermined what, if anything, either Covington or McDougald had done, and would leave undetermined whether the jury found that Cross-South States Motels, Inc., or Whitfield, or Roberson, had been robbed. Certainly, a finding of guilty in response thereto would not establish that all had been robbed. Notwithstanding, the jury was asked for and returned separate verdicts of guilty as charged as to each of the three separate bills of indictment and separate judgments, as set out in our preliminary statement, were pronounced.

For the reasons stated, appellant is awarded a new trial. However, it seems appropriate to refer with approval to the fact the trial was not disrupted by McDougald's pleas of guilty but proceeded as stated in such manner as to avoid prejudice to Covington, the remaining defendant, on account of McDougald's said pleas.

New trial.

ANNIE R. JOHNSON v. CHRISTINE LAMB AND HAZEL'S BEAUTY CENTER, INC., A CORPORATION.

(Filed 22 May 1968.)

1. Trial § 40—

It is the duty of the trial judge to submit issues necessary to settle the material controversies as to facts arising on the pleadings, but the form and number of the submitted issues is a matter resting in the sound discretion of the trial judge, it being sufficient that the issues be framed so as to present the material matters in dispute, to enable each party to have the full benefit of his contentions before the jury and to enable the court, when the issues are answered, to determine the rights of the parties under the law.

2. Pleadings § 29—

An issue arises upon the pleadings when a material fact is alleged by one party and controverted by the other. G.S. 1-196, G.S. 1-198.

3. Master and Servant § 33—

Where the answer of the corporate defendant admits that the alleged tort-feasor was its employee and that at the time of the injury complained of the employee was acting in the course of her employment, negligence of the tort-feasor is imputed as a matter of law to the corporate defendant under the doctrine of *respondeat superior*, and it is not necessary to submit to the jury an issue upon the question of employment.

4. Trial § 41—

Failure to submit to the jury an issue not material to the determination of the rights of the parties is not error.

5. Pleadings § 29—

A material fact is one which constitutes a part of plaintiff's cause of action or of defendant's defense.

6. Master and Servant § 33—

Refusal of the court to submit to the jury an issue with reference to the alleged failure of the corporate defendant to supervise its employee is not error, since, if the employee was negligent while acting in the course of employment and such negligence was the proximate cause of injury to another, the employer is liable under the doctrine of *respondeat superior*, notwithstanding the employer exercised due care in the supervision of the employee, and if the employee was not negligent, the employer is not liable irrespective of failure to supervise.

7. Cosmetologists—

G.S. 88-11, which restricts an apprentice cosmetologist to the practice of her trade "under the direct supervision of a registered managing cosmetologist," does not alter the common law rules governing the liability of the apprentice's employer for the consequences of the employee's acts in the course of employment, and, consequently, there is no necessity to submit to the jury as a material issue the presence or absence of supervision in the course of the apprentice's employment.

8. Same—

A cosmetologist is not an insurer against injury from the treatment she undertakes to render, nor is she liable for the consequences of every error of judgment.

9. Same—

Where an apprentice cosmetologist possesses the skill which others in her trade similarly situated possess, exercises reasonable care in the application of her skill to the customer's case and uses her best judgment in the performance of the service, there can be no liability for injury upon either the apprentice or the proprietor of a salon on the basis of negligence.

10. Appeal and Error § 42—

Statements in the record disclosing that appellant's objection was not interposed until after the answer of the witness are controlling notwithstanding statements in appellant's brief to the contrary.

11. Trial § 15—

An objection to a question asked a witness must be interposed when the question is asked and before the answer is given or the right to have the testimony excluded is waived.

12. Damages § 13; Appeal and Error § 53—

Refusal of the court to permit plaintiff to introduce in evidence the mortuary tables contained in G.S. 8-46 as bearing upon the question of damages resulting from defendant's negligence, *held* not error since the jury answered the issue of negligence in the negative.

13. Appeal and Error § 31—

Assignments of error to the court's misstatement of appellant's contentions as to the facts cannot be sustained when the misstatements were not called to the court's attention in apt time to permit a correction.

14. Negligence §§ 7, 28—

An instruction to the effect that the defendant should have been able to foresee the precise injury which resulted from his conduct is prejudicial, since all that plaintiff is required to prove on the question of foreseeability is that the defendant might have foreseen that some injury would probably result from his conduct.

15. Cosmetologists—

Failure of the court to instruct that the defendant cosmetologist must possess the knowledge and skill which is customarily possessed and exercised by cosmetologists in the area wherein she practices, *held* prejudicial to the plaintiff customer.

APPEAL by plaintiff from *Crissman, J.*, at the 11 September 1967 Civil Session of GUILFORD, High Point Division.

The plaintiff went to the beauty salon of the corporate defendant to have her hair, eyebrows and lashes tinted. The tinting of the eyebrows and lashes was done by Miss Lamb, an employee of the corporate defendant and the holder of an apprentice's license issued by the State.

The plaintiff alleges that she was painfully burned about her eyebrows, resulting in some loss of pigmentation of the skin and that the negligence of the defendants was the proximate cause of

these injuries. She alleges that Miss Lamb was negligent in that, contrary to the customary practice of the trade, she rubbed excessively the areas of the plaintiff's face exposed to the tinting solution and made two applications of it and that the corporate defendant was independently negligent in that it did not provide proper supervision and direction for Miss Lamb. The defendants filed a joint answer denying all allegations of negligence, and alleging that Miss Lamb used, in the usual and customary manner, a standard product of the trade, known as "Roux Lash & Brow Tint," and that the plaintiff, desiring a darker tint than was obtained by the first application, requested Miss Lamb to repeat the operation.

The following issues were submitted to the jury, the plaintiff excepting thereto:

> "1. Was plaintiff injured by the negligence of defendants, as alleged in the complaint?
>
> "2. What amount of damages, if any, is plaintiff entitled to recover from defendants?"

The jury answered the first issue "No," and did not answer the second. From a judgment in accordance with the verdict, the plaintiff appeals.

The testimony of the plaintiff was to the following effect: She went to the beauty salon to have her hair, eyebrows and lashes tinted by another employee of the corporate defendant, Mrs. Wood, a licensed operator, who had previously applied such treatments to the plaintiff without any adverse reaction. After completing the tinting of the plaintiff's hair, Mrs. Wood, having another customer, requested Miss Lamb to do the tinting of the eyebrows and lashes, Accordingly, the plaintiff went to Miss Lamb's chair. Miss Lamb placed her in a reclining position, removed the makeup which the plaintiff had previously applied, tinted the lashes, applied some liquid to the eyebrows, waited a few minutes and then applied another liquid. She then told the plaintiff she had gotten some of the tint on the skin and would have to remove it. The plaintiff informed Miss Lamb that her brows were burning and stinging. Miss Lamb rubbed the area around the eyebrows with moist cotton, applying "hard pressure." "It felt like she was taking the skin off." Miss Lamb then said, "This didn't take and I am going to apply another coat." The plaintiff made no comment concerning that and Miss Lamb repeated the process. The plaintiff did not request this. At the conclusion of the second application, Miss Lamb again said that there was some of the substance on the plaintiff's skin and rubbed "real hard" with moist cotton. The plaintiff was experiencing pain, her eyebrows were

"awful red * * * stinging and hurting." The director of the salon was not present during any of the above procedure. After the plaintiff left the salon, blisters developed around the eyebrows before she applied any other substance to the affected area.

Medical testimony was to the effect that the plaintiff sustained first and second degree burns around her eyebrows, that she had not previously been treated for allergy or skin irritation, and that there was some permanent loss of pigmentation of the skin in that area but no true scarring.

Mrs. Wood, called as a witness by the plaintiff, testified that she had had substantial experience in tinting eyebrows and eyelashes, including those of the plaintiff. The Roux solution, consisting of three bottled solutions used in succession, is the one customarily used for this treatment and had previously been used on the plaintiff by Mrs. Wood. The third solution used in the treatment is for the removal of stains. According to the testimony of Mrs. Wood, "It is normal to rub after this third solution * * * a tiny bit" with cotton on a toothpick but not to apply pressure or to rub vigorously.

Directions accompanying the kit of Roux solutions included the following:

> "No. 6. — Don't permit any accidental stains to remain. * * * Any stain accidentally produced should immediately be removed with soap and water applied by means of absorbent cotton.
>
> "No. 7. — Don't rub skin. Delicate tissues are easily irritated by friction. * * *
>
> "The observance of the ten simple rules set forth herein will produce the best results with the greatest degree of efficiency. * * *
>
> "Rule No. 1. — Sit patron in upright position, keeping the head in upright position. * * *
>
> "Rule No. 10. — If deeper shades are desired, repeat the process. * * *"

The defendants' evidence consisted of the testimony of Miss Lamb and Mrs. McAllister, the latter testifying as an expert in the field of cosmetology.

Miss Lamb testified, in substance: She had frequently used the Roux materials in such operations. She is familiar with the instructions packaged with them. At the time of her treatment of the plaintiff she was a duly licensed apprentice. She tinted the eyebrows and lashes of the plaintiff at the request of Mrs. Wood, and under her

supervision, Mrs. Wood making no suggestion concerning or criticism of Miss Lamb's procedure. Miss Lamb first placed the plaintiff in a reclining position in the chair and removed the makeup previously applied by the plaintiff. Next, with cotton on toothpicks, she applied the Roux Solution No. 1 and followed it with Solution No. 2 to tint the eyebrows. She then removed from the surrounding skin the excess of the tinting solution, using first water and then Solution No. 3, the stain remover, putting this on with a cotton-covered toothpick, rubbing "lightly on the skin." She then used a piece of cotton with a mild shampoo and water to take off the stain remover. This completed the process. The plaintiff examined the result and requested Miss Lamb to repeat the process to get a darker color, which Miss Lamb did, first getting the approval of Mrs. Wood. Following the second application, the plaintiff viewed the result in a mirror, expressed her satisfaction, and left the shop without making any complaint. She returned to the salon that afternoon to see the director of the salon, who was not in the salon during the treatment, but said nothing to Miss Lamb. In the treatment no more of the tint solution got on the plaintiff's skin than is customary in such operation. Miss Lamb rubbed the plaintiff's eyebrows several times "softly," applying some pressure to take off the excess tint material.

Mrs. McAllister, the operator of the beauty school from which Miss Lamb graduated, testified in substance: She, herself, studied in the Roux Laboratory on several occasions and has had practical experience in the application of these products. In the application of them, it is proper to place the customer in a reclining position of about 45 degrees. The making of a second application is frequent in the cosmetology trade. The procedure which Miss Lamb testified she followed was that which is customary and is the regular practice of cosmetology in the High Point area. It is quite common for some redness to appear over the eyebrows following a second application of the tinting procedure. Normally, the Roux solutions do not tend to irritate the skin. The application of them should be discontinued if the patron complains of pain about the eyebrows during the process. It would be incorrect to rub vigorously in the application. A rubbing of the eyebrows by a customer after she leaves the shop, which a majority of them do, can cause irritation.

The plaintiff assigns as error certain rulings upon the admissibility of evidence, instructions to the jury and the submission to the jury of the above issues, contending that these were inadequate. The record does not show that the plaintiff tendered other issues to the court.

Haworth, Riggs, Kuhn & Haworth by Walter W. Baker., Jr., and Robert L. Cecil for plaintiff appellant.

Jordan, Wright, Henson & Nichols and Fisher & Fisher by G. Marlin Evans for defendant appellees.

LAKE, J. G.S. 1-200 provides, "The issues arising upon the pleadings, material to be tried, must be made up by the attorneys appearing in the action, or by the judge presiding, and reduced to writing, before or during the trial." This provision is mandatory. It is the duty of the trial judge to submit such issues as are necessary to settle the material controversies as to facts arising on the pleadings. *Heating Co. v. Construction Co.,* 268 N.C. 23, 149 S.E. 2d 625; *Stanback v. Haywood,* 209 N.C. 798, 184 S.E. 831. Ordinarily, the form and number of issues to be submitted is a matter which rests in the sound discretion of the trial judge, it being sufficient that the issues be framed so as to present the material matters in dispute, to enable each party to have the full benefit of his contentions before the jury and to enable the court, when the issues are answered, to determine the rights of the parties under the law. *Rubber Co. v. Distributors,* 253 N.C. 459, 117 S.E. 2d 479; *Lumber Co. v. Construction Co.,* 249 N.C. 680, 107 S.E. 2d 538; *O'Briant v. O'Briant,* 239 N.C. 101, 79 S.E. 2d 252; *Griffin v. Insurance Co.,* 225 N.C. 684, 36 S.E. 2d 225.

It is necessary to submit to the jury only such issues as arise upon the pleadings and are material to be tried. *Cecil v. Henderson,* 121 N.C. 244, 28 S.E. 481. An issue arises upon the pleadings when a material fact is alleged by one party and controverted by the other. G.S. 1-196, G.S. 1-198; *Heating Co. v. Construction Co., supra.* "If a material fact alleged in the complaint is not denied by the answer, such allegation, for the purpose of the action, is taken as true and no issue arises therefrom." Strong, N. C. Index, 1st Ed., Pleadings, § 29. *Accord: Heating Co. v. Construction Co., supra.*

It is admitted in the answer that Miss Lamb was the employee of the corporate defendant and, in treating the plaintiff, was acting in the course of her employment. Consequently, upon the face of the pleadings, if Miss Lamb was negligent in the performance of this treatment her negligence would be imputed, as a matter of law, to the corporate defendant under the doctrine of *respondeat superior,* and it was not necessary to submit to the jury an issue upon the question of her employment.

There was also no error in the failure of the court to submit to the jury an issue with reference to the alleged failure of the corporate defendant to supervise its employee, Miss Lamb. While this failure is alleged in the complaint and denied in the answer, the controversy

as to that fact was not material to the determination of the rights of the parties and, therefore, no issue with reference to it was necessary. A material fact is one which constitutes a part of the plaintiff's cause of action or of the defendant's defense. *Wells v. Clayton,* 236 N.C. 102, 72 S.E. 2d 16. If an employee is negligent while acting in the course of employment and such negligence is the proximate cause of injury to another, the employer is liable in damages under the doctrine of *respondeat superior,* notwithstanding the fact that the employer, himself, exercised due care in the supervision and direction of the employee, the employee's violation of instructions being no defense to the employer. *Gillis v. Tea Co.,* 223 N.C. 470, 27 S.E. 2d 283, 150 A.L.R. 1330; *West v. Woolworth Co.,* 215 N.C. 211, 1 S.E. 2d 546. Conversely, failure to instruct or supervise an employee does not impose liability upon the employer if, in fact, the employee was guilty of no negligence in the performance of his work. In such event, the omission of instructions or supervision, assuming a duty to supply them, would not be a proximate cause of the injury. In 35 Am. Jur., Master and Servant, § 548, it is said:

> "Liability to a third person for the act of an employee, if any, must be predicated upon the wrongful act or omission of the employee at the time of the infliction of the injury complained of, or at least upon an act or omission which in the case of an experienced or competent person would have been wrongful. If the employee has done no such act or omission, there is no liability on the part of the employer, however inexperienced, incompetent, and unfit for their tasks the defendant's employees may have been. Any common-law liability on the part of the defendant to a third person must find its basis in negligent conduct on the part of its servant or servants. It cannot rest upon their want of qualification for their task alone."

Chapter 88 of the General Statutes provides for the licensing of apprentice cosmetologists and registered cosmetologists. G.S. 88-11 prohibits a registered apprentice from operating a cosmetic art beauty shop, limiting the right of such apprentice to practice of the trade "under the direct supervision of a registered managing cosmetologist." It was not the intent of this statute to impose upon the employer of an apprentice cosmetologist a duty, owed to customers of the establishment, to stand at the side of the apprentice and personally direct each act performed in the rendering of each service to each customer. The act does not alter the common law rules governing the liability of the employer of an apprentice cosmetologist for the consequences of the employee's acts in the course of her em-

ployment. Consequently, the presence or absence of supervision of Miss Lamb by the corporate defendant, through its other employees, is not a material part of the plaintiff's cause of action or of the defense of the corporate defendant and no issue upon that controversy need be submitted to the jury and no instruction to the jury concerning such supervision, or lack of it, was required.

We do not have here the case of a customer, patient or client contracting for the professional services of the owner of an establishment and, without his or her knowledge, being turned over to an employee for treatment, nor do we undertake to determine the rights of a person injured under those circumstances. The beauty salon being owned by a corporation, the services of some person other than the owner were, of necessity, contemplated by the plaintiff when she contracted for the treatment in question. She knew of and acquiesced in the transfer of her treatment from Mrs. Wood to Miss Lamb.

Like the physician, or other person undertaking to perform professional services, the cosmetologist is not an insurer against injury from the treatment she undertakes to render, nor is she liable for the consequences of every error of judgment. In *Hunt v. Bradshaw,* 242 N.C. 517, 88 S.E. 2d 762, we said of a physician:

> "(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."

The same principle is applicable to the cosmetologist alleged to have caused injury to her customer in the course of treatment. 10 Am. Jur. 2d, Barbers and Cosmetologists, § 16. Obviously, the proprietor of a beauty salon may not, by the assignment of a customer to an inexperienced apprentice, nothing else appearing, reduce the undertaking of the proprietor to bring to the performance of the service the degree of professional skill and ability ordinarily possessed by those engaged in the trade in the particular locality or area. If, however, the apprentice performing the service possesses such skill, exercises reasonable care in the application of it to the customer's case and uses her best judgment in the performance of the service, there can be no liability for injury upon either the apprentice or the

proprietor of a salon on the basis of negligence in the performance of the service.

The plaintiff assigns as error the overruling of her objection to testimony by Mrs. McAllister that the rubbing of the treated area by a patron after she leaves the salon can cause irritation and that from her experience she has observed that the majority of patrons do this. The record shows that the questions eliciting this testimony were clear and the plaintiff's objection was not interposed until after the answer of the witness was given. The plaintiff, in her brief, says that this is an error in the transcript, the objection having actually been entered before the question was answered. The defendants, in their brief, say that the record is correct in this respect. In such situation, we must assume that the record speaks the truth. "It is the general rule that an objection to a question asked a witness must be interposed when the question is asked and before the answer, or the right to have the testimony excluded is waived." *Brown v. Hillsboro,* 185 N.C. 368, 117 S.E. 41.

The plaintiff also assigns as error the refusal of the court to permit the plaintiff to introduce in evidence the mortuary tables contained in G.S. 8-46. The purpose of the proposed evidence was to bear upon the question of damages for the alleged disfigurement of the plaintiff by permanent loss of pigmentation about the eyebrows. It is a sufficient answer upon the present appeal to note that the jury, having answered the first issue in the negative, did not reach the issue of damages and, consequently, the plaintiff was not prejudiced by the exclusion of the proposed evidence. Furthermore, the table being statutory, need not be introduced in evidence in order to make use of it upon the question of damages when other facts are in evidence permitting its application. See *Chandler v. Chemical Co.,* 270 N.C. 395, 154 S.E. 2d 502.

The plaintiff assigns as error several alleged misstatements in the charge of the court to the jury as to the contentions of the parties and other errors in the court's review of the evidence introduced. The statements in question relate to contentions as to the facts, not to contentions as to the law applicable thereto. See *Ratliff v. Power Co.,* 268 N.C. 605, 151 S.E. 2d 641. These assignments of error cannot be sustained for the reason that they were not called to the attention of the court at the time so as to permit the court to correct its alleged inadvertent mistake. "If the defendant [or plaintiff] believed the trial judge was stating his contentions incorrectly in his charge, it was his duty to call the court's attention to the incorrectness before the case was finally given to the jury, so that it could be corrected." *Fisher v. Rogers,* 251 N.C. 610, 112 S.E. 2d 76.

See also: *Murchison v. Powell*, 269 N.C. 656, 153 S.E. 2d 352; *Dickson v. Coach Co.*, 233 N.C. 167, 63 S.E. 2d 297; *Steele v. Coxe*, 225 N.C. 726, 36 S.E. 2d 288; *Ball v. McCormack*, 172 N.C. 677, 90 S.E. 916; *Jeffress v. R. R.*, 158 N.C. 216, 73 S.E. 1013.

There are, however, errors in the charge, assigned and brought forward into the brief of the plaintiff, which require the case to be returned to the superior court for a new trial. Included in the charge is the following statement with reference to proximate cause:

> "So, the court charges you that it is generally held that in order to warrant you members of the jury in finding that the negligence of the defendants was the proximate cause of the plaintiff's injury, it must appear that the injury was the natural and probable consequence of the defendants' negligent act, and that *it* ought to have been foreseen in the light of attending circumstances." (Emphasis added.)

In *Hart v. Curry*, 238 N.C. 448, 78 S.E. 2d 170, this Court granted a new trial for error in charging the jury substantially in accordance with the above quoted portion of the charge in the present case. While this Court has repeatedly said that foreseeability of injury is an element of proximate cause, it is clear that it is not necessary that the defendant should have been able to foresee the precise injury which resulted from his conduct. *Williams v. Boulerice*, 268 N.C. 62, 149 S.E. 2d 590; *Bondurant v. Mastin*, 252 N.C. 190, 113 S.E. 2d 292. "All that the plaintiff is required to prove on the question of foreseeability, in determining proximate cause, is that in 'the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.'" *Hart v. Curry, supra; White v. Dickerson, Inc.*, 248 N.C. 723, 105 S.E. 2d 51. The above quoted portion of the charge in the present case implies the contrary and we cannot conclude that the jury was not misled by it. It was, therefore, error prejudicial to the plaintiff.

After the jury had deliberated for a considerable time, it returned to the courtroom and requested a further instruction as to what constitutes negligence "in the operation of this business." The court gave a further instruction, which, after a general definition of negligence, included the following:

> "It [negligence] is the failure to do what a reasonable and prudent man or woman would have done under the same and similar circumstances, or the doing of something which a reasonable and prudent man or woman would not have done under the same and similar circumstances, plus the fact that the doing or

not doing of that something that might be required, under the same and similar circumstances, is the proximate cause of the injury sustained, that is, the cause without which the injury would not have occurred, and it being such that a person of reasonable prudence should have foreseen that *that was likely to be the result of what took place;* and in this instance, if you are satisfied from the evidence and by its greater weight, on this first issue, that the defendant failed to exercise that degree of care that a reasonable and prudent man or woman, *with the usual and customary knowledge of cosmetology,* that that person has failed to exercise the care that a person with those capabilities would have, and should have, under the same and similar circumstances, then that would be negligence; *or,* if the defendant did something that a reasonable and prudent operator would not have done under the same and similar circumstances, that is, if the defendant failed to do what was done as skillfully and as carefully as a reasonable and prudent beauty operator would have and should have, under the same and similar circumstances, then that would be negligence, and it would be your duty, if you find that that were true and that that was the proximate cause of the injury that this plaintiff had, then it would be your duty to answer that first issue, 'Yes.'" (Emphasis added.)

In the first italicized portion of this supplementary instruction in response to the specific request for clarification by the jury, the court inadvertently repeated the above mentioned error with respect to the necessity of foreseeability of the precise injury which resulted. In the second italicized portion, the court failed clearly to state that the defendant operator must possess the knowledge and skill which is customarily possessed and exercised by cosmetologists in the area wherein she practices. The jury could well interpret the instruction to mean it must find the defendant operator failed to exercise the care of a reasonable person having no more knowledge of cosmetology than is usually and customarily possessed by the public generally. The defendants held themselves out to the public, including this plaintiff, as possessing a substantially higher degree of knowledge and skill in the art of cosmetology than that possessed by the general public, and they are liable for damages, if any, proximately caused by their failure, if any, to have that degree of skill which cosmetologists practicing in the High Point area customarily possess. This error in the charge was also prejudicial to the plaintiff.

New trial.

STATE v. BURLEY EDWARD HAYES.

(Filed 22 May 1968.)

1. Indictment and Warrant § 14; Criminal Law § 16—

A motion to quash in its entirety an indictment originating a prosecution in the Superior Court is properly denied when the court has jurisdiction to render judgment upon one of the counts charging a felony, even though another count charges a misdemeanor for which an inferior court has exclusive original jurisdiction.

2. Criminal Law § 124—

Where a verdict of guilty specifically refers to one of the counts, but not to all, it amounts to an acquittal of the counts not referred to.

3. Criminal Law § 75— Defendant's statements at scene of accident admissible despite failure to give Miranda warnings.

Testimony of a police officer that when he asked the crowd gathered at the scene of an automobile accident who was the driver of the automobile, defendant stepped forward, that when asked for his driver's license and registration card, defendant replied that he had no license and that the automobile belonged to his sister, that defendant gave his sister's name, and that when asked for his sister's address defendant stated that he had stolen the automobile, *is held* properly admitted in evidence although the officer did not advise defendant of his rights as required by *Miranda v. Arizona*, 384 U.S. 436, it appearing that defendant's admission was the result of a general police investigation at the scene of an automobile accident and was not the result of in-custody interrogation.

4. Larceny §§ 5, 8—

The presumption arising from the recent possession of stolen property is to be considered by the jury merely as evidential fact along with other evidence in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of defendant's guilt, and an instruction which in effect places the burden on defendant to offer evidence in explanation of his recent possession sufficient to raise a reasonable doubt of his guilt is prejudicial error.

APPEAL by defendant from *Crissman, J.*, 28 August 1967 Criminal Session of GUILFORD — Greensboro Division.

Criminal prosecution on an indictment containing three counts. The first count charges defendant on 26 July 1967 with the larceny of a 1964 Chevrolet, four-door sedan, color aqua, serial No. 41869C-166379, of the value of $1,200, the property of Bamby Bakers, Inc.; the second count charges defendant on the same date and at the same place with receiving the same automobile well knowing that it had been theretofore feloniously stolen, taken, and carried away; and the third count charges defendant on the same day and place with unlawfully and willfully driving and carrying away a vehicle, not his own, without the consent of Bamby Bakers, Inc., the owner thereof, with intent to temporarily deprive said owner of the posses-

sion of said automobile and without intent to steal the same, a violation of G.S. 20-105.

Defendant, who was an indigent, was without counsel, and the court appointed as his counsel James L. Swisher, an attorney at law of the Guilford County Bar. Defendant entered a plea of not guilty. Verdict: "Guilty of Larceny as charged in the Bill of Indictment in Count One."

From a judgment of imprisonment for a period of not less than five nor more than seven years, defendant appealed to the Supreme Court. Whereupon, the trial court appointed James L. Swisher to perfect his appeal and to appear for him in the Supreme Court. The record on appeal and the brief of defendant were mimeographed at the expense of Guilford County in the same manner that records on appeal and briefs are prepared in the case of solvent defendants.

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

Cahoon & Swisher by James L. Swisher for defendant appellant.

PARKER, C.J. Before pleading to the indictment, defendant moved to quash it. The defendant contends that the first two counts in the indictment charge the commission of felonies, while the third count in the indictment charges the commission of a misdemeanor; and that the Municipal-County Court of the city of Greensboro has original exclusive jurisdiction over misdemeanors, and, consequently, the indictment should be quashed. This assignment of error is overruled. The third count in the indictment charges a violation of G.S. 20-105, which is a misdemeanor. So far as the record before us discloses, the criminal prosecution here on all three counts was upon an indictment which originated in the Superior Court of Guilford County. The Municipal-County Court, Criminal Division, Greensboro, Guilford County, has "original, exclusive and final jurisdiction" over a violation of G.S. 20-105 committed in the city of Greensboro. Any jurisdiction the Superior Court of Guilford County obtains for a violation of G.S. 20-105 must be derivative. 1955 Session Laws, Ch. 971, sec. 3(a) and (b)(1). *S. v. Covington*, 267 N.C. 292, 148 S.E. 2d 138. The Superior Court of Guilford County under the circumstances here had no jurisdiction to try defendant for a violation of G.S. 20-105. *S. v. Covington, supra.* So far as the record before us discloses, the jury found by its verdict that defendant was "Guilty of Larceny as charged in the Bill of Indictment in Count One," and did not refer in its verdict to counts two and three in the indictment. The verdict in the case amounts to a verdict of acquittal on counts two and three

in the indictments. *S. v. Broome,* 269 N.C. 661, 153 S.E. 2d 384; *S. v. Choate,* 228 N.C. 491, 46 S.E. 2d 476; 3 Strong, N. C. Index 2d, Criminal Law, § 124.

The Superior Court of Guilford County had original jurisdiction over the offense of larceny of an automobile of the value of $1,200 as charged in the first count in the indictment, and to impose sentence upon conviction. *S. v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91. The first count in the indictment charges all the essential elements of larceny of an automobile of the value of $1,200 and empowered the court to render judgment upon conviction upon the first count in the indictment. Therefore, defendant's motion to quash the indictment in its entirety was properly overruled. *S. v. Anderson,* 265 N.C. 548, 144 S.E. 2d 581; *Commonwealth v. Nichols,* 134 Mass. 531; *Tyson v. People,* 116 N.Y.S. 2d 394; *Hardison v. State,* 226 Md. 53, 172 A. 2d 407; 27 Am. Jur., Indictments and Informations, § 129.

A summary of the State's evidence tends to show the following facts: On 26 July 1967 Bamby Bakers, Inc., owned a 1964 Chevrolet, four-door sedan, color aqua, serial No. 41869C166379, which at that time had a value of about $1,400. On the afternoon of that day this automobile was in its regular assigned parking place when it was feloniously taken and carried away. Defendant was not in any way connected with Bamby Bakers, Inc., and had no authority to drive the automobile away. That day the Greensboro Police Department was notified the automobile was missing and put out "an alert" on the air for the automobile.

W. Y. Herndon, Jr., is an officer of the Virginia State Police assigned to Mecklenburg County, Virginia, which embraces the south central part of Virginia and also Interstate Highway #85 as it comes into Virginia. On 27 July 1967, in response to a radio transmission, Herndon proceeded to the scene of an automobile wreck two miles south of Bracey, Virginia, and two and four-tenths miles north of the North Carolina State line on Interstate Highway # 85, where he found a crashed automobile. The crashed automobile was a 1964 Chevrolet sedan, aqua in color, bearing serial No. 41869C166379. The automobile was damaged on the left front fender and the left rear fender and was sitting on the right side of the highway. Several people were gathered at the scene. He asked who was the operator of the automobile. Defendant Burley Hayes stepped forward. Herndon asked him for his operator's license and his registration to the automobile, and defendant replied that he did not have an operator's license and that the automobile was his sister's. Herndon asked him his sister's name, and he replied, Juanita Hayes.

At this point defendant's counsel objected for the reason that

there had been no evidence of defendant's having been advised of his rights. Whereupon, the court excused the jury from the courtroom. In its absence Herndon testified in summary: After the defendant said the car belonged to his sister, Herndon wrote down the name, Juanita Hayes, which defendant had given him. Defendant did not tell him his sister's address. At that point defendant said: "I might as well tell you the truth now, I stole the car." At that time Herndon did not know that the automobile had been stolen. After defendant said he stole it, Herndon asked him where he got the automobile, and defendant replied, Greensboro. Herndon immediately took him before a justice of the peace and secured a warrant charging him with being a fugitive from justice. While they were in the justice of the peace's office, defendant voluntarily told Herndon that he had stolen the car because he wanted to go back to prison. He said he had friends in there, and he had none on the outside; and, if they turned him loose from this, he would do the same thing again until they took him back to prison. These statements by defendant were not made in response to questions asked him by Herndon who had in fact asked him no questions on this occasion. Herndon testified on cross-examination in the absence of the jury that he did not advise defendant that he had a right to remain silent, that he had a right to an attorney, that any statements he made could be used against him in a court of law, nor of any of his constitutional rights. After the warrant was served on defendant, another State trooper picked him up and took him to the county jail. On redirect examination Herndon testified that when defendant told him that the automobile was stolen, he went to the glove compartment and found a registration card stating that the automobile belonged to Bamby Bakers, Inc., of Greensboro.

At this time the jury returned to the courtroom, and Herndon testified in response to questions by the State, each question being objected to by defendant's counsel, that when defendant told him the automobile belonged to his sister, Juanita Hayes, Herndon asked him for her address, to which the defendant replied, "I might as well tell you the truth now, I stole the car." After defendant made that statement, Herndon looked into the glove compartment and saw that the car was registered to Bamby Bakers, Inc., Greensboro, North Carolina.

Upon his arrival at the scene of the automobile wreck, the Virginia State Policeman, Herndon, did not interrogate defendant at all, but simply asked the crowd generally who was the driver of the car, whereupon defendant stepped forward. When Herndon asked him for his driver's license, defendant replied that he did not have

porators and members, and said persons also constituted the initial Board of Directors. Between 29 April 1955 and 26 November 1963 Sigmund Sternberger made contributions to the Foundation of approximately $80,000. Said corporation was active in carrying out the purposes for which it was formed.

(4) From early 1955 until his death on 19 July 1964 Sigmund Sternberger employed Norman Block as his personal attorney.

(5) On 3 November 1962 Sigmund Sternberger executed two revocable *inter vivos* trust agreements, prepared for him by Norman Block as his attorney, between Sternberger, The Chase Manhattan Bank, as trustee, and the members of a Trust Advisory Committee created by each of said trust agreements. One of these two agreements created a trust for the benefit of Leah Louise B. Tannenbaum, and the other created four separate trusts, one for the benefit of each of the four children of Leah Louise B. Tannenbaum. Said beneficiaries were also beneficiaries of the *corpus* of each of their respective trusts. The terms and provisions of said *inter vivos* trusts are set forth in Exhibits 1 and 2 which were introduced into evidence at the trial.

(6) On 7 November 1962 Sigmund Sternberger executed a last will and testament together with codicil thereto, bearing the same date, both of which were prepared for him by Norman Block as his attorney. Under the provisions of said will and codicil, Sigmund Sternberger bequeathed substantially his entire estate to the *inter vivos* trusts created by him on 3 November 1962, and designated Jeannette S. Baach, Rosa Williams, Leah Louise B. Tannenbaum, Dr. A. J. Tannenbaum, and Norman Block as co-executors of said will. The terms and provisions of said will and codicil are as set forth in Exhibits 3 and 4 which were received in evidence at the trial.

(7) On 2 November 1963 a corporate meeting of the members of Sigmund Sternberger Foundation, Inc., was held. Sigmund Sternberger, designated in the minutes of said meeting as the only member of the corporation, elected a new Board of Directors of the corporation, the same being: Sigmund Sternberger, Rosa S. Williams, Norman Block, A. L. Meyland, and Robert B. Lloyd, Jr. Messrs. Block, Meyland, and Lloyd each contributed the sum of one dollar ($1.00) to the Foundation and, thereupon, each became a member thereof. Leah Louise B. Tannenbaum, Rosa S. Williams, and Jeannette S. Baach were not aware of this meeting until after the death of Sigmund Sternberger.

(8) On 14 December 1963 Sigmund Sternberger executed a revocable *inter vivos* trust agreement, prepared for him by Norman

one and that the automobile belonged to his sister. When Herndon asked defendant the address of his sister, defendant responded by confessing to the crime of which he stands convicted by the lower court.

H. L. Purcell is a police officer in Greensboro. In response to a report that defendant had been picked up by the Virginia State Police, he went to Virginia and served a warrant on Burley Hayes and returned him to North Carolina. This was after he waived extradition.

This is a brief summary of defendant's testimony: About 5:30 p.m. on 26 July 1967 defendant went to the bus station to return to Pageland, South Carolina, where he was working. He could not get a bus until 10:29 p.m., so he sat around the bus station, drank coffee, and took a couple of drinks of whiskey. When he was in the bus station he met four boys he used to run around with after he came out of prison. They all went to the bathroom and took a drink, and these four boys asked him if he would go with them to Virginia. They said they had an automobile. It was a green Chevrolet automobile. They left the bus station around 9:30 p.m. and traveled out to Interstate Highway #85. They stopped at a Gulf station and he bought gas. He traveled with the four boys all night. When they were approximately two miles from the Virginia line, they stopped at a Gulf station. He had not driven the car prior to that time. When they left the filling station, he started driving. When they crossed into Virginia, he was asked to stop the automobile so another boy could drive it. When he started to stop, he was going about 90 to 95 miles an hour and when he hit the brakes, the car started skidding and struck a guard rail. He had been drinking heavily all night. He threw a .32 automatic and a half-gallon of white whiskey in the river right where the automobile was wrecked. He did not know the automobile had been stolen when he started to drive it. He did not steal the automobile. He never told the officer that the automobile belonged to his sister. He did not tell the officer that he stole the automobile. He never told the officer that he wanted to go back to prison. Defendant stated in brief summary on cross-examination: The .32 automatic pistol that he was talking about is his. He carries a pistol and white lightning seven days of the week when he is in the street. He stated the police officers carry a gun and white lightning, and he feels like he can carry them just like they do. He thinks that he was convicted of larceny on 22 September 1960, he was convicted of automobile larceny on 27 January 1960, and he was convicted for mail theft on 6 May 1957; and he does not recall ever having been convicted of carrying a concealed

weapon even though he carries a .32 automatic pistol with him all the time.

Defendant assigns as error the admission in evidence over his objections and exceptions of his statements to Herndon that he had stolen the automobile and that he had stolen it because he wanted to go back to prison where his friends were. Defendant was not under arrest or in custody when the statements attributed to him were made. Herndon testified he did not know the automobile was stolen until after defendant said he stole it. When Herndon saw the wrecked automobile, it was his right to ask who the driver was; and, when defendant stepped forward indicating that he was the driver, Herndon had the further right to ask for his automobile registration card. When defendant told him the automobile was his sister's, Herndon had a right to ask her address. All of these questions were a general, on-the-scene questioning by a State trooper charged with the duty of enforcing the traffic statutes of the State of Virginia in respect to a wrecked automobile on an Interstate Highway. Defendant's voluntary incriminating statements, under the circumstances here, are not barred by the decisions in *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 10 A.L.R. 3d 974; by *Escobedo v. Illinois,* 378 U.S. 478, 12 L. Ed. 2d 977; and by *Massiah v. United States,* 377 U.S. 201, 12 L. Ed. 2d 246, as contended by defendant. A complete answer to defendant's contentions is given in the opinion written by Bobbitt, J., in *S. v. Meadows,* 272 N.C. 327, 158 S.E. 2d 638, in which he said:

> "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 in-custody 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 definitely 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 situations here considered. . . .

* * *

"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 'incommunicado 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 factual situation in the *Massiah* case is completely different from the case at bar. In that case the majority opinion says: "We hold that the petitioner was denied the basic protections of that guarantee [Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." Defendant's assignments of error to the admission of this evidence are overruled.

Defendant assigns as error the overruling of his motion for judgment of compulsory nonsuit. This assignment of error is without merit, requires no discussion, and is overruled.

Defendant assigns as error the charge on recent possession of stolen property, which is as follows:

> "Now, members of the jury, where a theft is established, the recent possession of the stolen property is very generally considered a relevant circumstance tending to establish guilt, and when the possession is so recent as to make it extremely probable that the holder, the person in possession, is the thief, that is, where in absence of explanation, he could not have recently gotten possession unless he had stolen the property himself, there is a presumption justified, and in the absence of such explanation, perhaps requiring conviction. While the recent possession of stolen goods may be of such a character as to raise the presumption of guilt on the part of the holder, it is never a presumption of law in the strict sense of the term, shutting out all evidence to the contrary, but it is always a presumption of fact open to explanation when there are facts in evidence which would afford reasonable explanation of such possession consistent with the defendant's innocence, and which is accepted to explain satisfactorily, the correct rule does not require the defendant to satisfy the jury that his evidence in explanation is true, but in such case, if the testimony offered in explanation, raises a reasonable doubt of guilt, the defendant would be entitled to acquittal.
>
> "So, members of the jury, if you find from the evidence beyond a reasonable doubt that the property described here in this

bill of indictment, this Chevrolet automobile, was stolen and that the same was found in the possession of the defendant, then the law raises the presumption that the defendant is guilty — is guilty of larceny of automobile, a theft. This presumption, however, is one of fact and not of law, and is a circumstance for your consideration bearing upon the question of the defendant's guilt; the rule being that such presumption is stronger or weaker as possession is more or less recent or remote, and the weight you will give such presumption is a matter entirely for you, and if, after considering all the evidence and circumstances in the case, you are satisfied beyond a reasonable doubt of the defendant's guilt, it would then be your duty to render a verdict of guilty. If you are not so satisfied, it would be your duty to render a verdict of not guilty."

The Attorney General states in his brief:

> "Finally, defendant assigns as error the instruction of the Trial Judge with respect to the element of 'recent possession.' The State admits that a charge on the presumption arising of RECENT POSSESSION WHICH PLACES THE BURDEN ON DEFENDANT to rebut the presumption is erroneous. *State v. Ramsey,* 241 N.C. 181 (1954). See also *State v. Holloway,* 262 N.C. 753 (1964)."

This instruction which is challenged by defendant, like the one held erroneous in *S. v. Holbrook,* 223 N.C. 622, 27 S.E. 2d 725; *S. v. Ramsey,* 241 N.C. 181, 84 S.E. 2d 807; *S. v. Holloway,* 262 N.C. 753, 138 S.E. 2d 629, is not only confusing but is open to interpretation that the burden was on defendant to rebut the presumption of his guilt; whereas the presumption arising from the recent possession of stolen property "is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt." *S. v. Baker,* 213 N.C. 524, 196 S.E. 829.

What is said in *S. v. Holbrook, supra,* is applicable here:

> "Under the record evidence, it appears that the instruction complained of may have weighed too heavily against the defendant. *S. v. Harrington,* 176 N.C. 716, 99 S.E. 892. It is open to interpretation that the burden was on the defendant to rebut the presumption of his guilt, whereas the presumption arising from the recent possession of stolen property '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 car-

ried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt.' *S. v. Baker, supra* [213 N.C. 524, 196 S.E. 829]."

The doctrine of recent possession and the guiding principles for its application are explained with care and precision by Stacy, C.J., in *S. v. Holbrook, supra,* and in *S. v. McFalls,* 221 N.C. 22, 18 S.E. 2d 700.

For error in the charge defendant is entitled to a
New trial.

STATE v. LEROY MASSEY.

(Filed 22 May 1968.)

1. **Larceny § 3—**

The common law distinctions between petit and grand larceny have been abolished by G.S. 14-70.

2. **Same—**

The larceny of property of the value of $200 or less is a misdemeanor, G.S. 14-72, but larceny from the person is a felony without regard to the value of the property stolen and is punishable for as much as ten years in the State's prison. G.S. 14-1, G.S. 14-2, G.S. 14-3.

3. **Criminal Law § 4; Constitutional Law § 28—**

The common law rule that an attempt to commit a felony is a misdemeanor remains unchanged in this State unless otherwise provided by statute, and an indictment will not support a conviction for an offense more serious than that charged.

4. **Larceny § 8—**

Trial court's instruction on the offense of larceny from the person in that the taking was "from the prosecuting witness" *is held* sufficient in this case, since the phrase "from the person" is self-explanatory and needs no additional definition.

5. **Criminal Law § 103—**

An instruction of the court submitting to the jury the issue of defendant's guilt of common-law robbery or of the lesser offense of larceny from the person, the maximum punishment for either offense being the same, is not prejudicial to the defendant on the ground that the jury might be misled as to the severity of the penalty imposed upon conviction, since the province and responsibility of the jury is to find the facts while the consequences of the verdict is solely for the court.

6. **Criminal Law § 132—**

A motion to set aside the verdict as being contrary to the evidence is addressed to the sound discretion of the trial judge, whose ruling is not reviewable on appeal in the absence of manifest abuse of discretion.

APPEAL by defendant from *Clarkson, J.*, 10 July 1967 Criminal Session of MECKLENBURG.

Defendant was indicted for the crime of robbery with firearms from the person of Floyd Walton. Defendant entered a plea of not guilty.

Material portions of the State's evidence may be summarized as follows:

The prosecuting witness, Floyd Walton, testified that in the early morning of 29 May 1967 he encountered defendant on West Trade Street in Charlotte and they went to a house on West Fifth Street, where they obtained some liquor. They left the house about twenty minutes later and walked through a field behind an A & P Store. Defendant there told Walton to give him his money and when Walton replied that he had no money, defendant grabbed him by the shirt, causing Walton's billfold to fall to the ground from within his shirt. Defendant picked up the billfold and placed it in his pocket. Walton testified that he saw something in defendant's hand but he was unable to say whether or not it was a gun, and that he did not pick up his billfold because defendant told him he would be killed if he "move or holler." Defendant then directed Walton to walk away. Walton located a police car and told the officers that he had been robbed. He then rode with the police officers to the house where he had earlier obtained liquor and there identified the defendant. The police officers placed defendant in custody of officers Bruce Treadeway and H. R. Smith, who took defendant and Walton to the rear of the A & P Store, where they found in a Dempster Dumpster papers which had been in Walton's billfold. The pocket book was identified by Walton and introduced as State's Exhibit 1.

W. J. Cosner of the Police Department testified and in substance corroborated the testimony of the prosecuting witness. He also testified that defendant denied robbing anyone.

Police Officer Bruce Treadeway testified that on the morning of 29 May 1967, at about 7:15, he advised defendant that he was under arrest for commission of a felony, and at that time advised him of his constitutional rights. Defendant thereupon denied robbing Walton. Defendant and Walton then had a conversation which resulted in Officers Smith and Treadeway, defendant and Walton, returning to the lot behind the A & P Store, where Walton identified papers found in a Dempster Dumpster, as having been in his billfold when it was taken from him. After their return to the detective bureau about 8:10 A.M., defendant stated that he had placed the billfold behind the back seat of the police car in which he rode to the police station that morning.

Officer Dwight Jordan of the Charlotte Police Department testified that he came on duty at about 6:55 A.M. on 29 May 1967, and at about 8:30 or 9:00 o'clock on that morning he found a black billfold, identified as State's Exhibit 1, in the back seat of the patrol car.

Defendant, testifying in his own behalf, stated *inter alia,* that he had been with Walton on the morning in question, but denied that he had left the house on West Fifth Street with Walton or that he robbed him. He testified that Walton and an unidentified person went through the field toward the rear of the A & P Store and that he observed the unidentified person knock Walton down and run. He saw this unidentified person throw something into a Dempster Dumpster as he ran past it. Defendant further testified that the billfold was already in the patrol car when he entered it.

The jury returned a verdict of guilty of larceny from the person. The court imposed sentence confining defendant to State's Prison for a term of not less than three nor more than five years. Defendant appealed.

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

John H. Cutter for defendant.

BRANCH, J. The principal question presented by this appeal is: Did the court err in failing to charge the jury as to the elements constituting larceny from the person?

Defendant was tried on a bill of indictment which charged:

> ". . . That Leroy Massey late of the County of Mecklenburg on the 29th day of May, 1967, with force and arms, at and in the County aforesaid, unlawfully, willfully, and feloniously having in his possession and with the use and threatened use of firearms, and other dangerous weapons, implements, and means, to wit: a pistol whereby the life of Floyd Walton was endangered and threatened, did then and there unlawfully, wilfully, forcibly, violently and feloniously take, rob, steal and carry away $23.00 in lawful money of the United States, personal papers and a billfold the property of Floyd Walton on the value of less than $200.00 to wit: $48.00 from the presence, person, place of business, and residence of Lloyd Walton, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State."

The trial judge, in charging the jury, defined larceny as "the tak-

ing and carrying away from any place at any time of the personal property of another without his consent by a person not entitled to the possession thereof, feloniously with intent to deprive the owner of his property permanently, and to convert it to the use of the taker." And in further explanation and application of the elements involved in larceny, the court stated:

> "So, to warrant the conviction of the defendant upon the charge of larceny, the State must prove beyond a reasonable doubt, from the evidence in this case, first, that at the time named in the indictment the prosecuting witness owned or possessed the personal property mentioned in the indictment; second, that the defendant knowingly took such personal property from the possession of the owner, the prosecuting witness, into his own possession and carried it away; and, third, that such taking and carrying away of such property by the defendant was by a trespass, that is, was against the will of the prosecuting witness, or at least without his consent; and, fourth, that such taking and carrying away of such property by the defendant was without any claim or pretence of right on the part of the defendant, and was with a then existing felonious intent on the part of the defendant wholly and permanently to deprive the prosecuting witness of his property to appropriate or convert the same to his, the defendant's, own use."

At common law the stealing of property of any value was a felony, and both grand larceny and petit larceny were felonies. *State v. Andrews,* 246 N.C. 561, 99 S.E. 2d 745. The common law distinctions between petit and grand larceny have been abolished by the ancient statute now codified as G.S. 14-70.

G.S. 14-72 provides:

> "The larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of not more than two hundred dollars, is hereby declared a misdemeanor, and the punishment therefor shall be in the discretion of the court. If the larceny is from the person, or from the dwelling or any storehouse, shop, warehouse, banking house, counting house, or other building where any merchandise, chattel, money, valuable security or other personal property shall be, by breaking and entering, this section shall have no application. In all cases of doubt the jury shall, in the verdict, fix the value of the property stolen."

Under the provisions of G.S. 14-72 as amended, the larceny of property of the value of $200 or less is a misdemeanor. It is provided

in the statute that the statute does not apply when "the larceny is from the person . . ." Thus, larceny from the person as at common law is a felony without regard to the value of the property stolen, and the punishment for larceny from the person may be for as much as ten years in State's prison. *State v. Brown,* 150 N.C. 867, 64 S.E. 775; *State v. Acrey,* 262 N.C. 90, 136 S.E. 2d 201; G.S. 14-1, 14-2, 14-3.

We find a full discussion of the statutory acts leading to the enactment of the present G.S. 14-72, together with an exhaustive discussion of cases interpreting the statute, by Bobbitt, J., speaking for the Court in the case of *State v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91.

The Act of 1895, Chapter 285, entitled "An Act to limit the punishment in certain cases of larceny" provided in Section 1 that where the value of the property stolen did not exceed twenty dollars, the punishment for the first offense should not exceed imprisonment for a longer term than one year. This Act also contained a further proviso that "if the larceny is from the person, section one of the act shall have no application." The various amendments to this act (which are apparent from a cursory reading and comparison of the Act of 1895, Chapter 285, and G.S. 14-72) have not affected the crime of larceny from the person.

The definition here given by the trial judge contains all the elements necessary to constitute and accurately describe and explain the crime of larceny. *State v. Booker,* 250 N.C. 272, 108 S.E. 2d 426; *State v. Griffin,* 239 N.C. 41, 79 S.E. 2d 230; *State v. Cameron,* 223 N.C. 449, 27 S.E. 2d 81.

There are cases in North Carolina which seem to hold that in indictments for larceny or crimes which include larceny as a lesser included offense, it is not essential for the State to allege in the indictment that the taking was from the person in order to support a verdict and sentence for the crime of larceny from the person. These cases place the burden on defendant to show diminution of sentence under P.L. 1895, Chapter 285, or G.S. 14-72. *State v. Bynum,* 117 N.C. 749, 23 S.E. 218; *State v. Harris,* 119 N.C. 811, 26 S.E. 148. However, later cases hold that in order for the State to convict of the felony of larceny (except in those instances where G.S. 14-72 does not apply) the State must prove beyond a reasonable doubt that the property stolen had a value of more than $200.00. *State v. Cooper, supra; State v. Weinstein,* 224 N.C. 645, 31 S.E. 2d 920; *State v. Tessnear,* 254 N.C. 211, 118 S.E. 2d 393. Further, this Court has held that where an indictment charges larceny of $200.00 or less, but does not contain allegations that the larceny was from a building by breaking and entering, the punishment cannot exceed two years in

prison, even though all the evidence tends to show the larceny was accomplished by a felonious breaking and entering. *State v. Bowers,* 273 N.C. 652, 161 S.E. 2d 11.

G.S. 14-87 provides for more serious punishment for the commission of a robbery when such offense is committed or *attempted* with the "use or threatened use of any firearms or other dangerous weapon, or implement or means," than is provided for common law robbery. The statute does not attempt to change the offense of common law robbery or divide it into degrees. *State v. Chase,* 231 N.C. 589, 58 S.E. 2d 364. The common law rule that an attempt to commit a felony was a misdemeanor remains unchanged in this state, unless otherwise provided by statute, and an indictment will not support a conviction for an offense more serious than that charged. *State v. Hare,* 243 N.C. 262, 90 S.E. 2d 550. However, the indictment in the instant case is sufficient, since the bill of indictment alleged a consummated robbery with firearms and included the allegation that the property was stolen from the person of the prosecuting witness. *State v. Fowler,* 266 N.C. 667, 147 S.E. 2d 36.

The crimes of larceny and larceny from the person are defined in the case of *State v. Braxton,* 230 N.C. 312, 52 S.E. 2d 895, as follows:

> ". . . 'the felonious or criminal taking and carrying away of the personal property of another by force and against the will of the owner and taking and carrying it away with the then present intent on the part of the one who takes it to appropriate it to his own use for all time and to deprive the rightful owner of its use, and when that taking is from the person of one then it becomes larceny from the person.' . . ."

Black's Law Dictionary, 4th Edition, defines larceny from the person as "Act of taking property from the person by merely lifting it from the person or pocket."

Admittedly, the charge in the instant case is not a model charge on the crime of larceny from the person; however, the trial judge clearly instructed the jury that the issue of defendant's guilt on this charge was being submitted to them. Although the remainder of the charge was confined to instructions correctly given on larceny and common law robbery, the trial judge referred to the taking as "from the prosecuting witness, Floyd Walton." The jury could hardly have failed to understand what is meant by the expression "from the person." It is self-explanatory and needs no additional definition. There is no point in explaining the obvious. Moreover, if the charge be erroneous, it must be because of the omission of the

words showing the taking to be from the person. The verdict of the jury, "The jury finds the defendant guilty of larceny from the person," further tends to show that this jury obviously understood the charge and its relation to the evidence adduced at the trial.

The verdict was clearly supported by the allegations of the indictment and by the evidence presented at the trial. Defendant fails to show error in the charge affecting one of his substantial rights and that a new trial would probably result in a different verdict. *State v. Peacock,* 236 N.C. 137, 72 S.E. 2d 612; *State v. Birchfield,* 235 N.C. 410, 70 S.E. 2d 5; *State v. Bullins,* 226 N.C. 142, 36 S.E. 2d 915.

Defendant also assigns as error the court's failure to grant defendant's motion to set aside the jury verdict. In support of this assignment of error defendant advances the same arguments concerning the court's instructions which we have hereinabove discussed. He further contends that this assignment of error is tenable because of the single instruction of the trial court: ". . . so the case will be submitted to you on the issue of whether he's guilty of common law robbery or whether he's guilty of the lesser offense of larceny from a person." The defendant did not favor us with citation or argument in his brief as to this assignment of error. However, conceding for the purpose of argument, but without deciding that the crime of larceny from the person is not a lesser offense than that of common law robbery, defendant has failed to show prejudicial error in the court's instructions which would justify his motion to set aside the verdict. We assume that defendant is here contending that the jury was misled as to the quality of the criminal act or the severity of the penalty which might be imposed therefor.

Whether larceny from the person is a lesser offense than common law robbery as related to the punishment, was of no concern to the jury, since its province and responsibility was to find facts and return a verdict based thereon. The consequence of the verdict was solely in the domain of the trial court. *State v. Hawley,* 229 N.C. 167, 48 S.E. 2d 35.

The motion to set aside the verdict as being contrary to the evidence was addressed to the sound discretion of the trial judge, whose ruling is not reviewable on appeal in absence of manifest abuse of discretion. *Grant v. Artis,* 253 N.C. 226, 116 S.E. 2d 383. This record does not reveal error of law appearing on the face of the record so as to sustain defendant's exception to entry of judgment on the verdict. *Vance v. Hampton,* 256 N.C. 557, 124 S.E. 2d 527.

We have made a careful examination of the entire record and find no prejudicial error.

No error.

FRANCES GUESS HOLSOMBACK v. JOSEPH B. HOLSOMBACK.

(Filed 22 May 1968.)

1. **Appeal and Error § 16—**

G.S. 1-287.1 does not apply when no case on appeal is required, and in such case the judge of the Superior Court has no authority to dismiss the appeal for failure to file case on appeal.

2. **Appeal and Error § 35—**

No case on appeal is required where appellant's assignments of error all relate to the record proper, the only requirement being that appellant docket his appeal within the time required by the rules of the Supreme Court.

3. **Notice § 2—**

Statutory requirements with reference to notice are strictly construed where the giving of notice must be relied upon to divest the recipient of a right.

4. **Judgments § 10—**

A consent judgment can be modified or set aside only by the consent of the parties or by an independent action based on fraud or mistake.

5. **Divorce and Alimony § 11—**

A consent judgment with reference to the payment of future installments of alimony is subject to modification by the court in the event of changed conditions.

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

APPEAL by plaintiff from *May, S.J.*, 24 July 1967 Civil Session of DURHAM, docketed and argued at the Fall Term 1967 as Case No. 772.

Plaintiff commenced this action against her husband on 10 May 1962 for alimony without divorce and the custody of their 14-year-old daughter, Charlotte. Plaintiff alleged that defendant, a gainfully employed mechanic, had abandoned her without cause and had failed to provide adequate support for her and the child. Answering the complaint, defendant admitted his obligation to support his wife and daughter and that plaintiff was the proper person to have custody of the child. He asked the court to set alimony and subsistence in a reasonable amount.

Plaintiff moved before Hobgood, J., on 18 May 1962 for allowances *pendente lite*. For the purpose of that hearing, defendant stipulated that he had abandoned plaintiff without just cause. Judge Hobgood awarded custody to plaintiff and ordered defendant to pay into court the sum of $40.00 per week for the support of his wife and child. He also gave plaintiff possession of the residence, which

the parties owned as tenants by the entirety, and directed defendant to pay the taxes, insurance and mortgage payments on the property.

On 3 June 1964, upon plaintiff's affidavit that defendant was then in arrears with the payments ordered by Judge Hobgood, Judge Mallard ordered defendant to show cause on 9 June 1964 why he should not be attached for contempt. However, the record does not disclose any proceedings based upon this order. On 11 February 1965, upon plaintiff's affidavit that defendant was $1,164.00 in arrears, Judge Johnson directed defendant to show cause why he should not be punished for contempt. On 17 February 1965, during a hearing begun before his Honor, Hubert E. May, defendant's attorney suggested that the parties be given an opportunity to discuss a settlement of their differences. The matter was continued for that purpose. Sometime prior thereto, in the Durham County Civil Court, defendant had instituted an action for divorce, which plaintiff was contesting.

On 24 February 1965, plaintiff filed an affidavit in which she averred that in the course of their discussions the parties did reach a settlement, which they reported to Judge May; that he approved and directed the attorneys to prepare a consent judgment; that the following day defendant reneged and refused to sign the judgment. Plaintiff also alleged, *inter alia,* that defendant was then $1,341.50 in arrears with the payments ordered by Judge Hobgood. Upon this affidavit an order to show cause was issued and served upon defendant on 25 February 1965.

Thereafter, on 17 March 1965, Johnson, J., entered a consent judgment, which was also signed by the parties and their attorneys. After rehearsing the history of the case, the judgment recited the agreement, which is summarized as follows:

(1) The facts found by Judge Hobgood in his judgment of 18 May 1962 are true.

(2) Plaintiff is granted full custody and control of Charlotte Holsomback.

(3) Defendant will transfer to plaintiff his interest in their 1953 Oldsmobile.

(4) The real estate owned by the parties as tenants by the entirety will be appraised by three appraisers selected in a specified manner. If defendant does not wish to purchase the property, it will be sold by the attorneys for the parties (as commissioners appointed by the court) at either public or private sale, and the proceeds equally divided between plaintiff and defendant. Until this property settlement is fully consummated, the judgment entered by Hob-

good, J., on 18 May 1962 will remain in full force and effect. Upon the final settlement, defendant shall pay plaintiff the full amount of all his arrearages.

(5) Beginning one week after the property settlement is made, defendant will pay into the office of the Clerk of the Superior Court of Durham County the sum of $30.00 per week during the minority of Charlotte Holsomback or until she finishes school and becomes self-supporting, whichever occurs first. Thereafter, as permanent alimony, defendant will pay plaintiff the sum of $15.00 per week until her death or remarriage.

(6) Plaintiff will withdraw her answer and not contest the divorce action which defendant has instituted in the Durham County Court and, upon consummation of the property settlement, she will make no further claim against defendant.

Judge Johnson approved the foregoing agreement and specifically ordered, adjudged and decreed its performance by the parties.

On 23 June 1967, plaintiff filed her fourth affidavit and motion that defendant be required to show cause why he should not be adjudged in contempt for failure to comply with the orders of the court. She alleged, *inter alia:* (1) The commissioners were unable to sell the residence of the parties at its appraised value of $7,500.00. From 17 March 1965 until 18 July 1966, when plaintiff had to vacate the house because she could not maintain it in a habitable condition, she herself was forced to make the mortgage payments on it. On 15 January 1967, the house was sold for $5,500.00, and plaintiff received the sum of $2,391.83, the parties' equity in the premises. (2) As of 31 December 1966, defendant was $2,473.86 in arrears with the payments which Judge Hobgood had ordered. After crediting him with his one-half of the proceeds from the sale of the residence, he remained $1,277.94 in arrears. (3) The parties still own as tenants by the entirety a farm which has been appraised at $4,800.00.

In his answer to plaintiff's verified motion, defendant alleged, *inter alia,* that he was willing to pay plaintiff one-half of the appraised value of the farm in full settlement of his obligation to her. He prayed (1) that he be released from any further obligation to support his wife and that an adequate sum be fixed for the support of his daughter until she became self-sustaining; (2) that plaintiff be ordered to convey her interest in the farm to him upon the receipt of $2,400.00; and (3) that he be allowed to proceed with his divorce action.

The motion came on for hearing before Judge May on 24 July 1967. Upon the "oral arguments by both attorney for the petitioner and attorney for the respondent," he found the following facts: (1)

defendant is in arrears in the amount of $2,763.86; (2) "there was some type of consent judgment entered into, on or about the 17th day of March 1965, and signed by his Honor W. A. Johnson"; and (3) "the stipulations set forth in said judgment were not carried out and executed by either party." Upon these findings, Judge May set aside the consent judgment which the parties and Judge Johnson had signed on 17 March 1965 and decreed that the order entered by Judge Hobgood on 18 May 1962 "is in full force and effect as if no consent order had been entered into by the parties hereto." He directed defendant to pay all arrearages to date; that he *"be given full credit for the proceeds from the sale of the house owned by the parties hereto"* (emphasis added); and that he continue to make the payments which Judge Hobgood had ordered. He also directed defendant to pay plaintiff's counsel the sum of $400.00 for services rendered to date.

Plaintiff excepted to the foregoing judgment and appealed. She was allowed 45 days in which to serve statement of case on appeal. Appeal bond in the sum of $200.00 was adjudged sufficient. No case on appeal was ever served. On 11 October 1967, defendant filed in the Superior Court a motion to dismiss the appeal for failure to serve statement of case on appeal and to post the required appeal bond. Notice of this motion was served upon plaintiff's counsel on 12 October 1967. Four days thereafter, on 16 October 1967, Judge Pou Bailey signed an order dismissing plaintiff's appeal on the grounds set forth in the motion. Counsel for plaintiff were not present when this order was entered and gave no notice of appeal from it. Subsequently, on 26 October 1967, plaintiff docketed her appeal in the Supreme Court. At the same time the appeal bond, justified on 8 August 1967 before the Clerk of the Superior Court of Durham County, was filed with the Clerk of this Court. On 12 December 1967, defendant filed a motion in this Court to dismiss plaintiff's appeal upon the ground that she had not appealed from Judge Bailey's order dismissing her appeal from Judge May's judgment.

Lester W. Owen for plaintiff appellant.

Weatherspoon & Pulley by Joe C. Weatherspoon; Hofler, Mount & White by Richard M. Hutson, II, for defendant appellee.

SHARP, J. When statement of case on appeal to the Supreme Court has not been served on the appellee within the time allowed, G.S. 1-287.1 requires the Superior Court judge, upon motion by the appellee, to enter an order dismissing the appeal "provided the appellant has been given at least five (5) days' notice of such motion."

This section further specifically provides that it "shall not apply in any case with the respect to which there is no requirement to serve a case on appeal."

The only question posed by this appeal is whether Judge May had authority to set aside the consent judgment entered by Johnson, J., on 17 March 1965. Appellant's assignments of error all relate to the record proper. Therefore, she was not required to serve a case on appeal upon defendant. *Rouse v. Rouse,* 238 N.C. 568, 78 S.E. 2d 451. In *Edwards v. Edwards,* 261 N.C. 445, 135 S.E. 2d 18, the defendant, appealing from a judgment on the pleadings, failed to serve a case on appeal. Upon the appellee's motion, made under G.S. 1-287.1, the judge dismissed her appeal. Notwithstanding, in apt time, she docketed it in this Court. In denying the plaintiff's motion to dismiss the appeal, Parker, C.J., said, "The only error relied on by appellant in her appeal . . . is presented by the record proper. Consequently, the record proper constitutes the case to be filed in this Court, and defendant was not required to serve it on appellee or his counsel. . . . Appellant filed the record proper in apt time in this Court. Plaintiff's motion to dismiss the appeal is without merit." *Id.* at 448, 135 S.E. 2d at 20-21.

Similarly, in this case, the only requirement was that appellant docket her appeal within the time required by the rules of this Court. This she did. Judge Bailey could not deprive plaintiff of the right to have this Court review her case for errors appearing upon the record proper. 1 Strong, N. C. Index, Appeal and Error § 21 (1957). We also note that, at the time Judge Bailey dismissed her appeal, appellant had not had the five days' notice which G.S. 1-287.1 requires. Statutory requirements with reference to notice are strictly construed where the giving of notice must be relied upon to divest the recipient of a right. *In re Appeal of Harris,* 273 N.C. 20, 159 S.E. 2d 539. Appellant's motion to dismiss plaintiff's appeal is denied.

In the consent judgment which Judge May purported to set aside, the parties agreed upon a division of their property and upon the amount of alimony which defendant should pay plaintiff until her death or remarriage. This judgment was not only a contract between the parties; it was also a decree of the court. The order with reference to the payment of future installments of alimony was, therefore, subject to modification by the court in the event of changed conditions. The agreed division of property, a separable provision, however, was beyond the power of the judge to modify without the consent of both parties. *Bunn v. Bunn,* 262 N.C. 67, 136 S.E. 2d 240; *Briggs v. Briggs,* 178 Ore. 193, 165 P. 2d 772, 166 A.L.R. 666. In

respect to its property provisions, the judgment of 17 March 1965 is an ordinary consent judgment which, absent the consent of the parties thereto, can be modified or set aside only for fraud or mistake in an independent action. *King v. King,* 225 N.C. 639, 35 S.E. 2d 893; *Keen v. Parker,* 217 N.C. 378, 8 S.E. 2d 209.

Judge May did not purport to exercise his right to modify the alimony provision of the consent judgment. Plaintiff did not agree either to modify or vacate it in any respect. Judge May, therefore, had no authority to set it aside or to direct that plaintiff's one-half of the net proceeds of the sale of the residence be credited upon defendant's arrearages under Judge Hobgood's judgment.

The judgment of 26 July 1967 from which plaintiff appeals is Reversed.

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

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 22 May 1968.)

1. Deeds § 4; Evidence §§ 41, 43—

In this action to set aside a deed for want of mental capacity in the grantor, testimony of the witnesses that in their opinion the grantor did not have sufficient mental capacity to understand the nature and consequences of making a deed, its scope and effect, and to know what land he was disposing of and to whom and how, *is held* properly admissible. *Hendricks v. Hendricks,* 272 N.C. 340, is no longer authoritative.

2. Appeal and Error § 53—

Where the rights of the parties are determined by the jury's answer to one of the issues, error relating to another issue is not prejudicial.

ON plaintiffs' petition to rehear our former decision reported in 272 N.C. 340.

Cooke & Cooke by William Owen Cooke for plaintiffs.

Jordan, Wright, Henson & Nichols by Edward L. Murrelle for defendants.

HIGGINS, J. The plaintiffs, within the time allowed by our rules, filed a petition to rehear, to vacate our former decision, and to sustain the judgment entered in the Superior Court. The Justices to whom the petition was referred ordered the rehearing and granted the parties leave to file additional briefs.

The Court has considered the original record and all briefs in the light of the petition to rehear. The pleadings, issues, and a summary of the evidence are set out in our former decision. However, the recitation of the evidence on the issue of mental capacity omitted the testimony of Dr. Flythe, who was the personal physician of Daniel J. Hendricks, Sr. from 1952 until his death in September, 1965. Dr. Flythe testified that prior to 1964, Mr. Hendricks had suffered from chronic brain syndrome, hardening of the arteries, and degeneration of mental faculties, including loss of memory. These ailments grew progressively worse until his death. Dr. Flythe expressed the opinion that in April, 1965, Mr. Hendricks did not have mental capacity "to understand the importance of what he was doing". This evidence is noted here because of what appears to be preponderating evidence to the contrary recited and discussed in the former opinion. Dr. Flythe gave the only medical testimony before the jury.

At the jury trial the plaintiffs examined certain lay witnesses, each of whom testified that based on his contacts and observations, he had formed an opinion satisfactory to himself as to the mental condition of Daniel J. Hendricks, Sr. as of April 15, 1965. Each testified in his opinion Mr. Hendricks did not have "sufficient mental capacity to understand the nature and consequences of making a deed, its scope and effect, and to know what land he was disposing of and to whom and how."

The decision now being reconsidered held the trial court committed error in overruling defendants' objection to the foregoing testimony and the error entitled the defendants to a new trial. The basis of the objection did not involve the right of lay witnesses to testify as to mental condition, but that the form of the question and the answer permitted the witness to express an opinion on the ultimate issue involved and thereby to invade the province of the jury. In support, the opinion cited *McDevitt v. Chandler,* 241 N.C. 677, 86 S.E. 2d 438. The witnesses in the case now being reconsidered testified that in their opinion Mr. Hendricks did not have sufficient mental capacity to understand the nature and consequences of making a deed, its scope and effect, and to know what land he was disposing of and to whom and how. The propriety and admissibility of the evidence is recognized in a long line of this Court's decisions. *Goins*

v. McCloud, 231 N.C. 655, 58 S.E. 2d 634; *Davis v. Davis,* 223 N.C. 36, 25 S.E. 2d 181; *Bissett v. Bailey,* 176 N.C. 43, 96 S.E. 648; *Lamb v. Perry,* 169 N.C. 436, 86 S.E. 179; *Whitaker v. Hamilton,* 126 N.C. 465, 35 S.E. 815; Strong, N. C. Index, 2d Ed., Vol. 3, Deeds, § 4, p. 243.

McDevitt is not in conflict with the position we now take. In that case, the Judge asked this question: "Is it your opinion on that day she did not have sufficient mental capacity to make a deed?" The Judge's question permitted the witness to draw the ultimate conclusion and thereby invaded the province of the jury. *Terrell v. Ins. Co.,* 269 N.C. 259, 152 S.E. 2d 198; *Ponder v. Cobb,* 257 N.C. 281, 126 S.E. 2d 67; Strong's N. C. Index, 2d Ed., Evidence, Sec. 41, Vol. 3, p. 668. Error in the question required the court to award a new trial.

In the case at bar there was competent evidence to sustain the jury's finding that on April 15, 1965 Daniel J. Hendricks, Sr. did not possess sufficient mental capacity to execute the deed to Daniel J. Hendricks, Jr. The pleadings raised the issue. The jury's answer thereto settled the case in favor of plaintiffs and authorized the judgment setting the deed aside. The second issue (duress) was rendered immaterial by the answer to the first issue. The court should have charged the jury that if, on the first issue, it found that Mr. Hendricks did not have sufficient mental capacity to make the deed, then the second issue was immaterial and need not be answered. It appearing that error was not committed on the first issue, which was answered in favor of the plaintiff, any errors committed on the second issue were rendered harmless and of no consequence. "The court will not consider exceptions and assignments of error arising upon the trial of other issues, when one issue decisive of appellant's right to recover has been found against him." *Bullin v. Moore,* 256 N.C. 82, 122 S.E. 2d 765; *King v. Powell,* 220 N.C. 511, 17 S.E. 2d 659; *Winborne v. Lloyd,* 209 N.C. 483, 183 S.E. 756; Strong's N. C. Index, 2d Ed., Appeal and Error, Sec. 53, pp. 211-212 (citing many cases.)

After a full rehearing, the Court now determines: (1) Its former decision reported in 272 N.C. 340 awarding a new trial was not sustained by the record; (2) A prejudicial error was not committed by the trial court; (3) The order granting a new trial is vacated; (4) the former decision is no longer authoritative; (5) This opinion becomes the law of the case.

In the Superior Court judgment, we now find

No error.

STATE OF NORTH CAROLINA v. JAMES WHITE, JR.

(Filed 22 May 1968.)

Rape § 5—

Evidence in this case *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of the crime of rape.

APPEAL by defendant from *Bailey, J.*, October 30, 1967 Criminal Session, DURHAM Superior Court.

In this criminal prosecution, the defendant, James White, Jr., was tried upon a bill of indictment which charged the capital felony of rape. The victim, Shirley Ann Rebells, a colored female, age 20 years, and weighing 96 pounds, resided with her mother on Odell Street in Durham. On the night of August 23, 1966, at about 11:45, as she was returning home from a visit to a relative who lived nearby, a tall colored man, with long hair, whom she did not know, asked for directions to the Robinson factory. She gave him directions, and as she continued on her way, the man seized her from behind, choked her, struck her in the face with his fist, dragged her into a junk yard where he violently beat her, stripped off her clothes, and raped her. He then dragged her from the junk yard across the railroad tracks into the bushes and again raped her. During the process, all of her clothes and part of his were removed. While he was hunting for one of his shoes, which he had lost in the struggle, she escaped in the bushes, and when he left, she went to the first house for help.

The owner and his wife took her in, gave her some clothes, and called the police. Miss Rebells gave a detailed description of her assailant and told the police where the assault had occurred. They took her to the hospital where for the next two weeks she underwent treatment for her injuries.

Here, in part, is the doctor's testimony with respect to the victim's injuries: "Her hair was disheveled and dirty; her face was puffy; and her eyes were swollen to such an extent that her lids could only be opened enough to form tiny slits. There was dried blood in both eyes. There was a superficial laceration less than one-half inch long on the left upper eyelid. She had bruised areas over the back and upper central part of her chest, and superficial scratches over the back, lower abdomen, left breast, front and outer thighs, and lower legs and ankles. The examination revealed some dried blood on the outside of her female organs. . . . X-rays revealed a fracture of the left cheek bone. My best opinion is that she had had recent intercourse."

The officers found the victim's clothing in the junk yard and in the bushes across the street. They found blood in the junk yard.

They later found a man's shoe, a pair of men's shorts, and a pair of men's pants. From photographs in the rogue's gallery, she immediately identified the picture of her assailant.

The defendant was arrested in Washington, D. C. in May, 1967. Miss Rebells positively identified him in Washington and repeated the identity to the jury. The State introduced in evidence articles of clothing found in the places the victim testified the assault occurred.

A State's witness testified the defendant came to his house while he was in bed one morning in August, 1966 and asked to borrow a pair of pants. He had something wrapped around him, but not clothed otherwise. The witness gave him a pair of trousers which later in the day were found at the door, inside the screen. Another witness identified the shorts which he had given to the defendant. Another witness identified the shoes as having belonged to the defendant. "The right shoe had a slit in it at the back because he had a sore back of his heel." These articles of clothing were introduced in evidence after being identified by the witnesses.

At the close of the State's evidence, the defendant moved for a directed verdict of not guilty and assigned as error the Court's refusal to grant the motion. The defendant did not offer evidence. The jury returned a verdict of guilty of rape with a recommendation that the punishment be imprisonment for life. From the judgment entered accordingly, the defendant appealed.

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

Jerry L. Jarvis for the defendant.

PER CURIAM. It will be difficult indeed to find in our books a case in which more compelling evidence of guilt was presented by the State. By independent evidence, the victim's story was amply corroborated in all essential details and contradicted in none. The defense counsel, as was his duty, questioned the sufficiency of the evidence to convict. Likewise, he questions the accuracy of the Court's charge. In neither particular was he successful in making the challenge good. The evidence was overwhelming and the Court's charge fully sustained by our decisions. In addition to the points raised by defense counsel, we have examined the record with that care which is customary in capital cases and find the trial free from error. In recommending life imprisonment, the jury did not deal harshly with the defendant.

No error.

APPENDIX.

AMEND SUPPLEMENTARY RULES OF THE SUPREME COURT GOVERNING THE HEARING OF CAUSES WHICH WERE ORIGINALLY DOCKETED IN THE COURT OF APPEALS, BY ADDING A NEW RULE TO BE NUMBERED RULE 18, READING AS FOLLOWS:

18. *Appeal Bond.*

(a) In all appeals as of right from the Court of Appeals to the Supreme Court and in all causes initially determined by the Court of Appeals and certified for further appellate review to the Supreme Court upon petition for *certiorari*, the appellant shall file with the Clerk of the Supreme Court, when the appeal is docketed in that court, a written undertaking with good and sufficient surety in the sum of $200, or deposit cash in lieu thereof, to the effect that the appellant will pay all costs awarded against him on the appeal to the Supreme Court.

(b) The word "appellant" as herein used means: (1) with respect to appeals as of right, the party who appeals from the decision of the Court of Appeals to the Supreme Court; (2) with respect to discretionary review by the Supreme Court on *certiorari* after determination by the Court of Appeals, the party who petitioned the Supreme Court for *certiorari* or other writ.

(c) In all causes docketed in the Court of Appeals and certified for appellate review by the Supreme Court before determination by the Court of Appeals, either upon petition for *certiorari* filed in the Supreme Court by any of the parties or by the Supreme Court upon its own motion, the undertaking on appeal initially filed by the appellant in the Court of Appeals shall stand for the payment of all costs incurred in either the Court of Appeals or the Supreme Court and awarded against him on the appeal.

This is to certify that the foregoing amendment to the Supplementary Rules of the Supreme Court was approved and adopted by the Supreme Court of North Carolina in conference on the 21st day of May, 1968.

HUSKINS, J.,
For the Court.

AMENDMENT TO SUPPLEMENTARY RULES OF THE SUPREME COURT.

Rule 3 (271 N.C. 744) is rewritten to read as follows:

"Rule 3. Appeals as of right from the Court of Appeals to the Supreme Court.

"When an appeal as a matter of right is taken to the Supreme Court from a decision of the Court of Appeals as provided in G.S. 7A-30(1), the appealing party shall:

(a) within 15 days from the date of the certificate of the Clerk of the Court of Appeals to the trial tribunal, give written notice of appeal to the Clerk of the Court of Appeals, to the Clerk of the Supreme Court, and to the opposing parties;

(b) in the notice of appeal specify the article and section of the Constitution allegedly involved and state with particularity how appellant's rights thereunder have been violated; affirmatively state that the constitutional question involved was timely raised (in the trial court if it could have been or in the Court of Appeals if not) and either not passed upon or passed upon erroneously;

(c) file supplemental briefs as required by Rule 7, Supplementary Rules of the Supreme Court (271 N.C. 747).

"The Supreme Court shall thereupon calendar the cause for hearing at any time it may deem appropriate after the expiration of 28 days from the date on which the cause was docketed in the Supreme Court."

Adopted by order of the Supreme Court in Conference this the 30th day of April, 1968.

HUSKINS, J.
For the Court.

WORD AND PHRASE INDEX

Acceptance of Benefits—Party accepting benefit under a statute is estopped from attacking its constitutionality, *Durham v. Bates*, 336.

Accidental Death—Evidence of wife's death resulting from defendant and wife playing with pistol, *S. v. Griffin*, 333.

Accomplice — Witness could not "honestly say" defendant was, *S. v. Clyburn*, 284.

Act of God—*Mills, Inc. v. Terminal*, 519.

Actions—Method of commencement and time from which action is pending, *Williams v. Bray*, 198; discontinuance and new action, *Williams v. Bray*, 198.

Administrative Law—Duties and authority of administrative boards and agencies in general, *Snow v. Board of Architecture*, 559; procedure, hearings and orders, *Snow v. Board of Architecture*, 559; appeal and review, *In re Appeal of Harris*, 20.

Administrators—See Executors and Administrators.

Admiralty—*Bruton v. Enterprises*, 399.

Admissions—Of defendant admissible in evidence see Criminal Law § 77.

Ad Valorem Taxation — County is a party aggrieved by a decision of the State Board of Assessment, *In re Appeal of Harris*, 20; property occupied gratuitously by a church is exempt from, *Wake County v. Ingle*, 343; property owned by cemetery association for purpose of sale is not exempt from, *Cemetery v. Rockingham County*, 487; real property which has increased more than $100 in value is subject to reassessment in the years between octennial revaluation, *In re Appeal of Broadcasting Corp.*, 571.

Agent—Stockbroker held not agent of purchaser, *Lane v. Griswold*, 1; private detective firm has status of agent in performance of duties in maintaining security watch and principal is responsible for its tort, *Hendricks v. Fay*, 59.

Airplane—Action for bailee's negligence in maintaining, *Mills, Inc. v. Terminal*, 519.

Alcoholic Beverages—*Miranda v. Arizona* is inapplicable to breathalyzer test, *S. v. Randolph*, 120; driving under the influence, *S. v. Kellum*, 348.

Alias or Pluries Summons—Issuance of summons by clerk commences a civil action and alias or pluries summons prevents discontinuance of the action, *Williams v. Bray*, 198.

Alibi—Defendant is not required to prove defense of alibi, *S. v. O'Neal*, 514.

Alimony—See Divorce and Alimony.

Ancillary Administrator—Authority of clerk of court to appoint, *In re Edmundson*, 92.

Appeal and Error—Judgments and orders appealable, *Board of Elders v. Jones*, 174; *King v. Insurance Co.*, 396; jurisdiction and powers of lower court after appeal, *Lane v. Griswold*, 1; *Holsomback v. Holsomback*, 728; exceptions and assignments of error, *Sternberger v. Tannenbaum*, 685; *Williams v. Bray*, 198; *In re Appeal of Broadcasting Corp.*, 571; *Johnson v. Lamb*, 701; necessity for case on appeal, *Holsomback v. Holsomback*, 728; settlement of case on appeal, *Shepherd v. Shepherd*, 71; record, *Johnson v. Lamb*, 701; brief, *Homes, Inc. v. Bryson*, 84; *Knutton v. Cofield*, 355; *Capune v. Robbins*, 581; *Freeman v. Charlotte*, 113, *Hollman v. Raleigh*, 240; harmless and prej-

udicial error, *Mills, Inc. v. Terminal*, 519; *Eubanks v. Eubanks*, 189; *Key v. Welding Supplies*, 609; error cured by verdict, *Hendricks v. Hendricks*, 733; review of orders relating to pleadings, *Lane v. Griswold*, 1; review of injunction, *Board of Elders v. Jones*, 174; review of judgment on motion to nonsuit, *Homes v. Bryson*, 84; *Sneed v. Lions Club*, 98; law of the case, *Cemetery, Inc. v. Rockingham*, 467.

Apprentice—Liability of apprentice cosmetologist for injuries to customer, *Johnson v. Lamb*, 701.

Architects — Revocation of certificate, *Snow v. Board of Architecture*, 559.

Arrest and Bail—Right of officer to arrest without warrant, *S. v. Covington*, 690.

Assault and Battery—*S. v. Ross*, 498; surfer navigating under ocean pier not trespasser so as to mitigate damages for assault upon his person, *Capune v. Robbins*, 581; assault with intent to commit rape, see Rape.

Assessment of Taxes — Real property which has increased more than $100 in value is subject to reassessment in the years between octennial revaluation, *In re Appeal of Broadcasting Corp.*, 571.

Assets—Of a deceased includes intangibles, *In re Edmundson*, 92.

Assignments of Error—Exceptions and assignments of error not discussed in the brief are deemed abandoned, *Homes, Inc. v. Bryson*, 84; *Freeman v. Charlotte*, 113; *S. v. Covington*, 690; failure to except at trial presents no question for review on appeal, *S. v. Randolph*, 120.

Atlantic Ocean—Eastern boundary of State is one marine league eastward from the seashore of the Atlantic Ocean, *Bruton v. Enterprises*, 399; Federal government has quitclaimed to the states littoral waters within the three-mile limit, *Bruton v. Enterprises*, 399; *Capune v. Robbins*, 581.

Attorney General—Common law power to protect beneficiaries of charitable trusts, *Sternberger v. Tannenbaum*, 658.

Attorneys' Fees—Awarded to wife in alimony action, *Brady v. Brady*, 299.

Automobile Race Track—Duty of proprietor to provide guard rails to protect spectators and test drivers, *Pardue v. Speedway*, 314.

Automobiles — Contract provisions allowing purchaser of car to trade back if "not happy" with car is enforceable, *Fulcher v. Nelson*, 221; entering highway from private road, *Warren v. Lewis*, 457; seat belts, *Miller v. Miller*, 228; pleadings and parties, *Kanoy v. Hinshaw*, 418; law of the road and contributory negligence in operation of motor vehicles, *Roberts v. Freight Carriers*, 600; *Warren v. Lewis*, 457; contributory negligence of passenger, *Miller v. Miller*, 228; culpable negligence, *S. v. Weston*, 275; instructions in accident case, *Kanoy v. Hinshaw*, 418; *Roberts v. Freight Carriers*, 600; *Key v. Welding Supplies*, 609; instructions in involuntary manslaughter, *S. v. Weston*, 275; drunken driving, *S. v. Kellum*, 348; *S. v. Randolph*, 120; *S. v. Mobley*, 471; passing stopped school bus, *S. v. Weston*, 275; mobile home is a motor vehicle and subject to registration, *Homes, Inc. v. Bryson*, 84.

Automobile Liability Insurance—Policy issued in name of deceased is an asset of estate, *In re Edmundson*, 92; cancellation of auto liability insurance policy on ground of unfavorable habits is not libel *per se*, *Robinson v. Ins. Co.*, 391; insurance company held not a necessary party to intervene in negligence action between its insured and injured party, *Strickland v. Hughes*, 481.

Available for Work — As applied to mother of 9-year old child in determining benefits under Employment Security Act, *In re Watson*, 629.

Avoidable Consequences — Requires

plaintiff to minimize his damages after tort occurs, *Miller v. Miller*, 228.

Bad Check—Owner of chattel held not estopped to assert title as against innocent purchaser from dealer giving worthless check for cash sale, *Homes, Inc. v. Bryson*, 84; where bad check is given, seller has election of remedies against purchaser, *Redmond v. Lilly*, 446.

Bailment—*Mills, Inc. v. Terminal, Inc.*, 519.

Banks and Banking — Duties to depositor, *In re Michal*, 504.

Barbiturates—Justice of the peace is authorized to issue search warrant for, *S. v. Cook*, 377.

Beauty Parlor—Liability of apprentice cosmetologist for injuries to customer, *Johnson v. Lamb*, 701.

Beneficiaries—Are entitled to file caveat to instrument probated in common form, *Sternberger v. Tannenbaum*, 658.

Bequest by Implication—Doctrine of, *McRorie v. Creswell*, 615.

Bill of Particulars — See Indictment and Warrant § 9; defendant may apply for bill of particulars as to identity of building broken into, *S. v. Sellers*, 641.

Blockade Runner — State owns abandoned ships and their cargoes within its littoral waters, *Bruton v. Enterprises*, 399.

Bona Fide Purchaser—Owner held not estopped to assert title as against innocent purchaser, *Homes, Inc. v. Bryson*, 84.

Boundaries—Eastern boundary of the State is one marine league eastward from the seashore of the Atlantic Ocean, *Bruton v. Enterprises*, 399; sufficiency of description, *Cummings v. Dosam, Inc.*, 28.

Breach of Warranty of Title—Municipal ordinance is not an encumbrance constituting a breach of covenant of warranty, *Fritts v. Gerukos*, 116.

Breathalyzer Test—*Miranda v. Arizona* is inapplicable to, *S. v. Randolph*, 120; witness held incompetent to administer Breathalyzer test, *S. v. Mobley*, 471; arresting officer's remark held to coerce defendant to submit to Breathalyzer test, *S. v. Mobley*, 271.

Brief—Exceptions and assignments of error not discussed in the brief are deemed abandoned, *Homes, Inc. v. Bryson*, 84; *Freeman v. Charlotte*, 113; statement in record proper controls over contrary statement in appellant's brief, *Johnson v. Lamb*, 701.

Brokers and Factors—Relationship of stockbroker to customer, *Lane v. Griswold*, 1.

Building Contract—Action for faulty workmanship, *Cantrell v. Woodhill Enterprises*, 490.

Burden of Proof—Applicant for interlocutory injunction must show substantial injury, *Board of Elders v. Jones*, 174; although defendant pleads self-defense, State has burden to show that victim died as proximate cause of wound inflicted by defendant, *S. v. Ramey*, 325; court must instruct jury as to which party has burden of proof, *King v. Bass*, 353; defendant is not required to prove defense of alibi, *S. v. O'Neal*, 514; defendant does not have burden of proof to explain recent possession of stolen property, *S. v. Hayes*, 712.

Burglary and Unlawful Breakings — Other than burglarious, *S. v. Sellers*, 641; sufficiency of evidence and nonsuit, *S. v. Clyburn*, 284; *S. v. Ross*, 498; *S. v. O'Neal*, 514; sentence and punishment, *S. v. Parrish*, 477.

Bystander — Death of innocent bystander does not mitigate the charge of homicide, *S. v. Rogers*, 330.

Caddy—Golfer has duty to warn players, caddies and spectators of his in-

tention to hit golf ball in their direction, *McWilliams v. Parham*, 592.

Cancellation—Of insurance policy on ground of unfavorable habits is not libel *per se*. *Robinson v. Ins. Co.*, 391.

Cancellation and Rescission of Instrument—*Speller v. Speller*, 340.

Cargoes—State owns abandoned ships and their cargoes within its littoral waters, *Bruton v. Enterprises*, 399.

Case on Appeal—Must be agreed to by the parties, *Shepherd v. Shepherd*, 71; where an assignment of error relates only to record proper, no case on appeal is required, *Holsomback v. Holsomback*, 728.

Cash Sale—*Homes, Inc. v. Bryson*, 84.

Caveat — Beneficiaries entitled to file caveat to instrument probated in common form, *Sternberger v. Tannenbaum*, 658.

Cemeteries—Property owned by cemetery association for purpose of sale is not exempt from ad valorem taxation, *Cemetery v. Rockingham County*, 467.

Certificate—Renewal of certificate to practice architecture, *Snow v. Board of Architecture*, 559.

Chain of Title—Purchaser of land is charged with notice of covenant in his chain of title, *Cummings v. Dosam, Inc.*, 28.

Change of Conditions—Decree awarding custody of minors subject to judicial modification for, *Shepherd v. Shepherd*, 71.

Charge—See Instruction.

Charitable Trust — Family settlement which preserves corpus of is approved, *Sternberger v. Tannenbaum*, 658; State acts as parens patriæ to protect the beneficiaries of charitable trusts, *Sternberger v. Tannenbaum*, 658.

Check — Owner of chattel held not estopped to assert title as against innocent purchaser from dealer giving worthless check for cash sale, *Homes, Inc. v. Bryson*, 84.

Children—Custody and support of, see Divorce and Alimony §§ 22 through 24; Infants § 9; death of child in swimming pool, *Sneed v. Lions Club*, 98; law presumes the legitimacy of a child born in wedlock, *Eubanks v. Eubanks*, 189; death of child by motorist passing stopped school bus, *S. v. Weston*, 275; court's abuse of discretion in awarding custody of children, *Brady v. Brady*, 299; legal obligation of father to support children until they become emancipated, *Gray v. Gray*, 319; order relieving father of duty to support his daughter upon finding that daughter is 18 years old held erroneous, *Gray v. Gray*, 319; society's interest in welfare of working mother's children, *In re Watson*, 629; equity will protect the estates and interests of children, *Sternberger v. Tannenbaum*, 658; hearing and grounds for awarding custody of minor, *Shepherd v. Shepherd*, 71; husband is liable for support of children of the marriage, *Becker v. Becker*, 65.

Church—Held not entitled to injunction pendente lite to restrain use of name "Moravian," *Board of Elders v. Jones*, 174; property occupied gratuitously by a church is exempt from ad valorem taxation, *Wake County v. Ingle*, 343.

Circumstantial Evidence—Sufficiency of to overrule nonsuit in narcotics prosecution, *S. v. Cook*, 377.

Civil Rights Act of 1964—Attempt of county commissioners to reallocate school bond funds to comply with Act does not dissolve temporary restraining order, *Dilday v. Board of Education*, 679.

Clerk of Court—Authority of to appoint ancilliary administrator, *In re Edmundson*, 92; has jurisdiction to appoint and remove guardian of an incompetent, *In re Michal*, 504; is without jurisdiction to allow surviv-

ing trustee to draw a check, *In re Michal*, 504; issuance of summons by clerk commences a civil action and alias or pluries summons prevents discontinuance of the action, *Williams v. Bray*, 198; clerk held not to have suggested or dictated verdict to jury, *Davis v. State*, 533; clerk of court vacates office *eo instanti* when he accepts office of justice of the peace, *S. v. Cook*, 377.

Coin Operated Phonograph — Contract provisions for installation of constitutes liquidated damages, *Knutton v. Cofield*, 355.

Collateral Attack of Judgment — For fraud, *Strickland v. Hughes*, 481.

Common Law — Distinctions between petit and grand larceny abolished by statute, *S. v. Massey*, 721; extent of common law in State, *Bruton v. Enterprises*, 399.

Common Law Robbery—See Robbery.

Complaint—See Pleadings.

Concealed Weapons—*S. v. Gainey*, 620.

Condemnation — Personal property is not subject to power of eminent domain, *Givens v. Sellars*, 44; jury determines damages in condemnation proceedings, *Redevelopment Comm. v. Panel Co.*, 368.

Conditional Promise—*Fulcher v. Nelson*, 221.

Confederate Blockade Runners — State owns abandoned ships and their cargoes within its littoral waters, *Bruton v. Enterprises*, 399.

Confession—See Criminal Law § 75.

Confidential Relationship — Transactions between husband and wife, *Eubanks v. Eubanks*, 189.

Conflict of Laws—Sale of nonregistered securities was consummated in another state, *Lane v. Griswold*, 1.

Consideration—Consideration recited in a deed is presumed correct, *Speller v. Speller*, 340.

Consolidation—Trial court has the discretionary power to consolidate actions arising out of one automobile accident, *Kanoy v. Hinshaw*, 418.

Constitutional Law—Nature of constitutional provisions in general, *Mitchell v. Financing Authority*, 137; estoppel, *Durham v. Bates*, 336; judicial powers, *Mitchell v. Financing Authority*, 137; regulation of trades and professions, *Cheek v. Charlotte*, 293; public convenience and prosperity, *Zopfi v. Wilmington*, 430; equal protection, *Cheek v. Charlotte*, 293; necessity for and sufficiency of indictment, *S. v. Rogers*, 208; *S. v. Massey*, 723; due process, *S. v. Pike*, 102; time to prepare defense, *S. v. Gay*, 125; self-incrimination, *S. v. Randolph*, 120; *S. v. Ross*, 498; cruel and unusual punishment, *S. v. McCall*, 135; *S. v. Weston*, 275.

Constitutional Rights—*Miranda v. Arizona* is inapplicable to breathalyzer test, *S. v. Randolph*, 120; where confession is not used at time of trial, failure to give *Miranda* warnings is immaterial, *S. v. Ross*, 498.

Construction Contract — Action for faulty workmanship, *Cantrell v. Woodhill Enterprises*, 490.

Contentions of the Parties — Where court states contentions of one party, it must present contentions of other, *S. v. Cook*, 337; *Key v. Welding Supplies*, 609; a slight misstatement must be called to court's attention in apt time, *S. v. Goines*, 509; *Johnson v. Lamb*, 701.

Contractor—Employer held responsible for tort of independent detective firm in its employ, *Hendricks v. Fay*, 59.

Contracts—Nature and essentials of, *Fulcher v. Nelson*, 221; *Knutton v. Cofield*, 355; form and requisites of agreements, *Cantrell v. Woodhill Enterprises*, 490; construction of, *Dixie Container Corp. v. Dale*, 624; *Fulcher v. Nelson*, 221; breach of, *Fulcher v. Nelson*, 221; *Cantrell v. Woodhill Enterprises*, 490; waiver of breach, *Can-*

trell v. Woodhill Enterprises, 490; damages for breach, *Fulcher v. Nelson*, 221; nonsuit in action involving contract, *Fulcher v. Nelson*, 221; of infant spouse is voidable at his election upon coming of age, *Eubanks v. Eubanks*, 189; of indemnity, *Dixie Container Corp. v. Dale*, 624; provision for installation of juke box constitutes liquidated damages, *Knutton v. Cofield*, 355.

Contributory Negligence — See Negligence §§ 11, 26.

Corporate Entity—Court disregards corporate entity when dominant shareholder engages in usurious transactions, *Henderson v. Finance Co.*, 253.

Corporations—Incorporation and corporate existence, *Henderson v. Finance Co.*, 253; authority and duties of stockholders, *Stein v. Outdoor Advertising*, 77; sale and transfer of stock, *Lane v. Griswold*, 1.

Corpus Delecti — Confession of guilt must be supported by evidence *aliunde* establishing corpus delecti, *S. v. Clyburn*, 284.

Cosmetologist—Liability of apprentice for injuries to customer, *Johnson v. Lamb*, 701.

Counties — Duties and authority of county commissioners, *Dilday v. Board of Education*, 679; reallocation of county school bond funds, *Dilday v. Board of Education*, 679; party aggrieved by a decision of State Board of Assessment, *In re Appeal of Harris*, 20.

County Board of Equalization and Review—Real property which has increased more than $100 in value is subject to reassessment in the years between octennial revaluation, *In re Appeal of Broadcasting Corp*, 571.

County Commissioners—May prescribe procedure for public hearing on county zoning ordinance, *Freeland v. Orange County*, 452; attempt of county commissioners to reallocate school bond funds to comply with Civil Rights Act of 1964 does not dissolve temporary restraining order, *Dilday v. Board of Education*, 679.

Courts—Role of court is to determine competency and sufficiency of evidence, *S. v. Clyburn*, 284; trial by court without jury see Trial §§ 56, 57; has limited discretion to accept or reject a verdict, *S. v. Hemphill*, 388; trial court has discretionary power to consolidate actions arising out of one automobile accident, *Kanoy v. Hinshaw*, 318; court has discretion to allow jury view, *S. v. Ross*, 498; trial court must submit all material issues to jury, *Johnson v. Lamb*, 701; appeal from inferior court to Superior Court, *Becker v. Becker*, 65; conflict of laws, *Lane v. Griswold*, 1; justices of the peace, *S. v. Cook*, 377.

Covenant—Purchaser of land is charged with notice of covenant in his chain of title, *Cummings v. Dosam, Inc.*, 28; of warranty, municipal ordinance is not an encumbrance constituting breach of covenant of warranty, *Fritts v. Gerukos*, 116.

Creditor—May not set aside as a fraudulent conveyance the transfer by husband of entirety property to wife, *Gas Co. v. Leggett*, 547.

Criminal Law—Elements of and prosecutions for particular crimes see particular title of crime; cruel and unusual punishment see Constitutional Law § 36; aiders and abettors, *S. v. Gainey*, 620; jurisdiction as between Superior Court and inferior court, *S. v. Hayes*, 712; *S. v. Gay*, 125; transfer of cause to Superior Court upon demand for jury trial, *S. v. Lawrence*, 351; *S. v. Mobley*, 471; plea of guilty, *S. v. Covington*, 690; plea of not guilty, *S. v. Ramey*, 325; plea of nolo contendere, *S. v. Sellers*, 641; plea of former jeopardy, *S. v. Bowers*, 652; *S. v. Shoemaker*, 475; pleas of the State, *S. v. Rogers*, 330; burden of proof and presumptions, *S. v. O'Neal*, 514; *S. v. Kirby*, 306; *S. v. Goines*, 509; circumstantial evidence, *S. v. Kirby*, 306; silence as im-

plied admission, *S. v. Cannon*, 215; blood tests, *S. v. Randolph*, 120; intoxication, *S. v. Cook*, 377; evidence of identity by sight, *S. v. Goodson*, 128; *S. v. Clyburn*, 284; *S. v. Covington*, 690; shorthand statement of fact, *S. v. Goines*, 509; hearsay testimony, *S. v. Cannon*, 215; confession, *S. v. Clyburn*, 284; *S. v. Hayes*, 712; unlawful search, *S. v. Pike*, 102; credibility of witnesses, cross-examination and impeachment, *S. v. Goodson*, 128; *S. v. Cooper*, 51; time of trial and continuance, *S. v. Gay*, 125; admission of evidence competent for restricted purpose, *S. v. Goodson*, 128: function of court and jury, *S. v. Pike*, 102; *S. v. Clyburn*, 284; *S. v. Massey*, 723; conduct of jury, *S. v. Moore*, 132; nonsuit, *S. v. Cooper*, 51; *S. v. Cook*, 377; *S. v. O'Neal*, 514; *S. v. Weston*, 275; *S. v. Clyburn*, 284; *S. v. Goines*, 509; expression of opinion by court, *S. v. Kirby*, 306; *S. v. Cook*, 377; instructions on less degree of crime, *S. v. Rogers*, 208; on contentions of parties, *S. v. Cook*, 377; sufficiency and effect of verdict, *S. v. Hemphill*, 388; *Davis v. State*, 533; *S. v. Hayes*, 712; *S. v. Moore*, 132; arrest of judgment, *S. v. Sellers*, 641; severity of sentence, *S. v. McCall*, 135; *S. v. Shoemaker*, 475; remand, *S. v. Ross*, 498; appeals in criminal cases, *S. v. Cooper*, 51; *Davis v. State*, 533; *S. v. Randolph*, 120; *S. v. Davis*, 349; *S. v. Covington*, 690; *S. v. Weston*, 275; *S. v. Goines*, 509; *S. v. Bowers*, 652; *S. v. Gay*, 125; *S. v. Pike*, 102; *S. v. Cannon*, 215.

Cross-Action—See Pleadings § 8.

Cross-Examination—Defendant may be cross-examined as to past crimes to impeach credibility as a witness, *S. v. Goodson*, 128.

Cruel and Unusual Punishment—See Constitutional Law § 36; sentences of 18 to 36 months for felonious escape does not constitute, *S. v. Shoemaker*, 475: sentence of 3 to 5 years for felonious breaking and entering is not cruel and unusual punishment, *S. v. Parrish*, 477.

Culpable Negligence—See Negligence § 31; Automobiles § 110.

Custody and Support of Children—See Divorce and Alimony §§ 22 through 24; Infants § 9.

Customs and Usages — Local custom, *McWilliams v. Parham*, 592.

Damages—Resulting from car dealer's breach of promise to "trade back", *Fulcher v. Nelson*, 221; jury determines damages in condemnation proceedings, *Redevelopment Comm v. Panel Co.*, 368; award of in indemnity contract, *Dixie Container Corp. v. Dale*, 624; for injury to personal property, *Givens v. Sellars*, 44; *Roberts v. Freight Carriers*, 600; liquidated damages, *Knutton v. Cofield*, 355; mitigation of damages, *Miller v. Miller*, 228; punitive damages. *King v. Ins. Co.*, 396; competency of mortuary tables, *Johnson v. Lamb*, 701; measure of damages for loss of use of vehicle, *Roberts v. Freight Carriers*, 600.

Deadly Weapon — Presumptions from the intentional use of, resulting in death, *S. v. Cooper*, 51; *S. v. Ramey*, 325; reckless use of firearms resulting in death of another is unlawful homicide, *S. v. Griffin*, 333.

Death—Of child by motorist passing stopped school bus, *S. v. Weston*, 275; of wife resulting from husband and wife playing with pistol held accidental, *S. v. Griffin*, 333.

Declaratory Judgment Act—*Zopfi v. Wilmington*, 430; *Sternberger v. Tannenbaum*, 658.

Deed of Separation—Wife may attack validity of on ground of mental illness, *Eubanks v. Eubanks*, 189.

Deeds—Competency of grantor, *Hendricks v. Hendricks*, 733; consideration, *Speller v. Speller*, 340; construction of deeds executed simultaneously, *Combs v. Combs*, 462; restrictive covenants, *Cummings v. Dosam, Inc.*, 28; covenant of warranty, *Fritts v. Gerukos*, 116; covenant

against encumbrances, *Fritts v. Gerukos*, 116; deeds of trust see Mortgages and Deeds of Trust.

Defective Cause of Action—Complaint stating defective cause of action, *Lane v. Griswold*, 1.

Demurrer—See Pleadings; motion to strike held to be in the nature of a demurrer, *King v. Ins. Co.*, 396.

Depositor—Bank is a debtor of its depositor, *In re Michal*, 504.

Derelict—State owns abandoned ships and their cargoes within its littoral waters, *Bruton v. Enterprises*, 399.

Descent and Distribution—Person is *in esse*, *Eubanks v. Eubanks*, 189.

Detective Firm—Employer held responsible for tort of, *Hendricks v. Fay*, 59.

Devise by Implication — Doctrine of, *McRorie v. Creswell*, 615.

Discretion of Court—Abuse of discretion in awarding custody of children, *Brady v. Brady*, 299; trial court has discretionary power to consolidate actions arising out of one automobile accident, *Kanoy v. Hinshaw*, 418; to allow jury view, *S. v. Ross*, 498.

Dictum—Language of prior Supreme Court decision upon incidental question does not have force of adjudication, *Cemetery v. Rockingham County*, 467.

District Court—See inferior courts.

Divorce and Alimony—Divorce for seperation, *Eubanks v. Eubanks*, 189; alimony without divorce, *Gaskins v. Gaskins*, 133; *Schloss v. Schloss*, 266; alimony *pendente lite*, *Schloss v. Schloss*, 266; *Brady v. Brady*, 299; modification of alimony decree, *Becker v. Becker*, 65; *Holsomback v. Holsomback*, 728; custody and support of children, *Becker v. Becker*, 65; *Shepherd v. Shepherd*, 71.

Doctrine of Avoidable Consequences—*Miller v. Miller*, 228.

Doctrine of Devise or Bequest by Implication, *McRorie v. Creswell*, 615.

Doctrine of Res Ipsa Loquitur—*Kekelis v. Machine Works*, 439.

Doctrine of Respondeat Superior—Employer held responsible for tort of independent detective firm in its employ, *Hendricks v. Fay*, 59; negligence of employee imputed to corporate defendant under, *Johnson v. Lamb*, 701.

Double Jeopardy—Indictment must be sufficient to prevent, *S. v. Rogers*, 208; *S. v. Sellers*, 641; imposition of prison administered punishment does not prevent imposition of court imposed sentence of imprisonment, *S. v. Shoemaker*, 475.

Double Office Holding—Clerk of court vacates office *eo instanti* when he accepts office of justice of the peace, *S. v. Cook*, 377.

Drunken Driving—*S. v. Kellum*, 348.

Easements — Nature and extent of, *Cummings v. Dosam, Inc.*, 28.

Ejectment—*Freeman v. Charlotte*, 113.

Election of Remedies—When election is required, *Redmond v. Lilly*, 446.

Electric Shock — Expert testimony of ophthalmologist as to employee's loss of vision by, *Hollman v. Raleigh*, 240.

Eminent Domain — Acts constituting taking, *French v. Highway Comm.*, 108; "public purpose", *Mitchell v. Financing Authority*, 137; evidence of value and compensation, *Givens v. Sellars*, 44; *French v. Highway Comm.*, 108; *Redevelopment Comm. v. Panel Co.*, 368; *Durham v. Bates*, 336.

Employee—Liability of State employee for negligence causing injury to property of another, *Givens v. Sellars*, 44; negligence of employee imputed to corporate defendant under doctrine of *respondeat superior*, *Johnson v. Lamb*, 701.

Employment Security Act—*In re Watson*, 629.

Encumbrance — Municipal ordinance is not an encumbrance constituting a breach of covenant of warranty, *Fritts v. Gerukos*, 116.

Employer and Employee—See Master and Servant; doctrine of *res ipsa loquitur* inapplicable to employee's injuries from defective machinery, *Kekelis v. Machine Works*, 439.

Equitable Mortgage—Deed and rental contract held to constitute, *Henderson v. Finance Co.*, 253.

Escape—*S. v. McCall*, 135; *S. v. Shoemaker*, 475.

Estate by the Entirety—Creditor could not set aside as a fraudulent conveyance the transfer by husband of entirety property to wife, *Gas Co. v. Leggett*, 547.

Estoppel—Party accepting benefit under a statute is estopped from attacking its constitutionality, *Durham v. Bates*, 336; is affirmative defense, *Cantrell v. Woodhill Enterprises*, 490; equitable estoppel, *Homes, Inc. v. Bryson*, 84.

Eviction—Action for breach of warranty of title to real estate does not arise until there has been an eviction, *Fritts v. Gerukos*, 116.

Evidence — In particular actions and prosecutions see Titles of particular actions and crimes; evidence in criminal prosecutions see Criminal Law; harmless or prejudicial error in exclusion or admission of evidence see Appeal and Error §§ 48, 49, Criminal Law § 169; court determines competency and sufficiency of evidence, jury determines weight and credibility, *S. v. Clyburn*, 284; *Sneed v. Lions Club*, 98; Supreme Court will discuss evidence in nonsuit question only to extent necessary for its decision, *Homes, Inc. v. Bryson*, 84; *Sneed v. Lions Club*, 98; evidence not objected to is to be considered on motion to nonsuit, *Freeman v. Charlotte*, 113; sufficiency of circumstantial evidence to overrule nonsuit in narcotics prosecution, *S. v. Cook*, 377; evidence raises only conjecture where witness could not "honestly say" defendant was an accomplice, *S. v. Clyburn*, 284; facts within common knowledge, *Mitchell v. Financing Authority*, 137; similar facts and transactions, *Henderson v. Finance Co.*, 253; circumstantial evidence, *Hollman v. Raleigh*, 240; nonexpert testimony as to sanity, *Hendricks v. Hendricks*, 733; expert testimony, *Mills, Inc. v. Terminal, Inc.*, 519; *Hollman v. Raleigh*, 240.

Executors and Administrators — Appointment of ancilliary administrator, *In re Edmundson*, 92; family agreement, *Sternberger v. Tannenbaum*, 658.

Exceptions — Exceptions and assignments of error not discussed in brief deemed abandoned, *Homes, Inc. v. Bryson*, 84; *Freeman v. Charlotte*, 113; *S. v. Covington*, 690; failure to except at trial presents no question for review on appeal, *S. v. Randolph*, 120; exception to findings of fact is broadside but sufficient to present record proper for review, *In re Appeal of Broadcasting Corp.*, 571; an exception to the judgment does not present for review findings of fact, *Sternberger v. Tannenbaum*, 658.

Exculpatory Statements — May be explained away by the State, *S. v. Cooper*, 51.

Exemption from Taxation — Statutes exempting property from taxation are to be strictly construed against exemptions, *Wake County v. Ingle*, 343.

Expert Testimony—Of ophthalmologist as to employee's loss of vision by electric shock, *Hollman v. Raleigh*, 240; witness held incompetent to administer Breathalyzer test, *S. v. Mobley*, 471; in absence of specific finding, there is a presumption that witness was an expert, *Mills, Inc. v. Terminal*, 519.

Expression of Opinion—Right of litigant to impartial judge, *Kanoy v. Hinshaw*, 418.

Eye—Loss of vision resulting from electric shock, *Hollman v. Raleigh*, 240.

Family Settlement — Which preserves corpus of charitable trust is approved, *Sternberger v. Tannenbaum*, 658.

Federal—Federal government has quitclaimed to the states littoral waters within the three-mile limit, *Bruton v. Enterprises*, 399; *Capune v. Robbins*, 581.

Felony—Attempt to commit, *S. v. Massey*, 721.

Findings of Fact—Superior Court is without authority to make additional findings on appeal from general county court, *Becker v. Becker*, 65; of Industrial Commission are conclusive on appeal when supported by competent evidence, *Hollman v. Raleigh*, 240; an exception to the judgment does not present for review findings of fact, *Sternberger v. Tannenbaum*, 658; exception to is broadside but is sufficient to present record proper for review, *In re Appeal of Broadcasting Corp.*, 571; upon *voir dire* as to competency of confession, *S. v. Clyburn*, 284; where wife takes voluntary nonsuit in prior action, trial court is not bound by previous findings of fact in pending action, *Brady v. Brady*, 299.

Firearms—Reckless use of resulting in death of another is unlawful homicide, *S. v. Griffin*, 333.

Fishing—Right to fish in State's navigable waters belongs to the people, *Capune v. Robbins*, 581.

Foreseeability — Defendant need not foresee the precise injury, *Johnson v. Lamb*, 701.

Foreshore—*Capune v. Robbins*, 581.

Former Jeopardy—Imposition of prison administered punishment does not prevent imposition of court imposed sentence of imprisonment, *S. v. Shoemaker*, 475.

Fraud — Action to rescind deed for fraud, *Speller v. Speller*, 340.

Fraudulent Conveyances—*Gas Co. v. Leggett*, 547.

Functus Officio — Appeal from final judgment makes Superior Court *functus officio* for purpose of amending complaint, *Lane v. Griswold*, 1.

Games and Exhibitions—Liability of proprietor to participants and patrons, *Pardue v. Speedway*, 314; liability of patrons or participants, *McWilliams v. Parham*, 592.

Gasoline—Taxes on gasoline collected by licensed distributor cannot be deducted in computing intangibles tax liability, *In re Oil Co.*, 383.

General County Court — See inferior courts.

General Assembly—Has those powers not defined in the Constitution, *Mitchell v. Financing Authority*, 137.

Gift—Land conveyed by husband to wife resists presumption of gift and is not a resulting trust, *Combs v. Combs*, 462.

Golfer—Has duty to warn players, caddies and spectators of his intention to hit golf ball in their direction, *McWilliams v. Parham*, 592.

Good Conduct—Court will not review escapee's loss of good conduct privileges, *S. v. McCall*, 135.

Governmental Immunity—Liability of State employee for negligence causing injury to property of another, *Givens v. Sellars*, 44.

Grand Jury—May return indictment on basis of hearsay, *S. v. Wall*, 130.

Guard Rails—Duty of proprietor of auto race track to provide guard rails to protect spectators and test drivers, *Pardue v. Speedway*, 314.

Harmless and Prejudicial Error—In

admission or exclusion of evidence see Appeal and Error § 49; Criminal Law § 169.

Health Clubs—Municipal ordinance regulating massage parlors held unconstitutional, *Cheek v. City of Charlotte*, 293.

Hearsay—Grand jury may return indictment on basis of, *S. v. Wall*, 130; statements of one defendant implicating codefendants is hearsay and inadmissible, *S. v. Cannon*, 215.

"Heirs"—Rule in *Shelley's* Case applies where word "heirs" used in technical sense, *McRorie v. Creswell*, 615.

Highway Commission—Personalty is not subject to power of eminent domain, *Givens v. Sellars*, 44; denial of agreed-upon access at survey stations constitutes a taking, *French v. Highway Comm.*, 108; liability of contractor to property owner, *Givens v. Sellars*, 44.

Historical Artifacts—State owns abandoned ships and their cargoes within its littoral waters, *Bruton v. Enterprises*, 399.

Holographic Will — Court may disregard errors in punctuation, spelling and grammar, *McRorie v. Creswell*, 615.

Homicide—Definitions, *S. v. Rogers*, 330; manslaughter, *S. v. Cooper*, 51; *S. v. Griffin*, 333; self-defense, *S. v. Cooper*, 51; *S. v. Kirby*, 306; presumptions and burden of proof, *S. v. Cooper*, 51; *S. v. Ramey*, 325; accidental killing, *S. v. Griffin*, 333.

Husband and Wife—Divorce and alimony see Divorce and Alimony; marital rights and liabilities, *Eubanks v. Eubanks*, 189; contracts and conveyances between husband and wife, *Eubanks v. Eubanks*, 189; *Combs v. Combs*, 462; estates by entireties, *Combs v. Combs*, 462; *Gas Co. v. Leggett*, 547; separation agreements, *Eubanks v. Eubanks*, 189.

Identity—Of defendant as an accomplice, *S. v. Clyburn*, 284; witness present at defendant's unlawful arrest not precluded from making courtroom identification, *S. v. Covington*, 690.

Immunity—Liability of State employee for negligence causing injury to property of another, *Givens v. Sellars*, 44.

Impeachment—Defendant may be cross-examined as to his past crimes to impeach his credibility as a witness, *S. v. Goodson*, 128.

Implied Admission—Silence of defendant held not an admission of guilt, *S. v. Cannon*, 215.

Implied Warranty — Of building contractor, *Cantrell v. Woodhill Enterprises*, 490.

Imprisonment — Severity of sentence, see Criminal Law § 138.

Incriminating Statements—Defendant's statements at scene of accident admissible despite failure to give *Miranda* warning, *S. v. Hayes*, 712.

Indemnity—Construction and operation of contract of, *Dixie Container Corp. v. Dale*, 624.

Independent Contractor—Employer held responsible for tort of independent detective firm in its employ, *Hendricks v. Fay*, 59.

Indictment and Warrant—Form and sufficiency of in particular prosecutions see particular title of crime; charge of the crime, *S. v. Rogers*, 208; motion to quash, *S. v. Hayes*, 712; variance between averment and proof, *S. v. Rogers*, 208; misdemeanant convicted in an inferior court may be tried in Superior Court upon the original warrant or upon indictment, *S. v. Gay*, 125; question as to validity of original warrant is moot when defendant is tried upon an indictment, *S. v. Gay*, 125; grand jury may return verdict on basis of hearsay, *S. v. Wall*, 130; must be sufficient to protect accused against double jeopardy, *S. v. Rogers*, 208; *S. v. Sellers*, 641; will not support

conviction of offense more serious than that charged, *S. v. Massey*, 721; solicitors are advised of proper charge of larceny from the person in bill of indictment, *S. v. Bowers*, 652.

Industrial Commission — See Master and Servant; the Industrial Commission is the proper forum for State tort claims, *Mason v. Highway Comm.*, 36; motion for further hearing for newly discovered evidence is in discretion of, *Mason v. Highway Comm.*, 36.

Industrial Development Financing Authority—Issuance of industrial revenue bonds held not to be for a public purpose, *Mitchell v. Financing Authority*, 137.

Infants—See Children.

Inferior Courts—Where alimony and support action is instituted in general county court, Superior Court has appellate jurisdiction, *Becker v. Becker*, 65; misdemeanant convicted in an inferior court may be tried in Superior Court upon the original warrant or upon indictment, *S. v. Gay*, 125; Superior Court acquires original jurisdiction upon demand in inferior court for trial by jury, *S. v. Lawrence*, 351; *S. v. Mobley*, 471.

Injunctions — To permanently restrain salvage operations from sunken vessels, *Bruton v. Enterprises, Inc.*, 399; continuance to final hearing, *Board of Elders v. Jones*, 174.

Innocent Bystander—Death of does not mitigate the charge of homicide, *S. v. Rogers*, 330.

Innocent Purchaser — Owner held not estopped to assert title as against innocent purchaser from dealer giving worthless check for cash sale, *Homes, Inc. v. Bryson*, 84.

Insane Persons—Appointment of guardian, *In re Michal*, 504; control and management of estate by guardian, *In re Michal*, 504.

Insurance — Cancellation of insurance policy on ground of unfavorable habits is not libel *per se*, *Robinson v. Ins. Co.*, 391; defenses available to insurer, *Strickland v. Hughes*, 481.

Instructions—Where the charge of the court is not in the record it will be presumed correct, *S. v. Cooper*, 51; conflicting instructions upon a material point resulting from *lapus linguæ* warrants new trial, *S. v. Weston*, 275; instruction in criminal prosecution held erroneous as to proper lookout, *S. v. Weston*, 275; instruction in prosecution for larceny from the person held sufficient, *S. v. Massey*, 721; on burden of proof of alibi held proper, *S. v. O'Neal*, 514; court must instruct jury as to which party has burden of proof, *King v. Bass*, 353; jury properly directed to reconsider an unresponsive verdict, *S. v. Hemphill*, 388; instruction on reckless driving in language of statute held insufficient, *Roberts v. Freight Carriers*, 600; failure to give equally pertinent contentions of opposing party, *Key v. Welding Supplies*, 609; court's instruction that jury had to reach a verdict held prejudicial, *S. v. Bowers*, 652; instruction that jury must continue deliberations until hopelessly deadlocked held not to coerce verdict, *Kanoy v. Hinshaw*, 418; instruction in prosecution for three separate armed robbery offenses held erroneous, *S. v. Covington*, 690; trial court must submit material issues to jury, *Johnson v. Lamb*, 701; misstatement of contentions of the parties must be called to court's attention in apt time, *S. v. Goines*, 509; *Johnson v. Lamb*, 701; instruction on self-defense see Homicide.

Intangibles—Assets of a deceased includes intangibles and may include policy of automobile liability insurance, *In re Edmundson*, 92.

Intangibles Tax—Taxes on gasoline collected by licensed distributor cannot be deducted in computing intangibles tax liability, *In re Oil Co.*, 383.

Integration—Attempt of county commissioners to reallocate school bond

funds to comply with Civil Rights Act of 1964 does not dissolve temporary restraining order, *Dilday v. Board of Education*, 679.

Intervention of Parties — Insurance company held not a necessary party to intervene in negligence action between its insured and injured party, *Strickland v. Hughes*, 481.

Intoxication—*Miranda v. Arizona* is inapplicable to breathalyzer test, *S. v. Randolph*, 120; driving under the influence, *S. v. Kellum*, 348.

Invitee—Duty of swimming pool owner to, *Sneed v. Lions Club*, 98.

Issuance of Summons—By clerk commences a civil action and alias or pluries summons prevents discontinuance of the action, *Williams v. Bray*, 198.

Joint Tenancy—When created, *Combs v. Combs*, 462.

Judge—Right of litigant to trial before impartial judge, *Kanoy v. Hinshaw*, 418.

Judgments — On the pleadings see Pleadings § 30; consent judgment, *Holsomback v. Holsomback*, 728; setting aside for fraud, *Strickland v. Hughes*, 481; Supreme Court may remand case to Superior Court for proper judgment, *S. v. Ross*, 498.

Judicial Notice—See Evidence § 3.

Juke Box—Contract provisions for installation of juke box constitutes liquidated damages, *Knutton v. Cofield*, 355.

Jurisdiction—Appeal from final judgment makes Superior Court *functus officio* for purpose of amending complaint, *Land v. Griswold*, 1; federal government has quitclaimed to the states littoral waters within the three-mile limit, *Bruton v. Enterprises*, 399; *Capune v. Robbins*, 581; Superior Court acquires original jurisdiction upon demand in inferior court for trial by jury, *S. v. Lawrence*, 351; *S. v. Mobley*, 471.

Jury—Has duty to weigh the evidence and determine what it proves or fails to prove, *Sneed v. Lions Club*, 98; may not invade province of court in determining admissibility of evidence, *S. v. Pike*, 102; misconduct of juror, *S. v. Moore*, 132; must determine issues in action for alimony without divorce, *Schloss v. Schloss*, 266; role of jury is to determine weight and credibility of the evidence, *S. v. Clyburn*, 284; determines damages in condemnation proceedings, *Redevelopment Comm. v. Panel Co.*, 368; properly directed to reconsider an unresponsive verdict, *S. v. Hemphill*, 388; instruction that jury must continue deliberations until hopelessly deadlocked held not to coerce verdict, *Kanoy v. Hinshaw*, 418; court has discretion to allow jury view, *S. v. Ross*, 498; clerk held not to have suggested or directed verdict to jury and any irregularity in taking verdict cured by polling jury, *Davis v. State*, 533; court's instruction that jury had to reach a verdict held prejudicial, *S. v. Bowers*, 652.

Justice of the Peace—Clerk of court vacates office *eo instanti* when he accepts office of justice of the peace, *S. v. Cook*, 377; is authorized to issue search warrant for barbiturates, *S. v. Cook*, 377.

Lapsus Linguæ — Conflicting instructions upon a material issue resulting from, *S. v. Weston*, 275; immediately corrected is not prejudicial, *S. v. Goines*, 509.

Larceny—*S. v. Bowers*, 652; *S. v. Massey*, 721; *S. v. Hayes*, 712; *S. v. Clyburn*, 284; *S. v. O'Neal*, 514.

Law of the Case—Language of prior Supreme Court decision upon incidental question does not have force of adjudication, *Cemetery v. Rockingham County*, 467.

Legislature — Has those powers expressly defined in the Constitution, *Mitchell v. Financing Authority*, 137.

Legitimacy—Law presumes the legiti-

macy of a child born in wedlock, *Eubanks v. Eubanks*, 189.

Lesser Offense—Where solicitor foregoes prosecution for first degree murder, defendant can thereafter only be convicted of some lesser offense, *S. v. Rogers*, 330.

Liability Insurance—Policy of automobile liability insurance issued in name of deceased is an asset of estate, *In re Edmundson*, 92.

Libel and Slander—*Robinson v. Ins. Co.*, 391.

Limited Access Highway — Denial of agreed-upon access at survey stations constitutes a taking, *French v. Highway Comm.*, 108.

Liquidated Damages — Contract provisions for installation of juke box constitutes liquidated damages, *Knutton v. Cofield*, 355.

Littoral Waters — Federal government has quitclaimed to the states littoral waters within the three-mile limit, *Burton v. Enterprises*, 399; *Capune v. Robbins*, 581; littoral proprietor has qualified property rights in water frontage, *Capune v. Robbins*, 581.

Local Custom—Golfer has duty to warn players, caddies and spectators of his intention to hit golf ball in their direction, *McWilliams v. Parham*, 592.

Loss of use of vehicle, *Roberts v. Freight Carriers*, 600.

Machinery Act—*In re Appeal of Broadcasting Corp.*, 571.

Mandamus—*Snow v. Board of Architecture*, 559.

Manslaughter—See Homicide; death of child by motorist passing stopped school bus, *S. v. Weston*, 275.

Marine League—Eastern boundary of State is one marine league eastward from the seashore of the Atlantic Ocean, *Bruton v. Enterprises*, 399; equals three geographical miles, *Bruton v. Enterprises*, 399.

Massage Parlor — Municipal ordinance regulating massage parlor held unconstitutional, *Cheek v. City of Charlotte*, 293.

Master and Servant—Liability of contractee of work under independent contract for injuries to third persons, *Hendricks v. Fay, Inc.*, 59; liability of employer for injuries to third persons, *Johnson v. Lamb*, 701; whether accident produces injury, pre-existing physical condition, *Hollman v. City of Raleigh*, 240; amount of compensation under Workmen's Compensation Act and review in Superior Court, *Hollman v. Raleigh*, 240; construction of Employment Security Law, *In re Watson*, 629.

Medical Expert Testimony—Of ophthalmologist as to employee's loss of vision by electric shock, *Hollman v. Raleigh*, 240.

Mental Capacity—Wife may attack validity of separation agreement on ground of mental illness, *Eubanks v. Eubanks*, 189; testimony relating to grantor's lack of mental capacity to make deed, *Hendricks v. Hendricks*, 733.

Merger of Terms—Written contract embraces preliminary negotiations, *Cantrell v. Woodhill Enterprises*, 490.

Minors—See Children.

Miranda v. Arizona—Is inapplicable to breathalyzer test, *S. v. Randolph*, 120; where confession is not used at time of trial, failure to give *Miranda* warnings is immaterial, *S. v. Ross*, 498; defendant's statements at scene of accident admissible despite officer's failure to give *Miranda* warnings, *S. v. Hayes*, 712.

Misconduct of Juror—*S. v. Moore*, 132.

Misdemeanor—One convicted of in an inferior court may be tried in Superior Court upon the original warrant or upon indictment, *S. v. Gay*, 125.

Mistrial—For misconduct of juror or State's witness, *S. v. Moore*, 132.

Mobile Home—Is a motor vehicle and subject to registration law, *Homes, Inc. v. Bryson*, 84.

Monopolies—*Knutton v. Cofield*, 355.

Moot Question—Question as to validity of original warrant is moot when defendant is tried upon an indictment, *S. v. Gay*, 125; *S. v. Mobley*, 471.

Moravian—Church held not entitled to injunction *pendente lite* to restrain use of name "Moravian," *Board of Elders v. Jones*, 174.

Mortgages and Deeds of Trust—Equitable mortgage, *Henderson v. Finance Co.*, 253.

Mortuary Tables—Refusal of court to permit introduction of cured by verdict, *Johnson v. Lamb*, 701.

Motel Room—Articles seized from motel room of known felon held inadmissible, *S. v. Covington*, 690.

Motion—For judgment on the pleadings on ground that complaint fails to state a cause of action, *Lane v. Griswold*, 1; to amend complaint after trial denied when amendment sets up different cause of action, *Lane v. Griswold*, 1; for further hearing on ground of newly discovered evidence is in discretion of Industrial Comm. in tort claims hearing, *Mason v. Highway Comm.*, 36; to poll jury properly denied when motion made after jury is discharged, *S. v. Moore*, 132; for bill of particulars see Indictment and Warrant § 9; to strike held to be in the nature of a demurrer, *King v. Ins. Co.*, 396; in arrest of judgment may be made for first time in Supreme Court, *S. v. Sellers*, 641; to quash, *S. v. Hayes*, 712; to set aside the verdict rests in discretion of trial court, *S. v. Massey*, 721.

Motor Fuels—Taxes on gasoline collected by licensed distributor cannot be deducted in computing intangibles tax liability, *In re Oil Co.*, 383.

Motor Vehicle—Mobile home is a motor vehicle and subject to registration, *Homes, Inc. v. Bryson*, 84; contract provisions allowing purchaser of car to trade back if "not happy" with car is enforceable, *Fulcher v. Nelson*, 221.

Municipal Corporations—Police power, *Cheek v. Charlotte*, 293; regulations re: public morals, *Cheek v. Charlotte*, 293; zoning ordinances and building permits, *Zopfi v. Wilmington*, 430; *Freeland v. Orange Co.*, 452.

Municipal Ordinance—Is not an encumbrance constituting a breach of covenant of warranty, *Fritts v. Gerukos*, 116.

Narcotics—Sufficiency of evidence, *S. v. Cook*, 377.

Navigable Waters—Right to fish in, belongs to the people, *Capune v. Robbins*, 581.

Necessary Party — Insurance company held not a necessary party to intervene in negligence action between its insured and injured party, *Strickland v. Hughes*, 481.

Negative Easement—*Cummings v. Dosam, Inc.*, 28.

Negligence — Negligence and contributory negligence in operation of automobiles see Automobiles; definitions, *Kekelis v. Machine Works*, 439; *Warren v. Lewis*, 457; *Mills, Inc. v. Terminal, Inc.*, 519; *res ipsa loquitur*, *Kekelis v. Machine Works*, 439; proximate cause, *Kanoy v. Hinshaw*, 418; *Johnson v. Lamb*, 701; *Mills, Inc. v. Terminal, Inc.*, 519; act of God, *Mills, Inc. v. Terminal, Inc.*, 519; primary and secondary liability, *Hendricks v. Fay, Inc.*, 59; contributory negligence, *Miller v. Miller*, 228; *Warren v. Lewis*, 457; comparative negligence, *Miller v. Miller*, 228; pleadings in negligence actions, *Pardue v. Speedway*, 314; *Mills, Inc. v. Terminal, Inc.*, 519; presumptions and burden of proof, *Kekelis v. Machine Works*, 439; sufficiency of evidence and nonsuit, *Kekelis v. Machine Works*, 438; culpable negligence, *S. v. Weston*, 275; duties and liabilities

to invitees, *Snead v. Lions Club*, 98; liability of State employee for negligence causing injury to property of another, *Givens v. Sellars*, 44.

Negroes—Attempt of county commissioners to reallocate school bond funds to comply with Civil Rights Act of 1964 does not dissolve temporary restraining order, *Dilday v. Board of Education*, 679.

Newly Discovered Evidence — Motion for further hearing on ground of additional or newly discovered evidence in tort claims is in discretion of Industrial Comm. and not subject to review in absence of abuse of discretion, *Mason v. Highway Comm.*, 36.

Nonsuit—In criminal cases see Criminal Law § 104 *et seq.;* in civil cases see Trial § 20 *et seq.;* Supreme Court will discuss evidence in nonsuit question only to extent necessary for its decision, *Homes, Inc. v. Bryson*, 84; evidence not objected to is to be considered by jury on motion to nonsuit, *Freeman v. Charlotte*, 113; admission of incompetent evidence does not entitle defendant to nonsuit, since on subsequent trial State may offer other, competent evidence, *S. v. Cannon*, 215; where wife takes voluntary nonsuit in prior action, trial court in pending action is not bound by previous findings of fact, *Brady v. Brady*, 299; State's evidence is reviewable on appeal regardless of whether motion has been made in the trial court, *S. v. Davis*, 349.

N. C. Board of Architecture—*Snow v. Board of Architecture*, 559.

N. C. Employment Security Comm.—*In re Watson*, 629.

N. C. Industrial Development Financing Authority—Issuance of industrial revenue bonds held not to be for public purpose, *Mitchell v. Financing Authority*, 137.

N. C. Prison Commission—Court will not review escapee's loss of good conduct privileges, *S. v. McCall*, 135.

N. C. Securities Law—Definition of sale of stock under, *Lane v. Griswold*, 1.

N. C. State Board of Assessment — County is a party aggrieved by a decision of, *In re Appeal of Harris*, 20.

N. C. Workmen's Compensation Act—See Master and Servant.

Not Guilty—Plea of puts in issue every element of the crime charged, *S. v. Ramey*, 325.

Notice—Purchaser of land is charged with notice of covenant in his chain of title, *Cummings v. Dosam, Inc.*, 28; trial of defendant on same day bill of indictment is returned does not deprive him of notice when case is appealed from inferior court for same offense, *S. v. Gay*, 125; sufficiency and requisites of notice, *In re Appeal of Harris*, 20; *Holsomback v. Holsomback*, 728.

Obiter Dictum—Language of prior Supreme Court decision upon incidental question does not have force of adjudication, *Cemetery v. Rockingham County*, 467.

Objection—Is waived when evidence of same import is thereafter admitted without objection, *Mills, Inc. v. Terminal*, 519; must be made before witness answers, *Johnson v. Lamb*, 701.

Ophthalmologist—Testimony of as to employee's loss of vision by electric shock, *Hollman v. Raleigh*, 240.

Opinion Witness—Lay witness may give his opinion that defendant was under influence of barbiturates, *S. v. Cook*, 377.

Opportunity to be Heard — County commissioners may prescribe procedure for public hearing on county zoning ordinance, *Freeland v. Orange County*, 452.

Option to Buy—Right to recover under option for defect in title, *Fritts v. Gerukos*, 116.

Ordinance — See Municipal Corporations; municipal ordinance is not an

encumbrance constituting a breach of covenant of warranty, *Fritts v. Gerukos*, 116.

Paddleboard—Owner of ocean pier cannot prevent passage of paddleboard beneath his pier, *Capune v. Robbins*, 581.

Paramount Title—Municipal ordinance is not an encumbrance constituting a breach of covenant of warranty, *Fritts v. Gerukos*, 116.

Parens Patriæ—State acts to protect the beneficiaries of charitable trusts, *Sternberger v. Tannenbaum*, 658.

Parent and Child—Relationship of, *Eubanks v. Eubanks*, 189; *In re Watson*, 629; duty to support, *Gray v. Gray*, 319.

Parties—Necessary and proper parties, *Strickland v. Hughes*, 481; joinder of additional parties, *Strickland v. Hughes*, 481; in a proceeding under the Declaratory Judgment Act, *Sternberger v. Tannenbaum*, 658.

Partition — By exchange of deeds, *Combs v. Combs*, 462.

Partnership—Execution of proxy held not to defeat voting of shares to which it applied, *Stein v. Outdoor Advertising*, 77.

Party Aggrieved—County is a party aggrieved by a decision of State Board of Assessment, *In re Appeal of Harris*, 20.

Passenger—No statutory duty upon passenger in automobile to use seat belts, *Miller v. Miller*, 228.

Payment — Transaction constituting, *Homes, Inc. v. Bryson*, 84; application of payment, *Henderson v. Finance Co.*, 253.

Personal Service — Statute providing for notice by must be strictly complied with, *In re Appeal of Harris*, 20.

Personalty—Is not subject to power of eminent domain, *Givens v. Sellars*, 44.

Persons Sui Generis—Right to make contract, *Fulcher v. Nelson*, 221.

Petition to Rehear—Granted in this case, *Hendricks v. Hendricks*, 733.

Petroleum Products—Taxes on gasoline collected by licensed distributor cannot be deducted in computing intangibles tax liability, *In re Oil Co.*, 383.

Pier—Owner of ocean pier cannot prevent passage of water craft beneath his pier, *Capune v. Robbins*, 581.

Pistol—Death of wife resulting from husband and wife playing with pistol held accidental, *S. v. Griffin*, 333.

Plea of Former Jeopardy—*S. v. Sellers*, 641.

Plea of Not Guilty—Puts in issue every element of the crime charged, *S. v. Ramey*, 325; effect of codefendant's plea of not guilty, *S. v. Covington*, 690.

Pleadings—In particular actions see particular titles of actions; statement of cause of action in general, *Givens v. Sellars*, 44; *Pardue v. Speedway*, 314; *Cantrell v. Woodhill Enterprises*, 490; cross-actions, *Hendricks v. Fay, Inc.*, 59; demurrer, *Givens v. Sellars*, 44; *Pardue v. Speedway*, 314; *Gas Co. v. Leggett*, 547; *Cantrell v. Woodhill Enterprises*, 490; amendment, *Lane v. Griswold*, 1; variance, *Cantrell v. Woodhill Enterprises*, 490; issues and necessity for proof, *Johnson v. Lamb*, 701; motions for judgment on pleadings, *Lane v. Griswold*, 1; *McRorie v. Creswell*, 615; motion to strike, *King v. Ins. Co.*, 396.

Police Officers — Articles seized from motel room of known felon held inadmissible, *S. v. Covington*, 690.

Police Power—Municipal ordinance regulating massage parlor held unconstitutional, *Cheek v. City of Charlotte*, 293; zoning regulations are exercise of, *Zopfi v. Wilmington*, 430.

Polling of Jury—Clerk held not to have suggested or dictated verdict to jury

and any irregularity in taking verdict cured by polling jury, *Davis v. State*, 533.

Pregnancy—Is presumed to be the term of 280 days, *Eubanks v. Eubanks*, 189.

Presumptions — From the intentional use of a deadly weapon resulting in death, *S. v. Cooper*, 51; *S. v. Ramey*, 325; where charge is not in the record it will be presumed correct, *S. v. Cooper*, 51; law presumes the legitimacy of a child born in wedlock, *Eubanks v. Eubanks*, 189; consideration recited in a deed is presumed correct, *Speller v. Speller*, 340; in favor of validity of zoning ordinance, *Zopfi v. Wilmington*, 430; land conveyed by husband to wife resists presumption of gift and is not a resulting trust, *Combs v. Combs*, 462; in absence of specific finding, there is a presumption that witness was an expert, *Mills, Inc. v. Terminal*, 519; presumptions arising from recent possession of stolen property, *S. v. Hayes*, 712.

Prima Facie Case—Of negligence arising out of bailment relationship, *Mills, Inc. v. Terminal*, 519.

Primary and Secondary Liability—See Negligence § 9.

Principal and Agent—Liability of principal for agent's driving see Automobiles; relationship, *Lane v. Griswold*, 1; liability of principal for torts of agent, *Hendricks v. Fay, Inc.*, 59.

Prior offenses — Defendant may be cross-examined as to past crimes to impeach credibility as a witness, *S. v. Goodson*, 128.

Prison Commission—Court will not review escapee's loss of good conduct privileges, *S. v. McCall*, 135; imposition of prison administered punishment does not prevent imposition of court imposed sentence of imprisonment, *S. v. Shoemaker*, 475.

Private Road—Motorist entering highway from private road must maintain proper lookout, *Warren v. Lewis*, 457.

Privilege Tax—Taxes on gasoline collected by licensed distributor cannot be deducted in computing intangibles tax liability, *In re Oil Co.*, 383.

Probable Cause—Articles seized from motel room of known felon held inadmissible, *S. v. Covington*, 690.

Probate—Beneficiaries are entitled to file caveat to instrument probated in common form, *Sternberger v. Tannenbaum*, 658.

Process—Service in general, *Williams v. Bray*, 198; alias and pluries summons, *Williams v. Bray*, 198.

Profits—Loss of during time deprived of use of vehicle, *Roberts v. Freight Carriers*, 600.

Proper Lookout—See Automobiles; motorist entering highway from private road must maintain proper lookout, *Warren v. Lewis*, 457.

Proximate Cause—See Negligence § 7; although defendant pleads self-defense, State has burden to show that victim died as proximate cause of wound inflicted by defendant, *S. v. Ramey*, 325.

Proxy—Execution of proxy held not to defeat voting of shares to which it applied, *Stein v. Outdoor Advertising*, 77.

Public Officers—Double office holding, *S. v. Cook*, 377; liability to individuals, *Givens v. Sellers*, 44.

Publication—Cancellation of insurance policy on ground of unfavorable habits is not libel *per se*, *Robinson v. Ins. Co.*, 391.

Public Hearing—County commissioners may prescribe procedure for on county zoning ordinance, *Freeland v. Orange County*, 452.

Public Purpose—Issuance of industrial revenue bonds held not to be for, *Mitchell v. Financing Authority*, 137.

Punitive Damages—See Damages § 11.

Quashal—Indictment not subject to quashal on ground that testimony of witness before grand jury was hearsay, *S. v. Wall*, 130.

Quitclaimed—Federal government has quitclaimed to the states littoral waters within the three-mile limit, *Bruton v. Enterprises*, 399.

Race Track—Duty of proprietor to provide guard rails to protect spectators and test drivers, *Pardue v. Speedway*, 314.

Rape—*S. v. White*, 736; *S. v. Goines*, 509.

Record—Where charge is not in the record it will be presumed correct. *S. v. Cooper*, 51; a finding of no error in the trial in the court below is an affirmation that the Court has examined the record, *Davis v. State*, 533; exception to findings of fact is broadside but sufficient to present record proper for review, *In re Appeal of Broadcasting Corp.*, 571; statement in record controls over appellant's brief, *Johnson v. Lamb*, 701; where an assignment of error relates only to record proper, no case on appeal is required, *Holsomback v. Holsomback*, 728.

Recorders Court—See inferior courts.

Registered Mail—Statute providing for notice by must be strictly complied with, *In re Appeal of Harris*, 20.

Registration of Motor Vehicles—Mobile home is subject to registration statute, *Homes, Inc. v. Bryson*, 84.

Religious Societies and Corporations—Injunction to restrain use of name, *Board of Elders v. Jones*, 174.

Renewal of Certificate — To practice architecture, *Snow v. Board of Architecture*, 559.

Rescission of Contract—To purchase automobile, *Fulcher v. Nelson*, 221.

Rescission of Deed—Action for, *Speller v. Speller*, 340.

Res Gestæ — Testimony admissible as part of, *S. v. Goines*, 509.

Res Ipsa Loquitur — Doctrine of, *Kekelis v. Machine Works*, 439.

Respondeat Superior — Employer held responsive for torts of independent detective firm in its employ, *Hendricks v. Fay*, 59; negligence of employee imputed to corporate defendant under doctrine of, *Johnson v. Lamb*, 701.

Restraining Order—State is entitled to restraining order against salvage operations on submerged ships, *Bruton v. Enterprises*, 399; attempt of county commissioners to reallocate school bond funds to comply with Civil Rights Act of 1964 does not dissolve temporary restraining order, *Dilday v. Board of Education*, 679.

Restrictive Covenant — Must be sufficiently descriptive, *Cummings v. Dosam, Inc.*, 28.

Resulting Trust — Land conveyed by husband to wife resists presumption of gift and is not a resulting trust, *Combs v. Combs*, 462.

Return of Summons—*Williams v. Bray*, 198.

Robbery—*S. v. Rogers*, 208; *S. v. Davis*, 349; *S. v. Covington*, 690.

Rule in *Shelley's* Case—Applies where word "heirs" used in technical sense, *McRorie v. Creswell*, 615.

Safety Statute—Statute requiring installation of seat belts is not a, *Miller v. Miller*, 228; wanton violation of a safety statute constitutes culpable negligence, *S. v. Weston*, 275.

Sales — Contract provisions allowing purchaser of car to trade back if "not happy" with car is enforceable, *Fulcher v. Nelson*, 221; nature and requisites of contract of sale, *Lane v. Griswold*, 1; transfer of title, *Homes, Inc. v. Bryson*, 84; implied warranties, *Cantrell v. Woodhill Enterprises*, 490; recovery of goods or pur-

chase price, *Redmond v. Lilly*, 446: *Lane v. Griswold*, 1.

Salvage Operations—State is entitled to restraining order against salvage operations on submerged ships, *Bruton v. Enterprises*, 399.

School Bonds—Attempt of county commissioners to reallocate school bond funds to comply with Civil Rights Act of 1964 does not dissolve temporary restraining order, *Dilday v. Board of Education*, 679.

School Bus—Death of child by motorist passing stopped school bus, *S. v. Weston*, 275.

Schools—Authority of Board of Education to transfer school bond funds, *Dilday v. Board of Education*, 679.

Searches and Seizures—Court must hold *voir dire* to determine lawfulness of search and seizure, *S. v. Pike*, 102; articles seized from motel room of known felon held inadmissible, *S. v. Covington*, 690.

Search Warrant—Justice of the peace is authorized to issue search warrant for barbiturates, *S. v. Cook*, 377.

Seat Belts — No statutory duty upon passenger to use, *Miller v. Miller*, 228.

Securities Law—Definition of sale of stock under, *Lane v. Griswold*, 1.

Self-Defense—See Homicide.

Self-Incrimination — *Miranda v. Arizona* is inapplicable to breathalyzer test, *S. v. Randolph*, 120.

Sentence—Within statutory maximum is not cruel and unusual, *S. v. McCall*, 135; *S. v. Weston*, 275; charge in indictment must be sufficient to pronounce sentence thereunder, *S. v. Rogers*, 208; sentence of 18 to 36 months for felonious escape does not constitute cruel and unusual punishment, *S. v. Shoemaker*, 475; sentence of 3 to 5 years for felonious breaking and entering is not unconstitutional, *S. v. Parrish*, 477.

Separation Agreement—Wife may attack validity of on ground of mental illness, *Eubanks v. Eubanks*, 189.

Service—There is no forfeiture of right to petition for review of administrative decision until provisions of statute providing for notice by registered mail or personal service are complied with, *In re Appeal of Harris*, 20.

Severity of Sentence — See Criminal Law § 138.

Shorthand Statement of Fact—Testimony admissible, *S. v. Goines*, 509.

Silence—Of defendant held not an admission of guilt, *S. v. Cannon*, 215.

Slander—See Libel and Slander.

Solicitor — Where solicitor foregoes prosecution for first degree murder, defendant can thereafter only be convicted of some lesser offense, *S. v. Rogers*, 330; need not sign bill of particulars, *S. v. Sellers*, 641; are advised of the proper charge of larceny from the person, *S. v. Bowers*, 652.

Spectators—Duty of proprietor of auto race track to provide guard rails to protect spectators and test drivers, *Pardue v. Speedway*, 314; golfer has duty to warn of intention to hit ball in their direction, *McWilliams v. Parham*, 592.

Spot Zoning — Amendment of zoning ordinance held not to constitute, *Zopfi v. Wilmington*, 430.

State—State lands, *Bruton v. Enterprises*, 399; *Capune v. Robbins*, 581; actions against the State, *Givens v. Sellars*, 44; actions by the State, *Bruton v. Enterprises*, 399; *Sternberger v. Tannenbaum*, 658; tort claims, *Mason v. Highway Comm.*, 36.

State Board of Architecture—*Snow v. Board of Architecture*, 559.

State Board of Assessment—County is a party aggrieved by a decision of, *In re Appeal of Harris*, 20; real property which has increased more than $100 in value is subject to reassess-

ment in the years between octennial revaluation, *In re Appeal of Broadcasting Corp.*, 571.

State Employee—Liability of for negligence causing injury to property of another, *Givens v. Sellars*, 44.

State Highway Commission—See Highway Comm.

Statutes—General rules of construction, *Wake County v. Ingle*, 343; *Freedland v. Orange Co.*, 452; *Cemetery, Inc. v. Rockingham County*, 467; *In re Watson*, 629; rule of construction as to constitutionality of statute see Constitutional Law § 10; strict construction of statutes with reference to notice, *Holsomback v. Holsomback*, 728; party accepting benefit under a statute is estopped from attacking its constitutionality, *Durham v. Bates*, 336; wanton violation of a safety statute constitutes culpable negligence, *S. v. Weston*, 275; statute requiring installation of seat belts is not a safety statute, *Miller v. Miller*, 228; statutes exempting property from taxation are to be strictly construed against exemptions, *Wake County v. Ingle*, 343; *Cemetery v. Rockingham County*, 476; administrative appeal act should be liberally construed in favor of petitioner, *In re Appeal of Harris*, 20.

Stipulated Facts—Trial without jury upon, *In re Edmundson*, 92.

Stock—Definition of sale of stock under Securities Law, *Lane v. Griswold*, 1; execution of proxy held not to defeat voting of shares to which it applied, *Stein v. Outdoor Advertising*, 77; court disregards corporate entity when dominant shareholder engages in usurious transactions, *Henderson v. Finance Co.*, 253.

Stockbroker—Held not agent of purchaser of nonregistered securities, *Lane v. Griswold*, 1.

Sui Generis—Right of persons *sui generis* to make contract, *Fulcher v. Nelson*, 221.

"Suitable Work"—As applied to mother of 9-year old child in determining benefits under Employment Security Act, *In re Watson*, 629.

Summons—Issuance of by clerk commences a civil action and alias or pluries summons prevents discontinuance of the action, *Williams v. Bray*, 198.

Sunken Vessels—State owns abandoned ships and their cargoes within its littoral waters, *Bruton v. Enterprises*, 399.

Superior Court — Appeal from final judgment makes Superior Court *functus officio* for purpose of amending complaint, *Lane v. Griswold*, 1; where alimony and support action is instituted in general county court, Superior Court has appellate jurisdiction, *Becker v. Becker*, 65; trial without jury upon stipulated facts, *In re Edmundson*, 92; has duty to determine sufficiency of evidence to go to jury, *Sneed v. Lions Club*, 98; *S. v. Pike*, 102; misdemeanant convicted in an inferior court may be tried in Superior Court upon the original warrant or upon indictment, *S. v. Gay*, 125; court may question witness for purpose of clarification, *S. v. Kirby*, 306; Superior Court acquires original jurisdiction upon demand in inferior court for trial by jury, *S. v. Lawrence*, 351; *S. v. Mobley*, 471; clerk of court has jurisdiction to appoint and remove guardian of an incompetent and Superior Court has appellate jurisdiction, *In re Michal*, 504.

Supreme Court—Appeal from final judgment of Superior Court makes that court *functus officio* for purpose of amending complaint, *Lane v. Griswold*, 1; will discuss evidence in nonsuit question only to extent necessary for its decision, *Homes, Inc. v. Bryson*, 84; *Sneed v. Lions Club*, 98; is not bound by lower court's findings in injunction proceedings, *Board of Elders v. Jones*, 174; language of prior Supreme Court decision upon incidental question does not have force of adjudication, *Cemetery v.*

Rockingham County, 467; may remand case to Superior Court for proper judgment, *S. v. Ross*, 498; finding no error in the trial below is an affirmation that the Court has examined the record, *Davis v. State*, 533.

Surfboard—Owner of ocean pier cannot prevent passage of surfboard beneath his pier, *Capune v. Robbins*, 581.

Survey Stations—Denial of agreed upon access at survey stations constitutes a taking, *French v. Highway Comm.*, 108.

Swimming Pool — Duty of swimming pool owner to his invitees, *Sneed v. Lions Club*, 98.

"Taking"—Denial of agreed-upon access at survey stations constitutes a taking, *French v. Highway Comm.*, 108.

Taxation—For "public purpose", *Mitchel v. Financing Authority*, 137; application of proceeds of school bond funds, *Dilday v. Board of Education*, 679; sales, use and excise taxes, *In re Oil Company*, 383; ad valorem taxation, *Cemetery Inc. v. Rockingham County*, 467; *In re Appeal of Broadcasting Corp.*, 571; exemption, *Wake County v. Ingle*, 343; *Cemetery, Inc. v. Rockingham County*, 467; collection and payment, *In re Oil Company*, 383.

Temporary Restraining Order — Attempt of county commissioners to reallocate school bond funds to comply with Civil Rights Act of 1964 does not dissolve temporary restraining order, *Dilday v. Board of Education*, 679.

Tenancy by the Entireties—See Husband and Wife § 14.

Tenants in Common — Exchange of deeds by for purpose of partitioning land, *Combs v. Combs*, 462.

Test Drivers—Duty of proprietor of auto race track to provide guard rails to protect spectators and test drivers, *Pardue v. Speedway*, 314.

Theory of Trial—Amendment of complaint cannot alter original theory of trial, *Lane v. Griswold*, 1.

Third Party Beneficiary — Is not a "party" to the contract, *Dixie Container Corp. v. Dale*, 624.

Thunderstorm—Not so severe and unexpected as to constitute act of God, *Mills, Inc. v. Terminal*, 519.

Timely Warning—Golfer has duty to warn players, caddies and spectators of his intention to hit golf ball in their direction, *McWilliams v. Parham*, 592.

Title—Municipal ordinance is not an encumbrance constituting a breach of covenant of warranty, *Fritts v. Gerukos*, 116.

Tort Claims Act—Industrial Commission is the proper forum for State tort claims, *Mason v. Highway Comm.*, 36; motion for further hearing for newly discovered evidence in tort claims action is in discretion of Industrial Comm., *Mason v. Highway Comm.*, 36; does not embrace injury intentionally inflicted, *Givens v. Sellars*, 44.

Torts — Judgment against tort-feasors, *Hendricks v. Fay, Inc.*, 59.

Tractor-Trailer Unit—Accident involving, *Roberts v. Freight Carriers*, 600.

Trade—Municipal ordinance regulating massage parlor held unconstitutional, *Cheek v. City of Charlotte*, 293.

"Trade Back" — Provision in contract permitting purchaser of car to trade back if "not happy" with car is enforceable, *Fulcher v. Nelson*, 221.

Trademarks and Trade-Names—*Board of Elders v. Jones*, 174.

Trespass — Surfer navigating under ocean pier not trespasser so as to mitigate assault upon his person, *Capune v. Robbins*, 581; trespass to State-owned abandoned ships and their cargoes, *Bruton v. Enterprises*, 399.

Trespass to Try Title — *Freeman v. Charlotte*, 113.

Trial — On criminal prosecutions see Criminal Law; in particular actions and prosecutions see particular title of action and crime; consolidation of actions, *Kanoy v. Hinshaw*, 418; expression of opinion by court, *Kanoy v. Hinshaw*, 418; jury view of scene of crime, *S. v. Ross*, 498; objection, exception and motion to strike, *Johnson v. Lamb*, 701; nonsuit, *Homes, Inc. v. Bryson*, 84; *Sneed v. Lions Club*, 98; *Mills, Inc. v. Terminal, Inc.*, 519; province of court and jury, *Sneed v. Lions Club*, 98; tender of issues, *Johnson v. Lamb*, 701; instructions and redeliberation of jury, *Kanoy v. Hinshaw*, 418; instructions on burden of proof, *King v. Bass*, 353; statement of contentions, *Key v. Welding Supplies*, 609; waiver of jury trial and trial by court, *In re Edmundson*, 92; *Knutton v. Cofield*, 355.

"Trick" Larceny—*S. v. Bowers*, 652.

Trusts—Charitable trust and duties of trustee thereof, *Sternberger v. Tannenbaum*, 658.

Unemancipated Child — Support and custody of see Divorce and Alimony §§ 22 through 26; Infants § 9.

Unemployment Benefits — Unemployment Security Act as applied to mother's availability for work on second shift, *In re Watson*, 629.

Unitas Fratrum—Church held not entitled to injunction *pendente lite* to restrain use of name, *Board of Elders v. Jones*, 174.

Unlawful Search—Court must hold *voir dire* to determine lawfulness of search and seizure, *S. v. Pike*, 102.

Usury—*Henderson v. Finance Co.*, 253.

Variance — Between indictment and proof, as to ownership of property is not fatal in robbery prosecution, *S. v. Rogers*, 208.

Vendor and Purchaser—*Fritts v. Gerukos*, 116.

Verdict—Jury properly directed to reconsider an unresponsive verdict, *S. v. Hemphill*, 388; instruction that jury must continue deliberations until hopelessly deadlocked held not to coerce verdict, *Kanoy v. Hinshaw*, 418; clerk held not to have suggested or dictated verdict to jury, *Davis v. State*, 533; court's instruction that jury had to reach a verdict held prejudicial, *S. v. Bowers*, 652; court's refusal to allow mortuary tables in evidence held cured by verdict, *Johnson v. Lamb*, 701; verdict of guilty to one specific count results in acquittal as to other counts, *S. v. Hayes*, 712.

Vision—Compensation for partial loss of is awarded under Compensation Act on basis of vision remaining without corrective lenses, *Hollman v. Raleigh*, 240.

Voir Dire—Court must hold *voir dire* to determine lawfulness of search and seizure, *S. v. Pike*, 102.

Voting Trust—Execution of proxy held not to defeat voting of shares to which it applied, *Stein v. Outdoor Advertising*, 77.

Waiver—*Cantrell v. Woodhill Enterprises*, 490.

Warrant—Misdemeanant convicted in an inferior court may be tried in Superior Court upon the original warrant or upon indictment, *S. v. Gay*, 125; question as to validity of original warrant is moot when defendant is tried upon an indictment, *S. v. Gay*, 125; contentions as to illegality of arrest warrant is rendered moot by trial upon indictment, *S. v. Mobley*, 471; articles seized from motel room of known felon held inadmissible, *S. v. Covington*, 690.

Warranty—Implied warranty of building contractor, *Cantrell v. Woodhill Enterprises*, 490.

Water and Water Courses—Title and rights in navigable waters, *Capune v. Robbins*, 581.

Wedlock—Law presumes the legitimacy

of a child born in wedlock, *Eubanks v. Eubanks*, 189.

Wills—Parties, *Sternberger v. Tannenbaum*, 658; construction, *McRorie v. Creswell*, 615; Rule in *Shelley's* Case, *McRorie v. Creswell*, 615.

Witness—Adequately identified defendant, *S. v. Goodson*, 128; exclusion of evidence cannot be prejudicial when record fails to show what witness would have testified had he been permitted to answer, *Eubanks v. Eubanks*, 189; expert testimony of ophthalmologist as to employee's loss of vision by electric shock, *Hollman v. Raleigh*, 240; witness could not "honestly say" defendant was an accomplice, *S. v. Clyburn*, 284; court may question witness for purpose of clarification, *S. v. Kirby*, 306; lay witness may give his opinion that defendant was under influence of barbiturates, *S. v. Cook*, 377; witness held incompetent to administer Breathalyzer test, *S. v. Mobley*, 471; in absence of a specific finding, there is a presumption that witness was an expert, *Mills, Inc. v. Terminal*, 519; witness present at defendant's unlawful arrest not precluded from making courtroom identification, *S. v. Covington*, 690; objection must be made before witness answers, *Johnson v. Lamb*, 701.

Workmen's Compensation Act — See Master and Servant.

Worthless Check—Owner held not estopped to assert title as against innocent purchaser from dealer giving worthless check for cash sale, *Homes, Inc. v. Bryson*, 84; where given, seller has election of remedies against purchaser, *Redmond v. Lilly*, 446.

Wrecks—State owns abandoned ships and their cargoes within its littoral waters, *Bruton v. Enterprises*, 399.

Zoning Regulations — See Municipal Corporations.

ANALYTICAL INDEX

ACTIONS.

§ 10. Method of Commencement and Time from Which Action Is Pending.

A civil action is commenced by the issuance of summons, G.S. 1-88, and the date it bears is *prima facie* evidence of the date of issuance. *Williams v. Bray*, 198.

A summons is "issued" within the meaning of G.S. 1-88 when it is delivered by the clerk, expressly or impliedly, to the sheriff, or to someone for him, for service. *Ibid.*

§ 11. Discontinuance and New Action.

If the original summons is not served on defendant within twenty days of its issuance it becomes *functus officio,* and plaintiff must then cause an alias summons to be issued and served in accordance with G.S. 1-95 to prevent a discontinuance of the action. *Williams v. Bray*, 198.

A summons issued within ninety days from the date of the original summons, and which referred back to the original summons, is a valid alias summons and prevents a discontinuance of the action as originally instituted. *Ibid.*

ADMINISTRATIVE LAW.

§ 3. Duties and Authority of Administrative Boards and Agencies in General.

Where notice of a contemplated action to withhold for cause the renewal of a certificate to practice architecture is given pursuant to G.S. 150-11, and the architect does not request a hearing before the Board of Architecture pursuant to that statute, the Board has jurisdiction to determine the matter, and its order is not subject to judicial review, G.S. 150-11(c). *Snow v. Board of Architecture,* 559.

§ 4. Procedure, Hearings and Orders of Administrative Boards and Agencies.

While the State Board of Architecture loses its authority to render a decision at the expiration of ninety days from the date of the hearing, G.S. 150-20, an order entered within that time does not become a nullity by the fact that it is not served upon the certificate holder within five days after it is rendered as required by G.S. 105-21. *Snow v. Board of Architecture,* 559.

§ 5. Appeal, Certiorari and Review as to Administrative Orders.

A county is a party aggrieved and entitled to appeal from a decision of the State Board of Assessment reducing the valuation of property appraised by the county for tax purposes. G.S. 143.307. *In re Appeal of Harris,* 20.

G.S. Chapter 143, Article 33, which confers upon a party aggrieved the right to the judicial review of an administrative decision, should be liberally construed in favor of the party seeking review in order to preserve and effectuate such right. *Ibid.*

The failure of a party aggrieved to file a petition for the judicial review of an administrative order not later than 30 days after a written copy of the order had been served upon him by regular mail, *is held* not to constitute a waiver or forfeiture of the party's right to petition for review pursuant to

ADMINISTRATIVE LAW—*Continued.*

G.S. 143-309, since the right of review under the statute continues until 30 days have expired from service of the order by personal service or by registered mail, return receipt requested. *Ibid.*

ADMIRALTY.

A marine league is a distance the equivalent of three geographical miles. *Bruton v. Enterprises, Inc.*, 399.

A vessel, cargo, or other property is derelict in the maritime sense of the word when it is abandoned by the owners without hope of recovery or without intention of returning, and such abandonment effectively divests the owners of title and ownership thereto. *Ibid.*

Under the common law, wrecks or derelicts became the property of the Crown or its grantee after a year and a day if no owner appeared within that time to claim them. *Ibid.*

The submerged hulks of certain Confederate blockade runners and the wreck of a Spanish privateer sunk during the eighteenth century, together with their cargoes, all of which are resting within the territorial waters of the State and below the surface of the waters at low tide, are derelicts or wrecks within the purview of the common law and belong to the State in its sovereign capacity, and the activities of defendants in going upon the vessels and removing therefrom historical artifacts constitute a trespass, entitling the State to an order permanently enjoining defendants from disturbing the vessels or their cargoes. *Ibid.*

G.S. 82-1 *et seq.*, relating to the protection and sale of stranded vessels and their cargo, are inapplicable to divest the State of its prerogative right to abandon vessels lying beneath the territorial waters of the State for more than 100 years. *Ibid.*

APPEAL AND ERROR.

§ 6. Judgments and Orders Appealable.

An appeal to the Supreme Court lies from an order granting an interlocutory injunction. *Board of Elders v. Jones*, 174.

A motion to strike allegations relating to the recovery of punitive damages on the ground that the complaint fails to state a cause of action supporting such a recovery is in the nature of a demurrer, and an appeal will lie from an order allowing the motion to strike, Rule of Practice in the Supreme Court No. 4(a) not being applicable. *King v. Insurance Co.*, 396.

§ 16. Jurisdiction and Powers of Lower Court After Appeal.

An appeal from a final judgment *eo instanti* removes the case from the Superior Court and transfers jurisdiction to the Supreme Court, and thereafter the Superior Court is *functus officio* to permit an amendment to the pleadings. *Lane v. Griswold*, 1.

G.S. 1-287.1 does not apply when no case on appeal is required, and in such case the judge of the Superior Court has no authority to dismiss the appeal for failure to file case on appeal. *Holsomback v. Holsomback*, 728.

§ 26. Exception and Assignments of Error to Judgment or to Signing of Judgment.

An exception to the signing and the entry of the judgment presents the question whether error of law appears on the face of the record proper, which includes whether the facts found or admitted support the judgment and whether

APPEAL AND ERROR—*Continued.*

the judgment is regular in form, but the exception does not present for review the findings of fact or the sufficiency of the evidence to support them. *Sternberger v. Tannenbaum,* 658.

§ 28. Objections, Exceptions, and Assignments of Error to the Findings of Fact.

On motion to dismiss for invalid service on defendant, the court is not required to make findings of fact, absent a request, and it is presumed that the court on proper evidence found facts sufficient to support its judgment. *Williams v. Bray,* 198.

An exception to the "findings of fact and conclusions of law" and the judgment of the court, although broadside, is sufficient to present the record proper for review and to raise the question whether error of law appears on the face of the record. *In re Appeal of Broadcasting Corp.,* 571.

§ 31. Exceptions and Assignment of Error to the Charge.

Assignments of error to the court's misstatement of appellant's contentions as to the facts cannot be sustained when the misstatements were not called to the court's attention in apt time to permit a correction. *Johnson v. Lamb,* 701.

§ 35. Necessity for Case on Appeal.

No case on appeal is required where appellant's assignments of error all relate to the record proper, the only requirement being that appellant docket his appeal within the time required by the rules of the Supreme Court. *Holsomback v. Holsomback,* 728.

§ 38. Settlement of Case on Appeal.

Where the record states that the parties agreed to the case on appeal but contradictions appear in the record as to matters decisive of the assignments of error, the case is properly remanded to be settled by the trial court. *Shepherd v. Shepherd,* 71.

§ 42. Conclusiveness and Effect of Record.

Statements in the record disclosing that appellant's objection was not interposed until after the answer of the witness are controlling notwithstanding statements in appellant's brief to the contrary. *Johnson v. Lamb,* 701.

§ 45. Form and Contents of Brief, and Effect of Failure to Discuss Exceptions and Assignments of Error Therein.

Exception not discussed in the brief is deemed abandoned. Rule of Practice in the Supreme Court No. 28. *Homes, Inc. v. Bryson,* 84; *Knutton v. Cofield,* 355; *Capune v. Robbins,* 581.

Exceptions in the record not set out in appellant's brief and in support of which no reason or argument is stated or authority cited will be deemed abandoned. Rule of Practice in the Supreme Court No. 28. *Freeman v. City of Charlotte,* 113; *Hollman v. City of Raleigh,* 240.

§ 48. Harmless and Prejudicial Error in Admission of Evidence.

An objection is waived when evidence of the same import is thereafter admitted without objection. *Mills, Inc. v. Terminal, Inc.,* 519.

§ 49. Harmless and Prejudicial Error in Exclusion of Evidence.

The exclusion of evidence cannot be held prejudicial when the record fails to show what the witness would have testified had he been permitted to answer. *Eubanks v. Eubanks,* 189.

APPEAL AND ERROR—*Continued.*

Error in respect to evidence rulings or portions of the charge relating to an issue answered in appellant's favor is not prejudicial to appellant. *Key v. Welding Supplies,* 609.

§ 53. Error Cured by Verdict.

Where the rights of the parties are determined by the jury's answer to one of the issues, error relating to another issue is not prejudicial. *Hendricks v. Hendricks,* 733.

§ 55. Review of Orders Relating to Pleadings.

Technical errors by the trial court in ruling on matters of pleading do not justify reversal when the complaint states a defective cause of action. *Lane v. Griswold,* 1.

§ 58. Review of Injunction and Other Equity Proceedings.

The sole question before the trial court at a hearing upon an order to show cause is whether an injunction should issue to restrain defendant from the action complained of pending final hearing on the merits, and upon appeal of the trial court's ruling, the Supreme Court is limited to a determination of the same question. *Board of Elders v. Jones,* 174.

Upon appeal from an order granting an interlocutory injunction, the Supreme Court is not bound by the findings of fact made by the court below but may review the evidence and find facts for itself. *Ibid.*

Neither the findings of fact or the conclusions of law of the trial court upon the hearing of an application for an interlocutory injunction, nor the findings or conclusions of the Supreme Court on appeal, are binding upon, or are to be considered by, the Superior Court at the final hearing of the matter. *Ibid.*

§ 59. Review of Judgments on Motion to Nonsuit.

On appeal from a judgment of nonsuit, the Supreme Court will discuss the evidence only to the extent necessary to give the reason for the decision and will not attempt to pass on the credibility of the witnesses or to reconcile conflicts in the evidence. *Homes, Inc. v. Bryson,* 84; *Sneed v. Lions Club,* 98.

In passing upon a motion for involuntary nonsuit, evidence offered by plaintiff and not challenged by defendant must be treated as before the jury with all its probative force. *Freeman v. City of Charlotte,* 113.

§ 68. Law of the Case and Subsequent Proceedings.

Language in a prior decision which is but an expression of opinion upon an incidental question not presented in the appeal does not have the force of adjudication. *Cemetery, Inc. v. Rockingham,* 467.

ARCHITECTS.

G.S. 83-11 gives an architect whose certificate of admission to practice has been revoked for failure to pay the annual renewal fee the absolute and unqualified right to have his certificate renewed upon paying the renewal fee and prescribed penalty within one year after its due date. *Snow v. Board of Architecture,* 559.

Renewal of the certificate of admission to practice upon payment of the renewal fee and penalty does not preclude the State Board of Architecture

ARCHITECTS—*Continued.*

from subsequently revoking the certificate for cause other than the failure to pay the renewal fee. *Ibid.*

Where notice of a contemplated action to withhold for cause the renewal of a certificate to practice architecture is given pursuant to G.S. 150-11, and the architect does not request a hearing before the Board of Architecture pursuant to that statute, the Board has jurisdiction to determine the matter, and its order is not subject to judicial review. G.S. 150-11(c). *Ibid.*

While the State Board of Architecture loses its authority to render a decision at the expiration of ninety days from the date of the hearing, G.S. 150-20, an order entered within that time does not become a nullity by the fact that it is not served upon the certificate holder within five days after it is rendered as required by G.S. 105-21. *Ibid.*

Where the State Board of Architecture has withheld for cause the renewal of an architect's certificate of admission to practice, *mandamus* may not be used to compel the Board to renew the certificate, the exclusive method for obtaining a judicial review of the Board's order being an appeal to the Superior Court pursuant to G.S. 150-24, G.S. 150-33. *Ibid.*

ARREST AND BAIL.

§ 3. Right of Officers to Arrest Without Warrant.

Where police officers who have no arrest warrant or search warrant forcibly enter a motel room and arrest the occupant, the officers having a reasonable belief that he has committed a felony but not having first demanded and been denied admittance into the motel room, the entry is unlawful, G.S. 15-44, and articles discovered and seized as a result of the unlawful entry are inadmissible into evidence. *S. v. Covington*, 690.

ASSAULT AND BATTERY.

§ 3. Actions for Civil Assault.

Plaintiff's evidence tended to show that plaintiff, who was attempting a trip from New York to Florida down the Atlantic coastal waters on a paddle-board, approached defendant's fishing pier which extended one thousand feet into the Atlantic Ocean, that as plaintiff attempted to pass under the pier defendant yelled to plaintiff to turn back, and that defendant threw several bottles at plaintiff, one of which hit and injured him. *Held:* The evidence is sufficient to be submitted to the jury in plaintiff's action for civil assault, there being no evidence of any legal right of defendant to prohibit plaintiff from passing under the pier in continuation of his journey. *Capune v. Robbins*, 581.

In an action to recover damages on account of an assault by defendant on plaintiff as the latter was attempting to pass under defendant's ocean pier, defendant's requested instruction that his action would not be wanton or reckless if he believed he was acting in an attempt to protect his property from a trespasser *is held* properly refused when the evidence is insufficient to support a finding that plaintiff was a trespasser at the time he was struck and injured by defendant. *Ibid.*

§ 14. Nonsuit.

Evidence in this case held sufficient to go to jury on issue of defendant's guilt of assault with a deadly weapon with intent to kill, inflicting serious bodily injury not resulting in death. *S. v. Ross*, 498.

ATTORNEY GENERAL.

The State, as *parens patriæ*, through its Attorney General, has the common law right and power to protect the beneficiaries of charitable trusts and the property to which they are or may be entitled. *Sternberger v. Tannenbaum*, 658.

AUTOMOBILES.

§ 5. Title, Certificate of Title, Sale and Transfer of Title.

A mobile home is a motor vehicle, G.S. 20-38(17), and is subject to the mandatory provisions of the statutes relating to the registration of motor vehicles in this State. *Homes, Inc. v. Bryson*, 84.

§ 6. Warranties and Fraud in Sale of Motor Vehicles.

A provision in a contract for the sale of an automobile which allows one party to rescind within a year if "not happy with car" is properly construed to mean if not satisfied with the car. *Fulcher v. Nelson*, 221.

A provision in a contract allowing the purchaser of an automobile to "trade back" with the dealer if unhappy with the automobile will be construed to confer this right if plaintiff's election was made in good faith upon his dissatisfaction with the car. *Ibid.*

Evidence in this case is *held* sufficient to permit a jury finding that defendant automobile dealer breached a contractual obligation to "trade back" the automobile of a purchaser upon the latter's dissatisfaction with a car purchased from the dealer. *Ibid.*

§ 18. Entering Highway from Driveway or Filling Station.

The driver of a vehicle is required to remain on a private road until he ascertains, by proper lookout, that he can enter the main highway in safety to himself and to others on the highway. G.S. 20-158. *Warren v. Lewis*, 457.

§ 42.1. Seat Belts.

Statutes requiring installation of seat belts on new vehicles registered in this State are not absolute safety measures and do not expressly or impliedly impose upon the occupant of an automobile a duty to use them. *Miller v. Miller*, 228.

The failure of a guest passenger to use an available seat belt does not constitute contributory negligence barring recovery by the passenger for personal injuries received in an automobile accident caused by defendant driver's negligence. *Ibid.*

The doctrine of avoidable consequences is not invoked by the failure of plaintiff guest passenger to use an available seat belt, since the failure to fasten the seat belt occurs before defendant's negligence and plaintiff's injury, and further, there being no duty upon the passenger to use a seat belt. *Ibid.*

§ 43. Pleadings and Parties.

Actions for injuries arising out of same accident are properly consolidated. *Kanoy v. Hinshaw*, 418.

§ 58. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Turning and Hitting Turning Vehicles.

Evidence in this case is held sufficient to show employee's negligence in making sudden turn without warning into a private driveway. *Roberts v. Freight Carriers*, 600.

§ 74. Nonsuit on Ground of Contributory Negligence in Entering Highway.

Evidence tending to show that a motorist entered a highway from a pri-

AUTOMOBILES—*Continued.*

vate road and that he had traveled a distance of only 15 to 16 feet from the road when his automobile was struck by defendant's car, and that the motorist's view of the highway in the direction from which defendant was traveling was unobstructed for a distance of more than 600 feet, is sufficient to disclose contributory negligence on the part of the motorist, barring recovery as a matter of law. *Warren v. Lewis*, 457.

§ 90. Instructions in Automobile Accident Cases.

Failure of the court to charge upon the requirements of G.S. 20-154 and G.S. 20-144 *is held* not to be error under the circumstances of this case. *Kanoy v. Hinshaw*, 418.

An instruction on the issue of negligence which incorporates the provisions of G.S. 20-140 without further instructions upon what facts the jury might find from the evidence that would constitute reckless driving, *held* erroneous as not complying with G.S. 1-180. *Roberts v. Freight Carriers*, 600.

In an action arising out of a collision which occurred while plaintiff was attempting to make a left turn and defendant was attempting to pass plaintiff's vehicle, where the court reviews extensively the defendant's contentions that plaintiff was contributorily negligent in violating G.S. 20-154 by turning without signalling and without first ascertaining that such movement could be made in safety, it is prejudicial error for the court to fail to review the opposing contentions of plaintiff which are supported by evidence. *Key v. Welding Supplies*, 609.

§ 94. Contributory Negligence of Guest or Passenger.

The failure of a guest passenger to use an available seat belt does not constitute contributory negligence barring recovery by the passenger for personal injuries received in an automobile accident caused by defendant driver's negligence. *Miller v. Miller*, 228.

§ 110. Culpable Negligence.

The willful, wanton or intentional violation of a safety statute, or the inadvertent or unintentional violation of such statute when accompanied by recklessness amounting to a thoughtless disregard of consequences or a heedless indifference to the safety of others, constitutes culpable negligence, but the inadvertent or unintentional violation of a safety statute, standing alone, does not constitute culpable negligence. *S. v. Weston*, 275.

§ 113. Assault and Homicide — Sufficiency of Evidence and Nonsuit.

Evidence held sufficient to go to jury on defendant's guilt of manslaughter in striking child while passing a stopped school bus. *S. v. Weston*, 275.

§ 114. Instructions in Assault and Homicide Prosecutions.

In a prosecution for involuntary manslaughter arising out of the operation of an automobile, an instruction that defendant would be guilty if at the time of the accident he was operating his car while failing to keep a reasonable lookout *is held* erroneous, since it applies the test of civil liability rather than that of criminal liability. *S. v. Weston*, 275.

§ 120. Elements of Offense Proscribed by G.S. 20-138.

Evidence in this case *held* sufficient to sustain defendant's conviction of the violation of G.S. 20-138. *S. v. Kellum*, 348.

§ 126. Competency and Relevancy of Evidence in Prosecutions for Driving While Under the Influence of Intoxicants.

The results of a breathalyzer test are admissible in evidence when the

AUTOMOBILES—*Continued.*

person making the test is shown to be qualified as an expert and the manner in which the test is made meets the requirements of G.S. 20-139.1. *S. v. Randolph*, 120.

The requirements of *Miranda v. Arizona*, 384 U.S. 436, are inapplicable to a breathalyzer test administered pursuant to G.S. 20-139.1, since the taking of a breath sample from an accused for the purpose of the test is not evidence of a testimonial or communicative nature within the privilege against self-incrimination. *Ibid.*

The technician operating a breathalyzer machine may properly request an accused to submit to the test. *Ibid.*

Evidence in this case *is held* insufficient to show that the person administering the Breathalyzer test was qualified as an expert so as to meet the requirement of G.S. 20-139.1, and his testimony as to the results of a Breathalyzer test made on defendant is thereby rendered incompetent. *S. v. Mobley*, 471.

Statement of the arresting officer to defendant that if he does not take the Breathalyzer test "it will be used as an assumption of guilt in court" exceeds the scope of G.S. 20-16.2(b) and is deemed objectionable as coercing defendant to submit to the test, and a motion to strike the officer's testimony as to the result of the test is proper. *Ibid.*

§ 127. Sufficiency of Evidence and Nonsuit in Prosecutions Under G.S. 20-138.

The elements of the offense defined by G.S. 20-138 are the driving of a vehicle upon a highway within the State while under the influence of intoxicating liquor. *S. v. Kellum*, 348.

§ 132. Passing Standing School Bus.

Evidence held sufficient to go to jury on defendant's guilt of manslaughter and passing a stopped school bus. *S. v. Weston*, 275.

BAILMENT.

§ 1. Nature and Requisites of the Relation.

Evidence and allegation to the effect that plaintiff turned over possession of his airplane to defendant for repairs are sufficient to establish the relationship of bailor and bailee in regard to the airplane while in defendant's control or possession. *Mills, Inc. v. Terminal, Inc.*, 519.

§ 3. Liabilities of Bailee to Bailor.

Plaintiff's evidence to the effect that when he delivered his airplane to defendant for repairs of the radio the plane was in good condition and that while the plane was in defendant's possession and control it became damaged, makes out a *prima facie* case of actionable negligence against the defendant in the absence of some fatal admission or confession. *Mills, Inc. v. Terminal, Inc.*, 519.

Plaintiff's evidence was to the effect that he delivered his airplane in good condition to defendant for repair of the radio and that while in defendant's possession the plane was damaged. The evidence was sufficient to be submitted to the jury. *Held:* Defendant's evidence that a severe thunderstorm, accompanied by hail and by gusts of wind of a force up to 92 miles per hour, occurred while the plane was in its possession does not rebut the *prima facie* case on the ground that the plaintiff's damages resulted from an act of God. *Ibid.*

BANKS AND BANKING.

§ 3. Duties to Depositors in General.

Where funds are deposited in a bank, a contractual relation between the depositor and the bank is created whereby the bank becomes the debtor of the depositor. *In re Michal*, 504.

BOUNDARIES.

§ 10. Sufficiency of Description and Admissibility of Evidence Aliunde to Establish Boundaries.

The description in a deed must be interpreted as of the date the deed was executed, and if the description was not sufficiently certain at that time, it does not become so later by the occurrence or nonoccurrence of some other event. *Cummings v. Dosam, Inc.*, 28.

A patent ambiguity in the description of land cannot be removed by parol evidence. *Ibid.*

BROKERS AND FACTORS.

§ 1. Nature and Essentials of the Relationship of Broker and Factor.

The ordinary relationship of a stockbroker to his customer is that of principal and agent. *Lane v. Griswold*, 1.

BURGLARY AND UNLAWFUL BREAKINGS.

§ 2. Breaking and Entering Otherwise than Burglariously.

In an indictment under G.S. 14-54, the building allegedly broken and entered must be described sufficiently to show that it is within the language of the statute and to identify it with reasonable particularity so that defendant may prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense. *S. v. Sellers*, 641.

An indictment charging a non-burglarious breaking and entry of "a certain storehouse, shop, warehouse, dwelling and building" occupied by a named corporation is not fatally defective in failing to identify the type of structure broken into, although the better practice is to identify the subject premises by some clear description and designation to set the subject premises apart from like and other structures set forth in G.S. Chapter 14, Art. 14, defendant's remedy being a motion for a bill of particulars if he desires more information as to the identity of the building. *Ibid.*

§ 5. Sufficiency of Evidence and Nonsuit.

Testimony of a store manager that a quantity of guns and other merchandise was stolen from the locked premises after business hours is sufficient to establish the *corpus delecti*, and such evidence, together with defendant's confession that he participated in the breaking and the larceny, *is held* sufficient to be submitted to the jury. *S. v. Clyburn*, 284.

Evidence is held sufficient to go to jury on issue of defendant's guilt of first degree burglary. *S. v. Ross*, 498; *S. v. O'Neal*, 514.

§ 8. Sentence and Punishment.

Sentence of imprisonment of three to five years, imposed upon defendant's plea of guilty to the charge of felonious breaking and entering of a store building, is within the statutory maximum provided by G.S. 14-54 and is not excessive nor cruel and unusual in the constitutional sense. *S. v. Parrish*, 477.

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 1. Nature and Essentials of Remedy in General.

An action for rescission of a deed does not lie for the breach of promises honestly made but not thereafter performed. *Speller v. Speller*, 340.

§ 2. Cancellation for Fraud or Mistake Induced by Fraud.

An action for fraud or for rescission of an instrument must be based upon a false representation knowingly made with intent to deceive which is relied on and does deceive, and which results in loss or injury to the party deceived. *Speller v. Speller*, 340.

§ 8. Pleadings.

Plaintiff's allegations in an action to rescind a deed are held insufficient in absence of allegation that plaintiff has suffered loss from defendant's conduct. *Speller v. Speller*, 340.

CLERKS OF COURT.

§ 5. Jurisdiction in Regard to Insane Persons and Their Estates.

The clerk of the Superior Court has no jurisdiction to determine the right of a surviving trustee for an incompetent person to draw a check upon an account in the name of the cotrustees since any right of the surviving trustee is governed by the contractual relationship between the bank and the trustees, and the clerk's refusal to order the bank to honor the signature of the surviving trustee is not error. *In re Michal*, 504.

The clerk of the Superior Court has the jurisdiction to appoint and remove the cotrustee or the guardian of an incompetent person, G.S. 33-1, G.S. 33-9, the jurisdiction of the judge of the Superior Court over such matters being limited to the correction of errors of law upon appeal from the clerk, and therefore an order of a Superior Court judge directing the clerk to appoint a cotrustee for an incompetent person is in excess of the court's authority and will be vacated on appeal. *Ibid.*

COMMON LAW.

The common law of England is in force in this State to the extent it is not destructive of, repugnant to, or inconsistent with our form of government and to the extent it has not been abrogated or has not become obsolete. G.S. 4-1. *Bruton v. Enterprises, Inc.*, 399.

The term "common law" refers to the common law of England and not of any particular state. *Ibid.*

CONCEALED WEAPONS.

§ 1. Elements of the Offense.

A person in his own automobile on a public highway is not on his own premises within the meaning of G.S. 14-269. *S. v. Gainey*, 620.

The purpose of G.S. 14-269 is to reduce the likelihood that a concealed weapon may be resorted to in a fit of anger. *Ibid.*

To constitute a violation of G.S. 14-269, the weapon need not be concealed on the person of the accused, but must be in such position that he has ready access to it. *Ibid.*

§ 2. Prosecutions.

Evidence that when officers stopped an automobile owned and driven by

defendant and occupied by four other persons, the officers saw two of the passengers rearranging the rear seat, that a sawed-off rifle was found under the rear seat, and that unconcealed guns owned by defendant and by one of the passengers were found in the automobile, *is held* insufficient to be submitted to the jury on the issue of defendant's guilt of carrying the sawed-off rifle concealed about his person, there being no evidence that defendant knew of or participated in the concealment, and the rifle not being concealed within the reach and control of defendant. *S. v. Gainey*, 620.

CONSTITUTIONAL LAW.

§ 2. Nature and Construction of Constitutional Provisions in General.

The Constitution of the State is a restriction of powers, and those powers not surrendered are reserved to the people through their representatives in the General Assembly. *Mitchell v. Financing Authority*, 137.

§ 4. Persons Entitled to Raise Constitutional Questions; Waiver and Estoppel.

Ordinarily, the acceptance of benefits under a statute or an ordinance estops a party from attacking the constitutionality of the statute or ordinance. *City of Durham v. Bates*, 336.

Where landowners accept a sum of money deposited by a municipality with the clerk as estimated compensation due the landowners for the taking of their property pursuant to G.S. Chapter 136, Art. 9, the landowners are thereafter estopped from attacking the constitutionality of the statutes, the jurisdiction of the court to put the municipality in possession, or the failure of the city strictly to comply with the provisions of the statutes. *Ibid.*

§ 10. Judicial Powers.

The initial responsibility for determining what is a public purpose rests with the legislature and its findings are entitled to great weight, but an enactment for a private purpose is unconstitutional and cannot be saved by a legislative declaration to the contrary. *Mitchell v. Financing Authority*, 137.

When a constitutional question is properly presented, it is the duty of the court to ascertain and declare the intent of the Constitution and to reject any legislative act in conflict therewith. *Ibid.*

There is a presumption in favor of the constitutionality of a statute. *Ibid.*

The court will not question the wisdom of the General Assembly in enacting a valid statute. *Ibid.*

§ 12. Regulation of Trades and Professions.

A statute or ordinance which curtails the right of a person to engage in an occupation can be sustained as a valid exercise of the police power only if it is reasonably necessary to promote the public health, morals, order, safety or general welfare. *Cheek v. City of Charlotte*, 293.

When the legislature undertakes to regulate a business, trade or profession, the courts will assume it acted within its powers until the contrary clearly appears. *Ibid.*

The occupation of a massagist and the business of massage parlors and similar establishments are proper subjects for regulation under the police power of a municipality, provided, however, that such regulation be uniform, fair and impartial in its operation. *Ibid.*

§ 14. Morals and Public Welfare.

The occupation of a massagist and the business of massage parlors and similar establishments are proper subjects for regulation under the police power

CONSTITUTIONAL LAW—*Continued.*

of a municipality, provided, however, that such regulation be uniform, fair and impartial in its operation. *Cheek v. City of Charlotte*, 293.

§ 15. Public Convenience and Prosperity.

The original zoning power of the State rests in the General Assembly and is subject to the constitutional limitations against arbitrary and unduly discriminatory interference with the rights of property owners. *Zopfi v. City of Wilmington*, 430.

§ 20. Equal Protection; Application and Enforcement of Laws, and Discrimination.

Statutes and ordinances are void as class legislation whenever persons engaged in the same business are subject to different restrictions or are given different privileges under the same conditions. *Cheek v. City of Charlotte*, 293.

Inequalities and classifications do not, *per se*, render a legislative enactment unconstitutional. *Ibid.*

A municipal ordinance which prohibits a person of one sex from giving a massage to a patron of the opposite sex in a massage parlor, health salon or physical culture studio, but which permits such conduct in a barber shop, beauty parlor or YMCA or YWCA health club, is unconstitutional, since it arbitrarily discriminates between businesses of the same class. *Ibid.*

§ 28. Necessity for and Sufficiency of Indictment.

Every defendant has the constitutional right to be informed of the accusation against him, and the warrant or indictment must set out the charge with such exactness that he can have a reasonable opportunity to prepare his defense and to avail himself of his conviction or acquittal as a bar to a subsequent prosecution for the same offense, and further, the charge must enable the court, on conviction, to pronounce sentence according to law. N. C. Constitution, Art. I, § 11. *S. v. Rogers*, 208.

The common law rule that an attempt to commit a felony is a misdemeanor remains unchanged in this State unless otherwise provided by statute, and an indictment will not support a conviction for an offense more serious than that charged. *S. v. Massey*, 723.

§ 30. Due Process in Trial in General.

Upon the *voir dire* to determine the lawfulness of a search and seizure, it is reversible error for the trial court to deny defendant the opportunity to offer evidence in his behalf. *S. v. Pike*, 102.

§ 31. Right of Confrontation, Time to Prepare Defense, and Access to Evidence.

Trial of defendant on the same day the bill of indictment is returned does not deprive defendant of notice and an opportunity to prepare his defense where the case is on appeal from defendant's conviction in an inferior court upon a warrant charging the same offense as the indictment. *S. v. Gay*, 125.

§ 33. Self-incrimination.

The requirements of *Miranda v. Arizona*, 384 U.S. 436, are inapplicable to a breathalyzer test administered pursuant to G.S. 20-139.1, since the taking of a breath sample from an accused for the purpose of the test is not evidence of a testimonial or communicative nature within the privilege against self-incrimination. *S. v. Randolph*, 120.

Defendant is not prejudiced by the failure of police officers to give him

CONSTITUTIONAL LAW—*Continued.*

the constitutional warnings set forth in *Miranda v. Arizona,* 384 U.S. 436, where no evidence obtained as a result of interrogation was used against him at the trial. *S. v. Ross,* 498.

§ 36. Cruel and Unusual Punishment.

Sentence of six months imprisonment imposed upon defendant's plea of guilty to a charge of felonious escape is not cruel and unusual in the constitutional sense, the sentence not exceeding the statutory maximum. *S. v. McCall,* 135.

Sentence of imprisonment within the statutory limit is not cruel and unusual punishment as forbidden by the North Carolina Constitution, Art. I, § 14. *S. v. Weston,* 275.

CONTRACTS.

§ 1. Nature and Essentials of Contracts.

Persons *sui generis* have a right to make any contract not contrary to law or public policy, and the court will not inquire into whether the parties acted wisely or foolishly. *Fulcher v. Nelson,* 221.

Ordinarily, when parties who are on equal footing and are competent to contract enter into an agreement on a lawful subject, and do so fairly and honorably, the law will not inquire as to whether the contract was good or bad, wise or foolish. *Knutton v. Cofield,* 355.

§ 5. Form and Requisites of Agreements and Parol Provisions.

Preliminary negotiations are merged into the subsequent written contract, and the written agreement is conclusive as to the terms of the bargain. *Cantrell v. Woodhill Enterprises, Inc.,* 490.

§ 12. Construction and Operation of Contracts Generally.

A contract is to be construed as a whole and each provision therein must be appraised in relation to all other provisions. *Dixie Container Corp. v. Dale,* 624.

Where a contractor specifically agrees to indemnify the owner of a building for any damages caused to its property during the course of construction, the tenant is thereby excluded from the protection afforded the owner, since it is reasonable to assume that had the parties intended to impose liability upon the contractor for damage to the tenant's property they would have made the provision applicable to him. *Ibid.*

Ordinarily, the engagement in an indemnity contract is to make good and save the indemnitee harmless from loss or some obligation which he has incurred to a third party, and a provision in a construction contract whereby the contractor agrees to indemnify and save harmless the owner of a building and his tenant "against all loss, cost, including reasonable attorney's fees, or damage on account of injury to persons or property" is construed to impose liability upon the contractor only for such damages incurred by the owner or tenant to third persons. *Ibid.*

§ 14. Contracts for Benefit of Third Persons.

A third-party beneficiary to an existing contract *is held* not a party to the contract so as to come within its provisions incorporating the terms of a prior contract and making them operational as to "the parties" of the existing contract. *Dixie Container Corp. v. Dale,* 624.

§ 18. Modification, Rescission, Abandonment, and Waiver.

A provision in a contract for the sale of an automobile which allows one

CONTRACTS—*Continued.*

party to rescind within a year if "not happy with car" is properly construed to mean if not satisfied with the car. *Fulcher v. Nelson*, 221.

An agreement in which the promise of one party is conditional upon the satisfaction of the promisee is generally enforceable, since such promise is generally considered as requiring a performance which shall be satisfactory to the promisee in the exercise of an honest judgment. *Ibid.*

Where the language of a contract is uncertain as to whether one party in case of dissatisfaction shall have an unqualified option to terminate the contract or whether such right of termination is to be based upon some reasonable ground, the contract will be construed as not reposing in the party the arbitrary or unqualified option to terminate it. *Ibid.*

A provision in a contract allowing the purchaser of an automobile to "trade back" with the dealer if unhappy with the automobile will be construed to confer this right if plaintiff's election was made in good faith upon his dissatisfaction with the car. *Ibid.*

§ 21. Performance, Substantial Performance, and Breach.

A contractor or builder impliedly represents that he possesses the skill necessary to perform the job undertaken, and he has a duty to perform the work in a proper and workmanlike manner. *Cantrell v. Woodhill Enterprises, Inc.*, 490.

§ 23. Waiver of Breach.

An acceptance of work done under a construction contract ordinarily waives defects which are known to the owner or which are discoverable by inspection, but such acceptance does not waive latent defects of which the owner is ignorant at the time of acceptance or which may appear thereafter. *Cantrell v. Woodhill Enterprises, Inc.*, 490.

Waiver and estoppel are affirmative defenses which must be pleaded. *Ibid.*

§ 25. Pleadings, Burden of Proof, and Issues.

In an action for breach of a building or construction contract the complaint must allege the existence of a contract, the specific provisions breached, the facts constituting the breach, and the amount of damages resulting from such breach. *Cantrell v. Woodhill Enterprises, Inc.*, 490.

A complaint which alleges generally that defendant erected a building "in an unskillful manner" is subject to demurrer for failure to allege facts constituting the faulty workmanship, but when the demurrer is sustained the plaintiff may then move for leave to amend his complaint to allege his cause of action properly. *Ibid.*

§ 26. Competency and Relevancy of Evidence in Contract Actions.

In the purchaser's action to rescind a contract of automobile sale under a provision allowing him to "trade back" if he is dissatisfied with the car, plaintiff's testimony as to the physical condition of the automobile immediately after acquiring possession thereof is competent upon the question of plaintiff's good faith in electing to exercise his right of rescission. *Fulcher v. Nelson*, 221.

§ 27. Sufficiency of Evidence and Nonsuit in Actions Involving Contracts.

Evidence in this case is *held* sufficient to permit a jury finding that defendant automobile dealer breached a contractual obligation to "trade back" the automobile of a purchaser upon the latter's dissatisfaction with a car purchased from the dealer. *Fulcher v. Nelson*, 221.

CONTRACTS—*Continued.*

§ 29. Measure of Damages for Breach of Contract.

In an action for damages resulting from an automobile dealer's breach of a contractual obligation to "trade back" at any time within a year if plaintiff is dissatisfied with the automobile purchased from the dealer, plaintiff is entitled to be placed, as near as this can be done in money, in the same position he would have occupied if the dealer's "trade back" obligation had been performed. *Fulcher v. Nelson*, 221.

CORPORATIONS.

§ 1. Incorporation and Corporate Existence.

The mere fact that one or two persons own all of the stock of a corporation does not make the acts of the corporation the acts of the stockholders so as to impose liability therefor upon them. G.S. 55-3.1. *Henderson v. Finance Co.*, 253.

Where a corporation is so operated that it is a mere instrumentality or *alter ego* of the sole or dominant shareholder and a shield for his unlawful activities, the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person. *Ibid.*

Evidence of usurious transactions by the dominant shareholder of a finance company who made no pretense of keeping his activities separate from those of the corporation *is held* to justify trial court's action in disregarding the corporate entity. *Ibid.*

§ 4. Authority and Duties of Stockholders and Directors; Meetings and Minutes.

The execution of a proxy without specifying the length of time for which it is to continue in force nor limiting its use to a particular meeting is invalid after the expiration of eleven months from the date of its execution. G.S. 55-68(b), and the record owner of the shares to which the proxy applies is entitled to vote the shares at a stockholders meeting held more than eleven months after the proxy is issued. *Stein v. Outdoor Advertising*, 77.

An agreement whereby a stockholder assigned to another stockholder for an unspecified time the right to vote all of the shares owned by the first stockholder did not create a voting trust subject to the provisions of G.S. 55-72 since there was no transfer, nor an intent to transfer, the shares of stock for the purpose of the agreement. G.S. 55-72(a). *Ibid.*

G.S. 55-73(a), providing that two or more stockholders may validly contract that the shares held by them shall be voted as a unit for the election of directors, is inapplicable to an agreement which gives one stockholder general voting rights in the shares of another stockholder and which fails to provide that the shares of the two stockholders are to be voted as a unit. *Ibid.*

Agreement giving one stockholder voting rights in the shares of another cannot be construed as an agreement by all of the shareholders to treat the corporation as a partnership, G.S. 55-73(b), there being no evidence that the third shareholder of the corporation assented to the voting agreement. *Ibid.*

Agreement giving one stockholder an unlimited right to vote the shares of another stockholder is a mere continuing proxy which expires eleven months after the execution thereof, G.S. 55-68(b), and is not an agreement attempting to interfere with the discretion of the board of directors. G.S. 55-73(c). *Ibid.*

§ 18. Sale and Transfer of Stock.

The word "sale" as used in the North Carolina Securities Law, G.S. 78-2(f), will be presumed, in the absence of a contrary intent in the statute, to have

CORPORATIONS—*Continued.*

its usual meaning of a transfer of property from one person to another for a valuable consideration. *Lane v. Griswold,* 1.

In an action by the purchaser of stock to render void a contract of stock purchase and recover the purchase price thereof, allegations that plaintiff in this State placed an unsolicited order for the purchase of stock with defendant stockbrokers in another state and that this order was filled by defendants, as agent for plaintiff, through its own office or clearinghouse in another state, *are held* ineffectual to allege a sale or an offer for sale of unregistered securities within the purview of G.S. 78-6 and G.S. 78-22, since it appears from the complaint that defendants were acting solely as the agent of plaintiff and not as a seller of the securities or as a seller's agent. *Ibid.*

Allegations that defendant stockbrokers, as agent for plaintiff, purchased shares of stock through its office or clearinghouse in another state and that the stock was subsequently delivered to plaintiff upon plaintiff's payment in this State of a sight draft attached to the securities, *are held* ineffectual to allege a sale of unregistered securities in this State within the meaning of G.S. 78-6 and G.S. 78-22, since the sale was consummated in the other state upon the purchase of the stock, the title having vested immediately in the plaintiff. *Ibid.*

COSMETOLOGISTS.

G.S. 88-11, which restricts an apprentice cosmetologist to the practice of her trade "under the direct supervision of a registered managing cosmetologist," does not alter the common law rules governing the liability of the apprentice's employer for the consequences of the employee's acts in the course of employment, and, consequently, there is no necessity to submit to the jury as a material issue the presence or absence of supervision in the course of the apprentice's employment. *Johnson v. Lamb,* 701.

A cosmetologist is not an insurer against injury from the treatment she undertakes to render, nor is she liable for the consequences of every error of judgement. *Ibid.*

Failure of the court to instruct that the defendant cosmetologist must possess the knowledge and skill which is customarily possessed and exercised by cosmetologists in the area wherein she practices, *held* prejudicial to the plaintiff customer. *Ibid.*

COUNTIES.

§ 3. County Commissioners, Meetings, Minutes, Duties and Authority.

To effectuate a transfer of school bond funds from one project to another, the county board of education must, by resolution, request such reallocation and apprise the county commissioners of the conditions necessitating the transfer, and the board of county commissioners must then make an investigation and record their findings upon their official minutes, and authorize or reject the proposed reallocations. *Dilday v. Board of Education,* 679.

The board of county commissioners may reallocate school bond funds in accordance with a request of the county board of education upon finding (1) that conditions have so changed since the bonds were authorized that the funds are no longer necessary for the original purpose, or that the proposed new project will eliminate the necessity for the originally contemplated expenditure and better serve the district involved, or that the law will not permit the original purpose to be accomplished in the manner intended, and (2) that the total proposed expenditure for the changed purpose is not excessive. *Ibid.*

COUNTIES—*Continued.*

§ 6. Fiscal Management and Debt.

G.S. 153-107 places no limitation upon the legal right to transfer or allocate funds from one project to another within the general purpose for which county bonds were issued, but it does prevent funds obtained for one general purpose from being transferred and used for another general purpose. *Dilday v. Board of Education*, 679.

County commissioners' approval of a reallocation of county school bond funds for construction of a central high school is held insufficient to dissolve a temporary restraining order where the commissioners made no specific findings as to the buildings planned for the proposed school and the sufficiency of available funds for such construction. *Ibid.*

COURTS.

§ 7. Appeals from Inferior Courts to Superior Court.

The jurisdiction of the Superior Court upon appeal from a general county court is limited to rulings on exceptions duly noted and brought forward, and the Superior Court is without authority to make additional findings of fact. *Becker v. Becker*, 65.

§ 21. What Law Governs; as Between Laws of This State and of Other States.

Allegations that defendant stockbrokers, as agent for plaintiff, purchased shares of stock through its office or clearinghouse in another state and that the stock was subsequently delivered to plaintiff upon plaintiff's payment in this State of a sight draft attached to the securities, *are held* ineffectual to allege a sale of unregistered securities in this State within the meaning of G.S. 78-6 and G.S. 78-22, since the sale was consummated in the other state upon the purchase of the stock, the title having vested immediately in the plaintiff. *Lane v. Griswold*, 1.

§ 17. Justices of the Peace.

A clerk of a county recorder's court vacates his office *eo instanti* he accepts the office of justice of the peace, since both are public offices under the State within the purview of Art. XIV, § 7, of the Constitution of North Carolina, and he is thereafter authorized to issue search warrants for barbiturates as a justice of the peace. G.S. 15-25.1. *S. v. Cook*, 377.

CRIMINAL LAW.

§ 4. Distinction Between Crimes, Misdemeanors and Penalties.

The common law rule that an attempt to commit a felony is a misdemeanor remains unchanged in this State unless otherwise provided by statute, and an indictment will not support a conviction for an offense more serious than that charged. *S. v. Massey*, 723.

§ 9. Principals in the First or Second Degree; Aiders and Abettors.

Where there is insufficient evidence to convict the principal defendant of carrying a concealed weapon, others may not be convicted of aiding and abetting that defendant in the concealment. *S. v. Gainey*, 620.

§ 13. Jurisdiction in General.

Defendant's contentions as to the illegality of the warrant upon which he was arrested is rendered moot and immaterial by his trial upon a valid in-

dictment in the Superior Court upon demand for trial by jury. *S. v. Mobley*, 471.

§ 16. Status of Offense; Concurrent and Exclusive Jurisdiction.

A motion to quash in its entirety an indictment originating a prosecution in the Superior Court is properly denied when the court has jurisdiction to render judgment upon one of the counts charging a felony, even though another count charges a misdemeanor for which an inferior court has exclusive original jurisdiction. *S. v. Hayes*, 712.

§ 18. Jurisdiction on Appeals to Superior Court.

Upon appeal from a conviction in an inferior court, a person charged with a misdemeanor may be tried in the Superior Court, in the discretion of the solicitor, upon the original warrant or upon an indictment charging the same offense. *S. v. Gay*, 125.

§ 19. Transfer of Cause to Superior Court Upon Demand in Inferior Court for Trial by Jury.

Where a prosecution is transferred from the recorder's court to the Superior Court upon the prosecutor's demand for a jury trial, Session Laws of 1955, Chapter 573, the jurisdiction of the recorder's court is ousted and the Superior Court acquires original jurisdiction to try the defendant upon indictment, and such transfer being mandatory, defendant is not entitled to notice thereof. *S. v. Lawrence*, 351.

Where a prosecution is transferred from a municipal-county court to the Superior Court upon the defendant's demand for a jury trial, Session Laws of 1945, Chapter 509, the jurisdiction of the inferior court is thereby ousted, and the Superior Court having acquired original jurisdiction, the defendant must be tried upon indictment. *S. v. Mobley*, 471.

§ 23. Plea of Guilty.

Where one of two codefendants, in the absence of the jury, withdraws his pleas of not guilty at the conclusion of the State's evidence, and enters pleas of guilty, the continuation of the trial and instruction of the jury as if both defendant's remained on trial is approved. *S. v. Covington*, 690.

§ 24. Plea of Not Guilty.

A plea of not guilty puts in issue every essential element of the crime charged. *S. v. Ramey*, 325.

§ 25. Plea of Nolo Contendere.

A plea of *nolo contendere* admits for the purpose of the particular case all the elements of the offense charged and gives the court power to sentence the defendant for such offense, and no other proof of guilt is required. *S. v. Sellers*, 641.

A plea of *nolo contendere* will support the same punishment as a plea of guilty. *Ibid.*

§ 26. Plea of Former Jeopardy.

Sentence of imprisonment imposed upon defendant's conviction of felonious escape does not constitute double jeopardy or double punishment in that he had already been punished under prison regulations, since the application of the prison rules authorized by G.S. 148-11 is an administrative act, not a ju-

CRIMINAL LAW—*Continued.*

dicial act, and cannot affect sentences imposed by the courts. *S. v. Shoemaker*, 475.

Upon an appeal from a conviction of misdemeanor larceny in a county court, the election of the State to try defendant upon the warrant in the Superior Court for misdemeanor larceny precludes the State from retrying defendant for felonious larceny in the event a new trial is granted, although the evidence at the first trial would support a charge of felonious larceny. *S. v. Bowers*, 652.

§ 30. Pleas of the State.

Where the solicitor announces in open court that the State will not prosecute defendant for first degree murder as alleged in the indictment, the defendant may not be convicted of that offense but may be convicted of some lesser offense embraced within the charge. *S. v. Rogers*, 330.

§ 32. Burden of Proof and Presumptions.

Defendant is not required to prove his defense of alibi, and the burden remains on the State to prove his guilt beyond a reasonable doubt. *S. v. O'Neal*, 514.

§ 33. Facts in Issue and Evidence Relevant to Issues in General.

Testimony describing a deceased's wounds is competent to show the violence of the transaction, particularly where the question of the use of excessive force is raised by defendant's plea of self-defense, and such testimony will not be excluded merely because it may excite prejudice against the defendant. *S. v. Kirby*, 306.

Testimony by the prosecutrix that during an assault upon her the occupants of a nearby apartment building were yelling for her assailant to free her *is held* competent as part of the *res gestæ*. *S. v. Goines*, 509.

§ 41. Circumstantial Evidence in General.

While the court may not ask questions reasonably calculated to impeach or discredit a witness or his testimony, the court may propound competent questions to a witness in order to clarify the witness' testimony or to develop some fact overlooked, and the fact that such a question requires a response that is circumstantial evidence does not render it incompetent. *S. v. Kirby*, 306.

§ 48. Silence of Defendant as Implied Admission.

Where a letter written by one defendant implicating another defendant was read by the sheriff while the second defendant was present, the silence of the second defendant is not competent as an implied admission of guilt where there is no showing that the second defendant was in a position to hear and understand what was read. *S. v. Cannon*, 215.

§ 55. Blood Tests.

The results of a breathalyzer test are admissible in evidence when the person making the test is shown to be qualified as an expert and the manner in which the test is made meets the requirements of G.S. 20-139.1. *S. v. Randolph*, 120.

The requirements of *Miranda v. Arizona*, 384 U.S. 436, are inapplicable to a breathalyzer test administered pursuant to G.S. 20-139.1, since the taking of a breath sample from an accused for the purpose of the test is not evidence of

CRIMINAL LAW—*Continued.*

a testimonial or communicative nature within the privilege against self-incrimination. *Ibid.*

The technician operating a breathalyzer machine may properly request an accused to submit to the test. *Ibid.*

§ 64. Evidence as to Intoxication.

A lay witness may give an opinion as to whether or not defendant was under the influence of barbiturates on a given occasion when the witness observed him, and such evidence is relevant to the issue of defendant's alleged unlawful possession of barbiturates. *S. v. Cook,* 377.

§ 66. Evidence of Identity by Sight.

Testimony of a witness on direct and on cross-examination sufficiently identifying defendant as the person who committed the crime is not rendered incompetent by her earlier testimony that she "could not see" who fired the fatal shot, it appearing that the witness was merely referring to the fact that she did not know the defendant. *S. v. Goodson,* 128.

The evidence of the State sufficiently established the *corpus delecti,* but the sole evidence as to the identity of the defendant was testimony by a witness who could not "honestly say" that defendant was an accomplice. *Held:* The evidence raises no more than a suspicion or conjecture as to defendant's identity, and the offense charged was incorrectly submitted to the jury. *S. v. Clyburn,* 284.

A witness who was present at defendant's unlawful arrest is not thereby precluded from making a courtroom identification of defendant as the person who robbed him where the identification is based on the robbery itself and not on what occurred during the arrest, and where evidence before the jury of what occurred at the time of defendant's arrest was first elicited and thereafter developed by defense counsel's cross-examination of State's witnesses. *S. v. Covington,* 690.

§ 71. "Shorthand" Statement of Fact.

Testimony of the prosecutrix that the defendant put his face close to hers, "trying to kiss me," *is held* competent as a shorthand statement of fact. *S. v. Goines,* 509.

§ 73. Hearsay Testimony in General.

Testimony by officers as to statements made by one defendant implicating two codefendants is hearsay and therefore inadmissible against the codefendants. *S. v. Cannon,* 215.

§ 75. Confessions — Tests of Voluntariness; *Admissibility in General.*

The test of admissibility of a defendant's confession is whether the statement was in fact voluntarily made. *S. v. Clyburn,* 284.

Defendant's statements at the scene of an automobile accident are held admissible despite failure of officer to give the *Miranda* warnings. *S. v. Hayes,* 712.

§ 76. Confessions — Determination and Effect of Admissibility.

Whether an alleged confession was made voluntarily so as to be admissible in evidence is a question to be determined by the trial court in the absence of the jury. *S. v. Clyburn,* 284.

Whether the defendant made a purported confession is a question of fact to be determined by the jury from evidence admitted in its presence. *Ibid.*

Where the trial court finds upon the *voir dire* from conflicting evidence

CRIMINAL LAW—*Continued.*

that the confession was voluntarily and freely made after defendant had been advised of his rights, the findings, being supported by conclusive evidence, are binding on appeal. *Ibid.*

§ 77. Admissions and Declarations.

Testimony by officers as to statements made by one defendant implicating two codefendants is hearsay and therefore inadmissible against the codefendants. *S. v. Cannon*, 215.

§ 84. Evidence Obtained by Unlawful Means.

On defendant's motion to suppress the evidence of the State on the ground that it was procured by an unlawful search, the procedure to be followed by the trial court is the same as the inquiry into the voluntariness of a confession. *S. v. Pike*, 102.

When the defendant objects to the admissibility of the State's evidence on the ground that it was obtained by unlawful search, 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 as to the lawfulness of the search and seizure and to make findings of fact thereon, and such findings are binding on appeal if supported by competent evidence. *Ibid.*

Upon the *voir dire* to determine the lawfulness of a search and seizure, it is reversible error for the trial court to deny defendant the opportunity to offer evidence in his behalf. *Ibid.*

Evidence obtained by search under a valid warrant is competent. *S. v. Cook*, 377.

§ 86. Credibility of Defendant and Parties Interested.

Defendant may be cross-examined as to his prior convictions of unrelated criminal offenses when the purpose of such examination is to impeach his credibility as a witness. *S. v. Goodson*, 128.

§ 90. Rule That a Party is Bound by and May Not Discredit His Own Witness.

The introduction by the State of testimony of a defendant which includes exculpatory statements does not prevent the State from showing the facts concerning the crime to be otherwise, and on motion to nonsuit, only evidence favorable to the State will be considered. *S. v. Cooper*, 51.

§ 91. Time of Trial and Continuance.

Trial of defendant on the same day the bill of indictment is returned does not deprive defendant of notice and an opportunity to prepare his defense where the case is on appeal from defendant's conviction in an inferior court upon a warrant charging the same offense as the indictment. *S. v. Gay*, 125.

§ 95. Admission of Evidence Competent for Restricted Purpose.

When evidence competent for one purpose and not for another is offered and admitted, 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. Rule of Practice in the Supreme Court No. 28. *S. v. Goodson*, 128.

§ 99. Conduct of the Court, and its Expression of Opinion on the Evidence During Progress of the Trial.

While the court may not ask questions reasonably calculated to impeach or discredit a witness or his testimony, the court may propound competent

CRIMINAL LAW—*Continued.*

questions to a witness in order to clarify the witness' testimony or to develop some fact overlooked, and the fact that such a question requires a response that is circumstantial evidence does not render it incompetent. *S. v. Kirby*, 306.

A question propounded by the court as to how wounds found on the deceased compared with each other *is held* a question to develop a relevant fact which had been overlooked and is not an expression of opinion by the court on the evidence. *Ibid.*

§ 101. Custody and Conduct of Jury and Misconduct Affecting Jury; Witnesses.

The fact that during trial a juror stated that he was ready to go home does not warrant a new trial. *S. v. Moore*, 132.

The mere fact that an officer, who was a State's witness, opens the door for a lady juror to enter the courtroom does not warrant a mistrial. *Ibid.*

§ 103. Function of Court and Jury in General.

In our system of jurisprudence the functions of the court are separate from those of the jury; it is the duty of the court to pass on the competency and admissibility of the evidence and the jury may not invade the province of the court in this respect. *S. v. Pike*, 102.

It is for the court to determine the competency, admissibility and sufficiency of the evidence, and it is for the jury to determine the weight, effect and credibility of the evidence. *S. v. Clyburn*, 284.

An instruction of the court submitting to the jury the issue of defendant's guilt of common law robbery or of larceny from the person is not prejudicial to the defendant on the ground that the jury might be misled as to the severity of the penalty imposed upon conviction, since the province and responsibility of the jury is to find the facts while the consequences of the verdict is solely for the court. *S. v. Massey*, 723.

§ 104. Consideration of Evidence on Motion to Nonsuit.

The introduction by the State of testimony of a defendant which includes exculpatory statements does not prevent the State from showing the facts concerning the crime to be otherwise, and on motion to nonsuit, only evidence favorable to the State will be considered. *S. v. Cooper*, 51.

All the evidence admitted which is favorable to the State, whether competent or incompetent, must be considered by the court upon motion for nonsuit. *S. v. Cook*, 377.

Contradictions and discrepancies, even in the State's evidence, are for the jury to resolve and do not warrant nonsuit. *S. v. O'Neal*, 514.

§ 106. Sufficiency of Evidence to Overrule Nonsuit.

If there is substantial evidence of each essential element of the offense charged, defendant's motion for nonsuit is correctly denied. *S. v. Weston*, 275.

The extra-judicial confession of guilt by a defendant must be supported by evidence *aliunde* which establishes the *corpus delecti*, and such evidence may be direct or circumstantial. *S. v. Clyburn*, 284.

The evidence of the State sufficiently established the *corpus delecti*, but the sole evidence as to the identity of the defendant was testimony by a witness who could not "honestly say" that defendant was an accomplice. *Held:* The evidence raises no more than a suspicion or conjecture as to defendant's identity, and the offense charged was incorrectly submitted to the jury. *Ibid.*

The test of the sufficiency of circumstantial evidence to withstand nonsuit is whether a reasonable inference of defendant's guilt may be drawn from the

CRIMINAL LAW—*Continued.*

evidence; if so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is guilty. *S. v. Cook*, 377.

Upon motion to nonsuit, the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom, and nonsuit should be denied where there is sufficient evidence, direct, circumstantial, or both, from which the jury could find that the offense charged has been committed and that defendant committed it. *S. v. Goines*, 509.

§ 112. Instructions on Burden of Proof and Presumptions.

The court's instruction on the burden of proof arising from defendant's evidence of alibi *is held* without error in this case. *S. v. O'Neal*, 514.

§ 113. Statement of Evidence and Application of Law Thereto.

A slight inadvertence in stating the contentions of the parties or in recapitulating the evidence must be called to the court's attention in time for correction. *S. v. Goines*, 509.

§ 114. Expression of Opinion by Court on the Evidence in the Charge.

While the trial court is not required to state the contentions of the litigants even upon request, when the court does undertake to state the contentions of one party it must also fairly present the contentions of the other. *S. v. Cook*, 377.

§ 115. Instructions on Lesser Degrees of Crime and Possible Verdicts.

Error committed by the court in submitting the question of defendant's guilt of a lesser degree of the offense charged cannot be prejudicial to defendant. *S. v. Rogers*, 208.

§ 118. Charge on Contentions of the Parties.

While the trial court is not required to state the contentions of the litigants even upon request, when the court does undertake to state the contentions of one party it must also fairly present the contentions of the other. *S. v. Cook*, 377.

§ 124. Sufficiency and Effect of Verdict in General.

A verdict is the unanimous decision made by the jury and reported to the court. *S. v. Hemphill*, 388.

A verdict must be responsive to the issues submitted by the court. *Ibid.*

An appeal itself is an exception to the judgment and to matters appearing on the face of the record proper, and an opinion by the Supreme Court finding no error in the trial below is a tacit affirmation that the Court has examined the record proper and has found that the verdict is valid and unambiguous and that the sentence imposed is supported by the verdict. *Davis v. State*, 533.

A defendant has a substantial right in a verdict, and while a verdict is not complete until accepted by the court for record, the court does not have an unrestrained discretion in accepting or rejecting a verdict, but must examine its form and substance to prevent a doubtful or insufficient verdict from becoming the record of the court. *Ibid.*

The verdict in a criminal action should be clear and free from ambiguity. *Ibid.*

A verdict should be considered in connection with the issue being tried, the evidence, and the charge. *Ibid.*

CRIMINAL LAW—*Continued.*

The verdict in this case is held not to have been dictated or suggested to the jury by the Clerk of Court. *Ibid.*

Where a verdict of guilty specifically refers to one of the counts, but not to all, it amounts to an acquittal of the counts not referred to. *S. v. Hayes*, 712.

§ 126. Unanimity of Verdict, Polling the Jury, and Acceptance of the Verdict.

Motion by defendant to poll the jury is properly denied when the motion is made after the jury has been discharged. *S. v. Moore*, 132.

A verdict is a substantial right, but it is not complete until accepted by the court for record. *S. v. Hemphill*, 388.

The court should examine a verdict as to form and substance so as to prevent a doubtful or insufficient finding from becoming the record of the court, but this power to accept or reject a verdict is restricted to the exercise of a limited legal discretion. *Ibid.*

In this prosecution for felonious larceny and for felonious breaking and entering, the answer of the jury, "guilty of larceny," to the clerk's inquiry as to how the jury found defendant upon the charge of breaking and entering, *is held* unresponsive, and the action of the court in restating the charges against defendant and directing the jury to reconsider its verdict is proper. *Ibid.*

A defendant has a substantial right in a verdict, and while a verdict is not complete until accepted by the court for record, the court does not have an unrestrained discretion in accepting or rejecting a verdict, but must examine its form and substance to prevent a doubtful or insufficient verdict from becoming the record of the court. *Davis v. State*, 533.

Either the defendant or the State has the right upon request in apt time to have the jury polled to enable the court and the parties to ascertain with certainty that a unanimous verdict has been reached and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented. *Ibid.*

The verdict in this case is held not to have been suggested or dictated to the jury by the Clerk of Court, and any uncertainty or irregularity in the taking of the verdict was cured by the polling of the jury. *Ibid.*

§ 127. Arrest of Judgment.

A motion in arrest of judgment on the ground the indictment is fatally defective may be made for the first time in the Supreme Court on appeal. *S. v. Sellers*, 641.

§ 132. Setting Aside Verdict as Being Contrary to Weight of Evidence.

A motion to set aside the verdict as being contrary to the evidence is addressed to the sound discretion of the trial judge, whose ruling is not reviewable on appeal in the absence of manifest abuse of discretion. *S. v. Massey*, 723.

§ 134. Form and Requisites of Judgment or Sentence in General.

An appeal itself is an exception to the judgment and to matters appearing on the face of the record proper, and an opinion by the Supreme Court finding no error in the trial below is a tacit affirmation that the Court has examined the record proper and has found that the verdict is valid and unambiguous and that the sentence imposed is supported by the verdict. *Davis v. State*, 533.

§ 138. Severity of Sentence.

The court will not review defendant's loss of rewards and privileges for

CRIMINAL LAW—*Continued.*

good conduct upon his conviction of felonious escape, since the Prison Commission has been given authority to promulgate and apply rules in this regard and the matter being administrative and not judicial. *S. v. McCall*, 135.

Sentence of imprisonment imposed upon defendant's conviction of felonious escape does not constitute double jeopardy or double punishment in that he had already been punished under prison regulations, since the application of the prison rules authorized by G.S. 148-11 is an administrative act, not a judicial act, and cannot affect sentences imposed by the courts. *S. v. Shoemaker*, 475.

§ 146. Nature and Grounds of Appellate Jurisdiction in Criminal Cases.

Where the record proper contains inconsistent and contradictory statements as to the judgment pronounced, the Supreme Court, pursuant to its inherent power and duty to make its records speak the truth, and acting under its supervisory power over the lower courts, will remand the cause to the Superior Court for a proper judgment. *S. v. Ross*, 498.

§ 158. Conclusiveness and Effect of Record on Appeal and Presumptions as to Matters Omitted.

Where the charge of the court is not in the record, it will be presumed that the court correctly instructed the jury as to the law arising upon the evidence. *S. v. Cooper*, 51.

§ 161. Necessity for and Form and Requisites of Exceptions and Assignments of Error in General.

An appeal itself is an exception to the judgment and to matters appearing on the face of the record proper, and an opinion by the Supreme Court finding no error in the trial below is a tacit affirmation that the Court has examined the record proper and has found that the verdict is valid and unambiguous and that the sentence imposed is supported by the verdict. *Davis v. State*, 533.

§ 162. Objections, Exceptions, and Assignments of Error on Appeal to Evidence, and Motions to Strike.

Where the record fails to show exceptions to the testimony on the trial, an assignment of error to the admission of evidence does not properly present the question on appeal. *S. v. Randolph*, 120.

§ 164. Exceptions and Assignments of Error to Refusal of Motion for Nonsuit.

The sufficiency of the evidence of the State in a criminal case is reviewable upon appeal without regard to whether a motion has been made pursuant to G.S. 15-173 in the trial court. *S. v. Davis*, 349.

§ 166 Appeal and Error — The Brief.

Assignments of error not set out in the brief are deemed abandoned. *S. v. Covington*, 690.

§ 168. Harmless and Prejudicial Error in Instructions.

Conflicting instructions upon a material point, one correct and one incorrect, must be held for reversible error, since the jury is not supposed to know which is the correct instruction, and it must be assumed on appeal that the jury's verdict was influenced by that portion of the charge which is incorrect. *S. v. Weston*, 275.

Conflicting instructions on a material point in this manslaughter prosecu-

CRIMINAL LAW—*Continued.*

tion, although resulting from a *lapsus linguæ* by the trial court, *is held* to warrant a new trial. *Ibid.*

A *lapsus linguæ* in the charge which is immediately corrected by the court so that the jury could not have been misled will not be held for prejudicial error. *S. v. Goines*, 509.

§ 170. Harmless and Prejudicial Error in Remarks of Court, Argument of Solicitor, and Incidents During Trial.

An instruction by the court, upon being informed that the jury was divided 11 to 1, that the jury should confer again and that "You have to reach a verdict" *is held* to constitute prejudicial error, since the jurors may have considered the court's statement as a mandatory and unequivocal directive to reach a verdict. *S. v. Bowers*, 652.

§ 174. Questions Necessary to Determination of Appeal.

Where defendant, on appeal from a conviction in the inferior court, is tried upon a bill of indictment and not upon the original warrant, any question as to the validity of the original warrant is not decisive on appeal to the Supreme Court. *S. v. Gay*, 125.

§ 177. Determination and Disposition of Cause on Appeal.

On appeal from the denial of motion of nonsuit, defendant is not entitled to a dismissal on the ground that incompetent evidence was admitted, since the State may be able to offer sufficient competent evidence at the next trial. *S. v. Pike*, 102; *S. v. Cannon*, 215.

CUSTOMS AND USAGES.

An ordinary custom, while admissible in evidence, is not conclusive on the issue of negligence, especially where the custom is clearly a careless or dangerous one. *McWilliams v. Parham*, 592.

A custom which is local is binding only upon persons who have knowledge of it. *Ibid.*

DAMAGES.

§ 4. Damages for Injury to or Conversion of Personal Property.

Compensatory damages for injury to personal property is the difference between its fair market value immediately before and immediately after the taking. *Givens v. Sellars*, 44.

When a plaintiff's vehicle is damaged by the negligence of a defendant, the plaintiff is entitled to recover the difference between the fair market value of the vehicle before and after the damage, and if the vehicle can be economically repaired, the plaintiff will also be entitled to recover special damages for loss of its use during the time he was necessarily deprived of it. *Roberts v. Freight Carriers*, 600.

In general, the right to recover for loss of use of a vehicle is limited to situations in which the damage to the vehicle can be repaired at a reasonable cost and within a reasonable time, but where the vehicle is totally destroyed or where parts for repairs are unavailable, the plaintiff would be entitled to damages for loss of use only if another vehicle was not immediately obtainable for purchase and, in consequence, he suffered loss of earnings during the interval between the accident and the acquisition of another vehicle. *Ibid.*

DAMAGES—*Continued.*

§ 7. Liquidated Damages.

Liquidated damages may be collected; a penalty will not be enforced. *Knutton v. Coffield,* 355.

A stipulated sum is for liquidated damages (1) where the damages which the parties might reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty and, (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach or is reasonably proportionate to the damages which have actually been caused by the breach. *Ibid.*

A provision in a contract for the installation of a coin-operated phonograph that in the event the store proprietor breached the contract the owner of the phonograph might recover a sum equal to the proprietor's average weekly profit prior to the breach, multiplied by the number of weeks remaining under the contract, is a provision for the payment of liquidated damages and not penalty. *Ibid.*

Liquidated damages may be recovered in the event of a breach, notwithstanding no actual damages are suffered. *Ibid.*

The effect of a provision for liquidated damages is to substitute the amount agreed upon as liquidated damages for the actual damages resulting from breach of contract, and the recovery must be for the stipulated amount. *Ibid.*

§ 9. Mitigation of Damages.

The doctrine of avoidable consequences requires an injured plaintiff to minimize his damages caused by defendant's wrong, and prevents recovery for those damages which plaintiff could have reasonably avoided. *Miller v. Miller,* 228.

Contributory negligence occurs either before or at the time of defendant's negligence, while the doctrine of avoidable consequences arises after defendant's wrongful act. *Ibid.*

The doctrine of avoidable consequences is not invoked by the failure of plaintiff guest passenger to use an available seat belt, since the failure to fasten the seat belt occurs before defendant's negligence and plaintiff's injury. and further, there being no duty upon the passenger to use a seat belt. *Ibid.*

§ 11. Punitive Damages.

Punitive damages may not be awarded for breach of contract, except for breach of promise to marry or for breach of duty to serve the public imposed by law upon a public utility. *King v. Insurance Co.,* 396.

Allegations which state a cause of action for breach of contract for defendant insurer's failure to perform its obligations under an automobile liability insurance policy to defend plaintiff insured and to pay a judgment rendered against him, but which are insufficient to state a cause of action for deceit or any other tort, will not support an award of punitive damages, and allegations relating thereto are properly stricken on motion. *Ibid.*

§ 13. Competency and Relevancy of Evidence on Issue of Compensatory Damages.

Refusal of the court to permit plaintiff to introduce in evidence the mortuary tables contained in G.S. 8-46 as bearing upon the question of damages resulting from defendant's negligence, *held* not error since the jury answered the issue of negligence in the negative. *Johnson v. Lamb,* 701.

§ 15. Burden of Proof and Sufficiency of Evidence as to Damages.

Ordinarily, the measure of damages for loss of use of a business vehicle is the cost of renting a similar vehicle during a reasonable period for repairs,

DAMAGES—*Continued.*

but to recover for loss of profits resulting from deprivation of the vehicle, plaintiff must show (1) that he made a reasonable effort to obtain a substitute vehicle for the time required to repair or replace the damaged one, and (2) that he was unable to obtain one in the area reasonably related to his business. *Roberts v. Freight Carriers,* 600.

§ 16. Instructions on Measure of Damages.

In an action to recover damages arising out of a collision between plaintiff's truck and the tractor-trailer of the defendant, it was error for the court to instruct the jury that plaintiff was entitled to lost profits from the loss of his truck when plaintiff's evidence revealed that repairs to his truck could have been economically made and when plaintiff made no showing that he attempted to hire a substitute vehicle or, failing that, to purchase another truck. *Roberts v. Freight Carriers,* 600.

DECLARATORY JUDGMENT ACT.

§ 2. Proceedings.

In this proceeding under the Declaratory Judgment Act the pleadings and the findings of fact *are held* to show a *bona fide* controversy justiciable under the Act and that all interested persons are made parties to the action. *Sternberger v. Tannenbaum,* 658.

DEEDS.

§ 4. Competency of Grantor.

In this action to set aside a deed for want of mental capacity in the grantor, testimony of the witnesses that in their opinion the grantor did not have sufficient mental capacity to understand the nature and consequences of making a deed, its scope and effect, and to know what land he was disposing of and to whom and how, *is held* properly admissible. *Hendricks v. Hendricks,* 272 N.C. 340, is no longer authoritative. *Hendricks v. Hendricks,* 733.

§ 8. Consideration.

The consideration recited in a deed is presumed to be correct, but under certain circumstances may be inquired into by the court. *Speller v. Speller,* 340.

§ 11. Construction and Operation Generally.

All deeds constituting a simultaneous transaction may be construed together in determining the intent and effect of one of the deeds. *Combs v. Combs,* 462.

§ 19. Restrictive Covenants.

A covenant restricting the use which the grantee may make of land conveyed to him or of land owned by him is deemed a grant by him of a negative easement in such land. *Cummings v. Dosam, Inc.,* 28.

Restrictive covenants are not favored and will be strictly construed in favor of the free use of land. *Ibid.*

A covenant in a deed purporting to impose restrictions upon the use of a tract of land conveyed by the grantor and upon "adjoining tracts being acquired by grantee" fails to impose restrictions upon such other tracts, since the covenant does not contain a sufficient description of the intended servient estate. *Ibid.*

DEEDS—*Continued.*

A purchaser of land is chargeable with notice of restrictive covenants if such covenants are contained in any recorded deed in his chain of title. *Ibid.*

§ 23. Covenants of Quiet Enjoyment and Warranty of Title.

A covenant of warranty is an agreement or assurance by the grantor of an estate that the grantee and his heirs and assigns shall enjoy the estate without interruption or eviction by virtue of a paramount title outstanding in another person. *Fritts v. Gerukos*, 116.

A cause of action for breach of warranty of title to real estate does not arise until there has been an ouster or eviction of the grantee under a superior title. *Ibid.*

§ 24. Covenants Against Encumbrances.

A restriction upon the use or the transfer of land imposed by a statute or ordinance enacted pursuant to the police power is not an encumbrance upon the land within the meaning of a covenant against encumbrances or a contract or option to convey the land free from encumbrances. *Fritts v. Gerukos*, 116.

In an action to recover the amount paid for an option, plaintiffs' evidence was to the effect that they entered into an option agreement whereby the defendant agreed to convey to them a tract of land by deed containing full covenants against encumbrances. An ordinance of the municipality applicable to the land in question prohibited the transfer of the land until the plat thereof had been approved by the city upon the construction of streets, curbs and storm sewers. The city issued a restraining order enjoining defendant from the transfer of the land until the ordinance had been complied with. *Held:* The existence of the ordinance did not subject defendant's title to an encumbrance, and there being no obligation by defendant to act in compliance with the ordinance, a finding by the jury that defendant was able to deliver a sufficient deed in accordance with the option agreement is fully supported by the evidence. *Ibid.*

DESCENT AND DISTRIBUTION.

§ 4. Time From Which Person Is in Esse for Purpose of Inheriting.

In the absence of evidence to the contrary, the term of pregnancy is presumed to be ten lunar months or 280 days. *Eubanks v. Eubanks*, 189.

DIVORCE AND ALIMONY.

§ 2. Process and Pleadings.

A defendant wife may plead the invalidity of a separation agreement by rebutter in her husband's suit for divorce where the husband, in reply to the wife's cross-action for alimony without divorce, sets up a deed of separation as a bar to the cross-action. *Eubanks v. Eubanks*, 189.

In an action for alimony without divorce, the issues raised by the pleadings must be determined by a jury before permanent alimony may be awarded. *Schloss v. Schloss*, 266.

§ 13. Absolute Divorce on Ground of Separation for Statutory Period.

A defendant wife may plead the invalidity of a separation agreement by rebutter in her husband's suit for divorce where the husband, in reply to the wife's cross-action for alimony without divorce, sets up a deed of separation as a bar to the cross-action. *Eubanks v. Eubanks*, 189.

A defendant wife in an action for divorce may not attack the legality of the separation until the deed of separation entered into between the parties has been rescinded. *Ibid.*

DIVORCE AND ALIMONY—*Continued.*

A married woman may attack the certificate of her acknowledgment and privy examination respecting her execution of a deed of separation upon the ground of mental incapacity, infancy, or fraud of the grantee. *Ibid.*

A 17-year-old wife may attack the validity of a separation agreement on the ground of her infancy and thereby disaffirm the agreement insofar as it releases the plaintiff husband from the obligation to support her, and the statute, G.S. 52-13 [now G.S. 52-10], relates only to the release of an interest in property and has no bearing whatever on the right of a wife to support. *Ibid.*

In the husband's action for absolute divorce on the ground of one year's separation, the defendant wife set up a cross-action alleging, *inter alia,* that plaintiff had abandoned her and their child. By reply plaintiff denied defendant's allegations of abandonment and paternity. On the evidence in the case, the presumption arose that the child was conceived after plaintiff had separated from defendant. There was no evidence that defendant had lived in adultery after the separation but there was evidence that plaintiff had an opportunity of access to the wife. The jury found on the trial court's peremptory instruction that plaintiff had lived apart from defendant for more than one year, but also found that plaintiff was the father of the child. *Held:* The trial court should have instructed the jury that if they answered the issue of separation in the affirmative, the issue of plaintiff's paternity should then be answered in the negative, and its failure to do so was error. *Ibid.*

The husband's action under G.S. 50-6 for absolute divorce on the ground of one year's separation may be defeated by the wife's allegations and proof of abandonment. *Ibid.*

§ 16. Alimony Without Divorce.

A wife may establish a right to alimony under G.S. 50-16 by a showing that she was compelled to leave home in fear of her safety as a result of defendant's assaults and cruel treatment, and in such case the husband will be deemed to have abandoned the wife, but the weight and the credibility of the wife's evidence is a matter for the jury. *Gaskins v. Gaskins,* 133.

If the husband abandons the wife within the purview of G.S. 50-7(1), she is entitled to alimony without divorce under former G.S. 50-16, notwithstanding that he may continue to provide adequate support for her. *Schloss v. Schloss,* 266.

In an action for alimony without divorce, a complaint alleging abandonment is not demurrable for failure to allege the amount of support supplied to the wife by the husband since his withdrawal from the home. *Ibid.*

§ 18. Alimony and Subsistence Pendente Lite.

An award *pendente lite* does not affect the final rights of the parties and may be entered by the judge without a jury. *Schloss v. Schloss,* 266.

In granting or denying alimony *pendente lite* the court is not required to make findings of fact unless adultery of the wife is pleaded in bar, although the better practice is to do so. *Ibid.*

The amount of alimony *pendente lite* for the support of the wife rests in the sound discretion of the trial court, but such discretion is not absolute, and while the financial ability of the husband to pay is a major factor in the amount arrived at, the court must also consider the earnings and means of the wife. G.S. 50-16. *Ibid.*

The amount awarded as subsistence *pendente lite* will not be disturbed on appeal in the absence of a clear abuse of discretion. *Ibid.*

An award of $1500 per month as alimony *pendente lite* for the support of

DIVORCE AND ALIMONY—*Continued.*

the wife, although exceedingly liberal under the circumstances of this case, *is held* not to constitute a clear abuse of discretion. *Ibid.*

The purpose of the allowance of counsel fees *pendente lite* is to enable the wife to meet the husband on substantially even terms during the litigation by allowing her to employ adequate counsel. *Ibid.*

Where plaintiff alleges that she has over $13.000 in bank accounts and investments and owns a new automobile and a $48,000 residence free of encumbrances, and where she has been awarded subsistence *pendente lite* of $1500 per month, an award of $2500 for counsel fees *pendente lite is held* to be error in the absence of findings by the court that she is financially unable to employ counsel. *Ibid.*

Chapter 1152, 1967 Session Laws, repealing G.S. 50-16 and establishing G.S. 50-16.1, *et seq.*, as the authority in actions for alimony and alimony *pendente lite*, does not apply to an action instituted prior to the 1967 enactment. *Brady v. Brady*, 299.

The remedy of subsistence and counsel fees *pendente lite* enables the wife to maintain herself according to her station in life and to employ counsel in order to meet her husband at the trial upon substantially equal terms. *Ibid.*

The amount of subsistence and counsel fees *pendente lite* is within the discretion of the court, and such discretion is not absolute but is confined to a consideration of the necessities of the wife and the means of the husband. *Ibid.*

Allegations and proof by the wife that the defendant had offered such indignities to her as to render her condition intolerable and her life burdensome, and that she consequently left home, *are held* sufficient to support a finding that the husband abandoned the wife. *Ibid.*

In the wife's action for alimony without divorce pursuant to G.S. 50-16, the court, in a hearing to determine subsistence and counsel fees *pendente lite*, is not bound by findings in a similar hearing in the wife's previous action where the wife took a voluntary nonsuit before defendant asserted any claim or demanded affirmative relief. *Ibid.*

A finding by the court that it was not within the means of the defendant husband to maintain two separate living establishments is an improper predicate for denying the wife's claim for subsistence and counsel fees *pendente lite*. *Ibid.*

Where the court's finding with respect to the wife's unfitness to have custody of the children is contrary to the medical testimony, and where the court's findings with respect to the wife's ability to support herself is not supported by any evidence, it appears that the court did not exercise its discretion in the light of controlling factual conditions, and the cause is remanded for further hearing. *Ibid.*

§ 19. Modification of Decrees Relating to Alimony.

Where plaintiff institutes an action in the general county court for alimony without divorce and for custody and support of the children, that court acquires original jurisdiction of the parties and the children, and the Superior Court thereafter has appellate jurisdiction only and is without authority to modify custody or contempt orders entered in the court below. *Becker v. Becker*, 65.

A consent judgment with reference to the payment of future installments of alimony is subject to modification by the court in the event of changed conditions. *Holsomback v. Holsomback*, 728.

§ 20. Decree of Divorce as Affecting Right to Alimony.

A decree of divorce on the ground of separation for the statutory period

DIVORCE AND ALIMONY—*Continued.*

in an action instituted by the wife terminates the husband's liability for support of the wife and for payment of her counsel fees, G.S. 50-11, but his duty to support the children of the marriage continues, and payments made to the wife subsequent to the divorce should be credited to the defendant's liability for the support of the children. *Becker v. Becker*, 65.

§ 22. Jurisdiction and Procedure Relating to Custody and Support of Children of the Marriage.

Where plaintiff institutes an action in the general county court for alimony without divorce and for custody and support of the children, that court acquires original jurisdiction of the parties and the children, and the Superior Court thereafter has appellate jurisdiction only and is without authority to modify custody or contempt orders entered in the court below. *Becker v. Becker*, 65.

In a suit for alimony without divorce and for custody of the children, the court first acquiring jurisdiction of the parties and children retains that jurisdiction subject only to review by appeal for errors of law raised by exceptive assignments. *Ibid.*

The court in which a divorce action is instituted acquires jurisdiction over the custody of the unemancipated children of the parties, and such jurisdiction continues even after the decree of divorce. *Shepherd v. Shepherd*, 71.

§ 23. Support of Children of the Marriage.

A decree of divorce on the ground of separation for the statutory period in an action instituted by the wife terminates the husband's liability for support of the wife and for payment of her counsel fees, G.S. 50-11, but his duty to support the children of the marriage continues, and payments made to the wife subsequent to the divorce should be credited to the defendant's liability for the support of the children. *Becker v. Becker*, 65.

§ 24. Custody of Children of the Marriage.

Decrees awarding custody of minor children are subject to judicial modification upon a change of circumstances affecting the welfare of the children. *Shepherd v. Shepherd*, 71.

An order of the court modifying a decree of custody must be supported by a finding of fact of changed conditions, and upon the failure of the court to find sufficient facts to support the judgment, the cause will be remanded for a hearing *de novo*. *Ibid.*

EASEMENTS.

§ 8. Nature and Extent of Easement.

The description of an easement in a deed must identify the land with reasonable certainty. *Cummings v. Dosam, Inc.*, 28.

EJECTMENT.

§ 10. Sufficiency of Evidence, Nonsuit, and Directed Verdict.

In an action to recover for trespass on a tract of land by the cutting and removal of timber therefrom, the failure of plaintiffs to prove their title to the land by some recognized method does not warrant judgment as of nonsuit when one of the plaintiffs testifies without objection that they are the owners of the tract and when the defendant's witnesses refer to the land as the plaintiffs' tract. *Freeman v. City of Charlotte*, 113.

ELECTION OF REMEDIES.

§ 1. When Election is Required.

One who makes an election between two inconsistent rights with full knowledge of the facts giving rise to such rights may not subsequently proceed upon the contrary alternative. *Redmond v. Lilly*, 446.

EMINENT DOMAIN.

§ 2. Acts Constituting a Taking.

Where an agreement between the owner and the State Highway Commission for the taking of land for a limited access highway provides that the owner should have no right of access to the highway except at designated survey stations, the right of access in accordance with the agreement is a property right, and the denial by the Commission of access at these stations constitutes a "taking" for which the owner is entitled to compensation. *French v. Highway Commission*, 108.

§ 3. What Is "Public Purpose" Within Power of Eminent Domain.

The term "public purpose" is generally used in the same sense in the law of taxation and in the law of eminent domain. *Mitchell v. Financing Authority*, 137.

It is the rule in this State that government may not engage in private enterprise, nor may the power of eminent domain be used in behalf of a private interest. *Ibid.*

§ 5. Amount of Compensation.

Where a leasehold estate is taken under the power of eminent domain for highway purposes, the personalty thereon is not affected by the taking, the Highway Commission being without authority to appropriate personal property for a public use. *Givens v. Sellars*, 44.

Where an agreement between the owner and the State Highway Commission for the taking of land for a limited access highway provides that the owner should have no right of access to the highway except at designated survey stations, the right of access in accordance with the agreement is a property right, and the denial by the Commission of access at these stations constitutes a "taking" for which the owner is entitled to compensation. *French v. Highway Commission*, 108.

§ 6. Evidence of Value.

Whether property involved in a voluntary sale is sufficiently similar in nature, location and condition to the property appropriated by condemnation to admit evidence of its sale and the price paid therefor as a guide to the value of the condemned property is a question to be determined by the trial judge in the exercise of his sound discretion. *Redevelopment Comm. v. Panel Co.*, 368.

Evidence tending to show a decrease in the market value of one piece of property some three and one-half blocks from the property sought to be condemned *is held* properly excluded by the trial court in the exercise of its discretion. *Ibid.*

The exclusion of testimony relating to the value of property sought to be condemned by a municipal redevelopment commission *is held* without error where testimony of similar import was admitted without objection. *Ibid.*

§ 7. Proceedings to Take Land and Assess Compensation Generally.

Where landowners accept a sum of money deposited by a municipality with the clerk as estimated compensation due the landowners for the taking of

EMINENT DOMAIN—*Continued.*

their property pursuant to G.S. Chapter 136, Art. 9, the landowners are thereafter estopped from attacking the constitutionality of the statutes, the jurisdiction of the court to put the municipality in possession, or the failure of the city strictly to comply with the provisions of the statutes. *City of Durham v. Bates*, 336.

§ 11. Report of Appraisers, Confirmation, Exceptions, and Trial Upon Exceptions.

In condemnation proceedings the issue as to the amount of damages or compensation is for determination *de novo* by jury trial in the Superior Court. *Redevelopment Comm. v. Panel Co.*, 368.

ESCAPE.

§ 1. Elements of and Prosecutions for Escape.

Sentence of six months imprisonment imposed upon defendant's plea of guilty to a charge of felonious escape is not cruel and unusual in the constitutional sense, the sentence not exceeding the statutory maximum. *S. v. McCall*, 135.

The court will not review defendant's loss of rewards and privileges for good conduct upon his conviction of felonious escape, since the Prison Commission has been given authority to promulgate and apply rules in this regard and the matter being administrative and not judicial. *Ibid.*

Sentence of imprisonment for 18 to 36 months, imposed upon defendant's plea of *nolo contendere* to the charge of felonious escape, is within the statutory maximum provided by G.S. 148-45 and does not constitute cruel and unusual punishment in the constitutional sense. *S. v. Shoemaker*, 475.

Sentence of imprisonment imposed upon defendant's conviction of felonious escape does not constitute double jeopardy or double punishment in that he had already been punished under prison regulations, since the application of the prison rules authorized by G.S. 148-11 is an administrative act, not a judicial act, and cannot affect sentences imposed by the courts. *Ibid.*

Indictment in this case *held* sufficient to charge and support a conviction of the felony of third offense of escape. *Ibid.*

ESTOPPEL.

§ 4. Equitable Estoppel.

The fact that he has entrusted the bare possession of a chattel to another does not estop the true owner from denying such possessor's authority to sell or encumber it, but if the true owner invests the possession with *indicia* of title, the true owner is estopped to claim ownership of the chattel as against an innocent purchaser. *Homes, Inc. v. Bryson*, 84.

The plaintiff, a manufacturer of mobile homes, delivered a unit to a dealer with instructions for payment by certified check. Upon assurances by the dealer that he had sufficient funds in the bank, the manufacturer accepted the dealer's personal check and gave the dealer possession of the mobile home. The evidence fails to show that plaintiff invested the dealer with a manufacturer's certificate of origin or any other *indicia* of title. Thereafter the dealer sold the mobile home to the defendant. The dealer's check was subsequently dishonored. *Held:* Plaintiff's evidence is sufficient to withstand a motion for nonsuit since, assuming the evidence to be true, plaintiff retained title to the mobile home and is not estopped to assert it even against an innocent purchaser. *Ibid.*

EVIDENCE.

§ 3. Judicial Notice of Facts Within Common Knowledge.

The court will take judicial notice that the social order is not threatened by widespread unemployment such as confronted the nation during the depression years. *Mitchell v. Financing Authority,* 137.

§ 19. Evidence of Similar Facts and Transactions.

In an action to recover the statutory penalty for usury paid, evidence that the mortgagee engaged in similar usurious transactions with other borrowers at about the same time as those with the plaintiff is competent upon the question of the existence of a corrupt intent to exact usury. *Henderson v. Finance Co.,* 253.

§ 21. Circumstantial Evidence.

Evidential facts which cannot be established by direct evidence may be proved by reasonable and legitimate inferences drawn from the established facts. *Hollman v. City of Raleigh,* 240.

§ 43. Nonexpert Opinion Evidence as to Sanity.

In this action to set aside a deed for want of mental capacity in the grantor, testimony of the witnesses that in their opinion the grantor did not have sufficient mental capacity to understand the nature and consequences of making a deed, its scope and effect, and to know what land he was disposing of and to whom and how, *is held* properly admissible. *Hendricks v. Hendricks,* 272 N.C. 340, is no longer authoritative. *Hendricks v. Hendricks,* 733.

§ 48. Competency and Qualification of Expert Witnesses.

Where there is sufficient evidence to support a finding that the witness in question was an expert in his field, it will be presumed that thte court, before admitting his expert testimony, found that he was an expert, notwithstanding the absence of a specific finding to this effect, and a general objection to his testimony without specific objection to his qualifications will be considered only as to the competency of the particular question. *Mills, Inc. v. Terminal, Inc.,* 519.

§ 50. Expert Medical Testimony.

The evidence was to the effect that plaintiff, who had never worn glasses nor had trouble with his vision, came into contact with a high voltage wire during the course of his employment and sustained an electric shock. A medical expert in the field of eye diseases testified that his examination disclosed that claimant's vision was 20/200 in each eye and that it was his opinion the impaired vision was caused by the electric shock. On cross-examination the witness repeated his opinion but admitted that he had never known any myopia patients whose impairment was caused by shock nor had he read of such a case in any medical testbooks. *Held:* The evidence was sufficient to support a finding by the Industrial Commission that the injury resulted from the accident. *Hollman v. City of Raleigh,* 240.

EXECUTORS AND ADMINISTRATORS

§ 2. Appointment of Administrators.

The clerk of the Superior Court of the county in which a nonresident dies leaving assets in this State has authority to appoint an administrator for the decedent. G.S. 28-1(4). *In Re Edmundson,* 92.

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 3. Appointment of Ancillary Administrators.

The term "assets" as used in G.S. 1-28(3) and in G.S. 1-28(4) includes intangibles. *In Re Edmundson*, 92.

Administrator's potential right of exoneration against the automobile liability insurer of the decedent is a chose in action and is, therefore, an intangible asset of the estate. *Ibid.*

A policy of automobile liability insurance issued in the name of the deceased by an insurer qualified to do business in this State or otherwise subject to service of process is an asset within the purview of G.S. 28-1(4) so as to support the appointment of an ancilliary administrator. *Ibid.*

§ 33. Distribution of Estate Under Family Agreements.

The provisions of a will or testamentary trust may be modified by a family settlement agreement only where there exists some exigency or emergency not contemplated by the testator. *Sternberger v. Tannenbaum*, 658.

The court will look closely into contracts or family settlements materially affecting the rights of infants. *Ibid.*

A *bona fide* agreement by one interested in the estate of a testator to refrain from contesting the will and to permit its admission to probate is valid. *Ibid.*

FRAUD.

§ 1. Nature and Elements of Fraud.

An action for fraud or for rescission of an instrument must be based upon a false representation knowingly made with intent to deceive which is relied on and does deceive, and which results in loss or injury to the party deceived. *Speller v. Speller*, 340.

§ 9. Pleadings.

Plaintiff's allegations in an action to rescind a deed for mistake and fraud are held insufficient in absence of allegation that plaintiff has suffered loss from defendant's conduct. *Speller v. Speller*, 340.

FRAUDULENT CONVEYANCES.

§ 1. Elements, and Scope of Remedy.

A voluntary conveyance by a debtor is invalid as to creditors if the grantor did not retain property fully sufficient and available to pay his then-existing debts. *Gas Co. v. Leggett*, 547.

A conveyance is voluntary when it is not for value. *Ibid.*

§ 3. Actions to Set Aside Conveyances and Transfers as Fraudulent.

In plaintiff's action to set aside a deed as a fraudulent conveyance, an allegation that the deed was without legal consideration is sufficient to allege that the conveyance was without valuable consideration. *Gas Co. v. Leggett*, 547.

A creditor may not set aside as fraudulent conveyances by the husband of entirety property to the wife. *Ibid.*

GAMES AND EXHIBITIONS.

§ 2. Liability of Proprietor to Patrons.

As a general rule the owner or operator of an automobile race track is charged with the duty of exercising care commensurate with any known or reasonably foreseeable danger to prevent injury to patrons or participants. *Pardue v. Speedway, Inc.*, 314.

GAMES AND EXHIBITIONS—*Continued.*

The owner or operator of an automobile race track is under a duty to erect fences or barriers for the safety of the spectators where the need is obvious or where experience shows that such barriers are necessary for the reasonable protection of the spectators. *Ibid.*

§ 3. Liability of Proprietor to Participants.

As a general rule the owner or operator of an automobile race track is charged with the duty of exercising care commensurate with any known or reasonably foreseeable danger to prevent injury to patrons or participants. *Pardue v. Speedway, Inc.*, 314.

Allegations that plaintiff's intestate was engaged in testing tires on defendant's race track at speeds in excess of 150 miles per hour, that the front right tire of intestate's automobile ruptured, causing the car to veer toward the edge of the track, that a guard rail maintained by defendant gave way upon contact, and that intestate crashed to his death outside the track, *are held* insufficient to state a cause of action in the absence of allegations setting forth particular facts detailing defendant's negligence in improperly maintaining the guard rails. *Ibid.*

§ 4. Liability of Patrons or Participants.

It is the duty of a person hitting a golf ball to exercise ordinary care under the circumstances for the safety of other players, caddies, or spectators, and he must give adequate and timely notice to persons who appear to be unaware of his intention to hit the ball when he knows, or by the exercise of ordinary care should know, that such persons are so close to the intended flight of the ball that danger to them might be reasonably anticipated, but he is not an insurer of such persons. *McWilliams v. Parham*, 592.

Defendant's contention that a custom of a particular golf course relieved him of the duty to warn the plaintiff of his intention to drive the ball from a certain tee *is held* to be without merit where defendant offered no evidence that he had knowledge of the custom, and since, in any event, the custom would not obviate the requirement of reasonable care. *Ibid.*

In an action by a caddy to recover for injuries sustained when he was struck by a golf ball driven by defendant, who was playing behind the foresome for whom plaintiff was caddying, evidence that defendant observed plaintiff walking from the intended path of the ball, that plaintiff gave no warning of his intention to hit the ball until after he struck the ball, and that plaintiff heard no warning, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence. *Ibid.*

Evidence held insufficient to establish contributory negligence as a matter of golfing accident. *Ibid.*

HIGHWAYS.

§ 7. Construction of Highways; Signs and Warnings; Liability of Contractor.

A contractor employed by the State Highway Commission is personally liable to the owner of property for damages proximately resulting from the negligence of the contractor in the performance of his work. *Givens v. Sellars*, 44.

HOMICIDE.

§ 1. Definitions and Distinctions in General.

Where defendant intends to kill one person and kills an innocent bystander, he is guilty in the same degree as though he had killed the person intended. *S. v. Rogers*, 330.

HOMICIDE—*Continued.*

§ 6. Manslaughter.

The killing of a human being under the influence of passion or in the heat of blood produced by adequate provocation constitutes manslaughter. *S. v. Cooper*, 51.

Any unjustifiable and reckless or wanton use of a firearm which jeopardizes the safety of another is unlawful, and if an unintentional killing results, it is an unlawful homicide. *S .v. Griffin*, 333.

§ 9. Self-defense.

Upon the plea of self-defense, defendant must satisfy the jury (1) that he acted in self-defense, and (2) that in so acting he used no more force than reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm. *S. v. Cooper*, 51.

One may kill in self-defense if it is necessary or if he reasonably believes it is necessary to protect himself from death or great bodily harm, it being for the jury to determine the reasonableness of the belief upon the facts and circumstances as they appeared to the defendant at the time of the killing. *S. v. Kirby*, 306.

§ 14. Presumptions and Burden of Proof.

When it is admitted or when the State satisfies the jury from the evidence beyond a reasonable doubt that defendant intentionally shot deceased with a deadly weapon and thereby proximately caused his death, the presumptions arise (1) that the killing was unlawful and (2) that it was done with malice, thereby constituting the felony of murder in the second degree. *S. v. Cooper*, 51.

When presumptions from the intentional use of a deadly weapon obtain, the burden is upon defendant to show to the satisfaction of the jury the legal provocation that negates malice, thus reducing the offense to manslaughter, or that excuses the homicide altogether upon the ground of self-defense. *Ibid.*

When defendant rebuts the presumption of malice only, the presumption that the killing was unlawful remains, making the crime manslaughter. *Ibid.*

The presumptions that a killing was unlawful and with malice, thereby constituting murder in the second degree, do not arise until the State has satisfied the jury beyond a reasonable doubt that the defendant intentionally shot deceased with a deadly weapon and thereby proximately caused his death. *S. v. Ramey*, 325.

§ 19. Evidence Competent on Self-defense.

Testimony describing a deceased's wounds is competent to show the violence of the transaction, particularly where the question of the use of excessive force is raised by defendant's plea of self-defense, and such testimony will not be excluded merely because it may excite prejudice against the defendant. *S. v. Kirby*, 306.

§ 21. Sufficiency of Evidence and Nonsuit.

Evidence in this case *held* sufficient to be submitted to the jury on the question of defendant's guilt of manslaughter. *S. v. Cooper*, 51.

The State's evidence tended to show that defendant had been drinking during the day, that he and his wife played with a pistol by twirling it and throwing it to each other, and that while the wife was sitting on her husband's lap the pistol, which the wife was twirling around her finger, fired, fatally wounding the wife. *Held:* The evidence, taken in the light most favorable to the State, shows only an accidental killing, and defendant's motion for nonsuit was improperly denied. *S. v. Griffin*, 333.

HOMICIDE—*Continued.*

§ 24. Instructions on Presumptions and Burden of Proof.

Where defendant enters a plea of not guilty and does not withdraw or modify this plea, defendant's testimony that he shot deceased in self-defense is not an admission that he killed the deceased, and the trial court should not assume such fact but should instruct the jury, even in the absence of a specific request, that the State has the burden to satisfy them beyond a reasonable doubt that deceased came to his death as a proximate result of the bullet wound inflicted by defendant. *S. v. Ramey,* 325.

§ 28. Instructions on Defenses.

The court's charge relating to the actual or apparent necessity for defendant to act in self-defense, and as to whether defendant used only such force as was necessary, or reasonably appeared to him to be necessary, to save himself from death or great bodily harm *is held* to be proper in this case. *S. v. Kirby,* 306.

An instruction that defendant would be guilty of manslaughter if he unlawfully killed the deceased in the heat of passion unless the jury should find that defendant acted in self-defense *is held* erroneous, since an unlawful killing in the heat of passion is not excusable on the ground of self-defense. *S. v. Ramey,* 325.

HUSBAND AND WIFE.

§ 1. Marital Rights, Privileges, Disabilities, and Liabilities.

The relationship between husband and wife is the most confidential of all relationships and transactions between them, to be valid, must be fair and reasonable. *Eubanks v. Eubanks,* 189.

§ 4. Contracts and Conveyances Between Husband and Wife.

A married woman may attack the certificate of her acknowledgment and privy examination respecting her execution of a deed of separation upon the ground of mental incapacity, infancy, or fraud of the grantee. *Eubanks v. Eubanks,* 189.

In the absence of a statute to the contrary, the contract of an infant with his spouse is voidable at his election within a reasonable time after he comes of age. *Ibid.*

In a partition of land held as tenants in common by two wives through an exchange of deeds, neither of which contained the certificate of examination pursuant to G.S. 52-6, a deed naming one tenant and her husband as grantees cannot create an estate by the entirety since a wife may not convey her realty to her husband, either directly or indirectly, without complying with the requirements of G.S. 52-6. *Combs v. Combs,* 462.

A conveyance of land by a husband to equalize the partition of land held by his wife as a tenant in common does not create a resulting trust in his favor to that extent, for, nothing else appearing, the law presumes that he intended it as a gift to his wife. *Ibid.*

§ 10. Requisites and Validity of Separation Agreements.

In the husband's action for divorce, evidence that the defendant wife was mentally disturbed, that her husband knew of her condition and had made an appointment for her with a psychiatrist, but that he took her to the office of his attorney where she was induced for $100, and without representation by her own attorney, to sign a deed of separation releasing the husband from all obligations to support her and waiving all her interest in his property, *is held*

HUSBAND AND WIFE—*Continued.*

sufficient to be submitted to the jury on the issue of the wife's lack of mental capacity to execute the agreement. *Eubanks v. Eubanks*, 189.

To be valid, a separation agreement must be untainted by fraud and must have been entered into without coercion or the exercise of undue influence and with full knowledge of all the circumstances, conditions and rights of the contracting parties. *Ibid.*

§ 11. Construction and Operation of Separation Agreements.

A 17-year-old wife may attack the validity of a separation agreement on the ground of her infancy and thereby disaffirm the agreement insofar as it releases the plaintiff husband from the obligation to support her, and the statute, G.S. 52-13 [now G.S. 52-10], relates only to the release of an interest in property and has no bearing whatever on the right of a wife to support. *Eubanks v. Eubanks*, 189.

§ 14. Estate by Entireties in General.

A joint tenancy exists when there is unity of time, title, interest and possession, and a tendency by the entirety is created with the addition of unity of person. *Combs v. Combs*, 462.

A conveyance of land to a husband and wife, nothing else appearing, creates an estate by the entirely. *Ibid.*

The common law doctrine of tenancy by the entirety remains unchanged by statute in this State. *Ibid.*

Where tenants in common exchange deeds for the purpose of partitioning land, the deeds employed merely sever the unity of possession and create no new title, and therefore if any one of such deeds names the tenant and his spouse as grantees, no estate by the entirety is thereby created, even though the tenant consents thereto, since the grantees must be jointly named and jointly entitled to create an estate by the entirety. *Ibid.*

In a partition of land held as tenants in common by two wives through an exchange of deeds, neither of which contained the certificate of examination pursuant to G.S. 52-6, a deed naming one tenant and her husband as grantees cannot create an estate by the entirety since a wife may not convey her realty to her husband, either directly or indirectly, without complying with the requirements of G.S. 52-6. *Ibid.*

§ 15. Nature and Incidents of Estate by Entireties.

An estate by the entirety is based on the common law doctrine of the unity of persons resulting from marriage, so that a conveyance to a husband and wife is a conveyance in law to but one person, and upon the death of one spouse, the whole estate belongs to the other, not solely by right of survivorship but also by virtue of the grant which vested the entire estate in each grantee. *Combs v. Combs*, 462.

The nature of the estate by the entireties is such that the estate cannot be subjected to execution to satisfy a judgment taken against the husband or wife alone, and the lien of a judgment so taken does not attach to the entirety property during coverture. *Gas Co. v. Leggett*, 547.

While the husband can do no act to affect the wife's right of survivorship in entirety property, the use, rents, issues and profits arising from the entirety property during coverture become the absolute property of the husband and constitutes a part of the fund from which his creditors may be satisfied. *Ibid.*

A creditor may not set aside as fraudulent conveyances by the husband of entirety property to wife. *Ibid.*

INDEMNITY.

§ 2. Construction and Operation.

The primary purpose of the court in construing a contract of indemnity is to ascertain and give effect to the intention of the parties, and the ordinary rules of the construction of contracts apply. *Dixie Container Corp. v. Dale*, 624.

A contract of indemnity will be construed to cover all losses, damages and liabilities which reasonably appear to have been within the contemplation of the parties, but it cannot be extended to cover any losses which are neither expressly within its terms nor of such character that it can reasonably be inferred that they were intended to be within the contract. *Ibid.*

INDICTMENT AND WARRANT.

§ 4. Evidence and Proceedings Before the Grand Jury.

An indictment is not subject to quashal on the ground that the testimony of the witness who appeared before the grand jury was hearsay. *S. v. Wall*, 130.

§ 7. Form, Requisites, and Sufficiency of Indictment and Warrant.

It is not essential in an indictment charging robbery with firearms that there be an allegation as to the place where the offense occurred, it being sufficient that the county of the offense be named in order to establish the jurisdiction of the court. *S. v. Rogers*, 208.

The signature of the prosecuting officer is not essential to the validity of a bill of indictment. *S. v. Sellers*, 641.

§ 9. Charge of Crime.

Every defendant has the constitutional right to be informed of the accusation against him, and the warrant or indictment must set out the charge with such exactness that he can have a reasonable opportunity to prepare his defense and to avail himself of his conviction or acquittal as a bar to a subsequent prosecution for the same offense, and further, the charge must enable the court, on conviction, to pronounce sentence according to law. N. C. Constitution, Art. I, § 11. *S. v. Rogers*, 208.

Where time and place are not essential elements of the offense charged in the warrant or indictment, a defendant may obtain further information in respect thereto by motion for a bill of particulars. *Ibid.*

§ 14. Motion to Quash — Grounds and Procedure in General.

A motion to quash in its entirety an indictment originating a prosecution in the Superior Court is properly denied when the court has jurisdiction to render judgment upon one of the counts charging a felony, even though another count charges a misdemeanor for which an inferior court has exclusive original jurisdiction. *S. v. Hayes*, 712.

§ 17. Variance Between Averment and Proof.

The issue of variance between the indictment and the proof of the State is properly raised by a motion to dismiss. *S. v. Rogers*, 208.

INFANTS.

§ 1. Protection and Supervision of Infants by Courts Generally.

The courts of this State in their equity jurisdiction have inherent authority over the property of infants and will exercise this jurisdiction whenever necessary to preserve and protect children's estates and interests. *Sternberger v. Tannenbaum*, 658.

INFANTS—*Continued.*

§ 2. Liability of Infants on Contracts.

In the absence of a statute to the contrary, the contract of an infant with his spouse is voidable at his election within a reasonable time after he comes of age. *Eubanks v. Eubanks*, 189.

§ 9. Hearing and Grounds for Awarding Custody of Minors.

Decrees awarding custody of minor children are subject to judicial modification upon a change of circumstances affecting the welfare of the children. *Shepherd v. Shepherd*, 71.

An order of the court modifying a decree of custody must be supported by a finding of fact of changed conditions, and upon the failure of the court to find sufficient facts to support the judgment, the cause will be remanded for a hearing *de novo. Ibid.*

In a judgment awarding the custody of a child, a recital therein to the effect that the court considered other matters which were brought to its attention and that such matters were known by all the parties and their counsel, *is held* insufficient to show that the court based its ruling on matters *dehors* the record. *Ibid.*

INJUNCTIONS.

§ 4. Injunctions to Restrain Violation of Statute or Ordinance, or Commission of Crime.

The State is entitled to an order permanently restraining diving and salvage operations by defendants to remove irreplaceable historical artifacts from sunken vessels lying within the territorial waters of the State, and the State is also entitled to a mandatory injunction to compel defendants to return such articles taken from the vessels. *Bruton v. Enterprises, Inc.*, 399.

§ 12. Issuance, Continuance, and Dissolution of Temporary Orders.

The sole question before the trial court at a hearing upon an order to show cause is whether an injunction should issue to restrain defendant from the action complained of pending final hearing on the merits, and upon appeal of the trial court's ruling, the Supreme Court is limited to a determination of the same question. *Board of Elders v. Jones*, 174.

Neither the findings of fact or the conclusions of law of the trial court upon the hearing of an application for an interlocutory injunction, nor the findings or conclusions of the Supreme Court on appeal, are binding upon, or are to be considered by, the Superior Court at the final hearing of the matter. *Ibid.*

§ 13. Grounds for Issuance, Continuance, and Dissolution of Temporary Orders.

The purpose of an interlocutory injunction is to preserve the status quo of the subject matter of the suit pending trial on the merits. *Board of Elders v. Jones*, 174.

The burden is upon the applicant for an interlocutory injunction to prove a probability of substantial injury from the continuance of the activity complained of pending the final determination of the action. *Ibid.*

An injunction *pendente lite* should not be granted where there is a serious question as to the right of defendant to engage in the activity complained of and where to restrain defendant pending the final determination of the matter would cause defendant greater damage than plaintiff would sustain from the continuance of the activity. *Ibid.*

In a hearing upon the Board of Elders' application for an interlocutory in-

INJUNCTIONS—*Continued.*

junction to restrain defendants from using the names "Moravian" or "Unitas Fratrum" in connection with their religious activities, the granting of an injunction *pendente lite is held* erroneous in the absence of a showing that plaintiff would probably suffer substantial injury to its reputation, doctrine, membership or contributions. *Ibid.*

INSANE PERSONS.

§ 2. Inquisition of Lunacy and Appointment of Guardian or Trustee.

The clerk of the Superior Court has the jurisdiction to appoint and remove the cotrustee or the guardian of an incompetent person, G.S. 33-1, G.S. 33-9, the jurisdiction of the judge of the Superior Court over such matters being limited to the correction of errors of law upon appeal from the clerk, and therefore an order of a Superior Court judge directing the clerk to appoint a cotrustee for an incompetent person is in excess of the court's authority and will be vacated on appeal. *In re Michal,* 504.

§ 4. Control, Management and Sale of Estate by Guardian.

The clerk of the Superior Court has no jurisdiction to determine the right of a surviving trustee for an incompetent person to draw a check upon an account in the name of the cotrustees' since any right of the surviving trustee is governed by the contractual relationship between the bank and the trustees, and the clerk's refusal to order the bank to honor the signature of the surviving trustee is not error. *In re Michal,* 504.

INSURANCE.

§ 6. Construction and Operation of Policies.

The statutory provisions governing a policy of insurance control over contrary provisions in the policy. *Strickland v. Hughes,* 481.

§ 106. Actions Against Insurer — Defenses Available to Insurer.

Provision of an assigned risk policy that no action should lie against the insurer unless as a condition precedent thereto the insured shall have fully complied with all the terms of the policy, although unenforceable insofar as it conflicts with the provisions of G.S. 20-279.21(f)(1), is nonetheless valid when asserted by the insurer as a defense to a judgment obtained against an insured by collusion of the parties. *Strickland v. Hughes,* 481.

§ 109. Conclusiveness of Judgment Rendered in Action Against Insured.

The obligation of an automobile liability insurer to defend an action brought by the injured party against the insured becomes absolute when the allegations of the complaint bring the claim within the coverage of the policy, but where the insurer defends under a full reservation of right to deny coverage, the defense of the action in obedience to its contractual obligation does not estop the insurer to assert the defenses of fraud and collusion in any subsequent action against it based upon a judgment obtained against its insured. *Strickland v. Hughes,* 481.

JUDGMENTS.

§ 10. Construction and Operation of Consent Judgments.

A consent judgment, absent the consent of the parties thereto, can be modified or set aside only for fraud or mistake in an independent action. *Holsomback v. Holsomback,* 728.

JUDGMENTS—*Continued.*

§ 27. Attack on and Setting Aside of Judgments for Fraud.

Whenever the rights of third persons are affected, they may collaterally attack a judgment for fraud committed by one party, or for the collusion of both parties. *Strickland v. Hughes*, 481.

LARCENY.

§ 1. Elements of the Crime and Parties Thereto.

Larceny is the taking and carrying away of the personal property of another without his consent, with felonious intent at the time of the taking to deprive the owner of his property and to appropriate it to the taker's use, and the act of taking must involve either an actual trespass or a constructive trespass in fraudulently acquiring possession through some trick or artifice. *S. v. Bowers*, 652.

§ 3. Degrees of the Crime.

The common law distinctions between petit and grand larceny have been abolished by G.S. 14-70. *S. v. Massey*, 721.

The larceny of property of the value of $200 or less is a misdemeanor, G.S. 14-72, but larceny from the person is a felony without regard to the value of the property stolen and is punishable for as much as ten years in the State's prison. *Ibid.*

§ 5. Presumptions and Burden of Proof, Issues.

The presumption arising from the recent possession of stolen property is to be considered by the jury merely as evidential fact along with other evidence in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of defendant's guilt, and an instruction which in effect places the burden on defendant to offer evidence in explanation of his recent possession sufficient to raise a reasonable doubt of his guilt is prejudicial error. *S. v. Hayes*, 712.

§ 7. Sufficiency of Evidence and Nonsuit.

Testimony of a store manager that a quantity of guns and other merchandise was stolen from the locked premises after business hours is sufficient to establish the *corpus delecti*, and such evidence, together with defendant's confession that he participated in the breaking and the larceny, *is held* sufficient to be submitted to the jury. *S. v. Clyburn*, 284.

Testimony of accomplice *held* sufficient to be submitted to jury on issue of defendant's guilt of the felonious breaking and entry into a garage and the larceny of goods therefrom. *S. v. O'Neal*, 514.

Evidence in this case held sufficient to be submitted to the jury on the issue of defendant's guilt of larceny by trick. *S. v. Bowers*, 652.

§ 8. Instructions in Larceny Prosecutions.

The presumption arising from the recent possession of stolen property is to be considered by the jury merely as evidential fact along with other evidence in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of defendant's guilt, and an instruction which in effect places the burden on defendant to offer evidence in explanation of his recent possession sufficient to raise a reasonable doubt of his guilt is prejudicial error. *S. v. Hayes*, 712.

Trial court's instruction on the offense of larceny from the person in that the taking was "from the prosecuting witness," *is held* sufficient in this case,

LARCENY—*Continued.*

since the verdict of the jury that they found defendant guilty of larceny from the person tends to show that they were not misled by the charge. *S. v. Massey*, 723.

§ 10. Judgment and Sentence.

Larceny from the person in any amount is a felony punishable by imprisonment for as much as 10 years. *S. v. Bowers*, 652.

LIBEL AND SLANDER.

§ 2. Words Actionable Per Se.

The term "libel *per se*" means a false written statement which on its face is defamatory. *Robinson v. Insurance Co.*, 391.

A publication is libelous *per se* when, standing alone and stripped of any innuendo, it is susceptible of but one meaning which would tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned or avoided, and it is not necessary that the words charge the commission of a crime or the violation of law, or impute moral turpitude or immoral conduct. *Ibid.*

In determining whether a publication is libelous *per se*, the courts will consider the publication in the sense in which it would be naturally understood by ordinary men, and not as it might be understood by those of morbid imagination or supersensitiveness. *Ibid.*

Allegations that an insurer informed plaintiff insured by letter of the cancellation of an automobile liability policy because of the insured's "infavorable personal habits" fails to state an action for libel *per se* where the complaint does not allege further circumstances, or that the statement was understood to be defamatory by those who saw it, and that plaintiff suffered special damages. *Ibid.*

§ 3. Words Susceptible to Two Interpretations.

Where the alleged publication is not libelous *per se*, a cause of action arises only upon allegations that defendant intended the publication to be defamatory and that it was so understood by those to whom it was published. *Robinson v. Insurance Co.*, 391.

§ 9. Absolute Privilege.

Where an insurer is under no statutory duty to provide an insured with a written explanation of its reason for cancelling or for failing to renew a policy of automobile liability insurance, an explanation given by the insurer in response to an insured's inquiry as to the reason for cancellation is not rendered privileged by G.S. 20-310(b) or G.S. 20-310(c). *Robinson v. Insurance Co.*, 391.

§ 12. Pleadings.

Allegations that an insurer informed plaintiff insured by letter of the cancellation of an automobile liability policy because of the insured's "infavorable personal habits" fails to state an action for libel *per se* where the complaint does not allege further circumstances, or that the statement was understood to be defamatory by those who saw it, and that plaintiff suffered special damages. *Robinson v. Insurance Co.*, 391.

MANDAMUS.

§ 1. Nature and Grounds of the Writ in General.

Mandamus may not be used as a substitute for an appeal. *Snow v. Board of Architecture*, 559.

MANDAMUS—*Continued.*

Mandamus lies only to enforce a clear legal right where plaintiff has no other adequate remedy. *Ibid.*

§ 4. Administrative Bodies Generally.

Mandamus may not be used to review the final action taken by an administrative board on a matter within its jurisdiction. *Snow v. Board of Architecture,* 559.

Where the State Board of Architecture has withheld for cause the renewal of an architect's certificate of admission to practice, *mandamus* may not be used to compel the Board to renew the certificate, the exclusive method for obtaining a judicial review of the Board's order being an appeal to the Superior Court pursuant to G.S. 150-24. G.S. 150-33. *Ibid.*

MASTER AND SERVANT.

§ 20. Liability of Contractor of Work Under Independent Contract for Injuries to Third Persons.

A contractee generally is not liable for the torts of an independent contractor, but in certain cases involving non-delegable or non-assignable duties the employer may be held vicariously liable for the tort of the independent contractor, although the employer has done everything that could be reasonably required of him. *Hendricks v. Fay, Inc.,* 59.

The duties performed by a private detective firm in maintaining a security watch over the property and the employees of a principal are non-delegable, and the firm has the status of an agent and not of an independent contractor in the performance of its duties, and the liability of the detective firm for the malicious prosecution or the false arrest of an employee of the principal is imputable to the principal under the doctrine of *respondeat superior. Ibid.*

§ 33. Liability of Employer for Injuries to Third Persons — Scope of Employment.

Where the answer of the corporate defendant admits that the alleged tortfeasor was its employee and that at the time of the injury complained of the employee was acting in the course of her employment, negligence of the tortfeasor is imputed as a matter of law to the corporate defendant under the doctrine of *respondeat superior*, and it is not necessary to submit to the jury an issue upon the question of employment. *Johnson v. Lamb,* 701.

Refusal of the court to submit to the jury an issue with reference to the alleged failure of the corporate defendant to supervise its employee is not error, since, if the employee was negligent while acting in the course of employment and such negligence was the proximate cause of injury to another, the employer is liable under the doctrine of *respondeat superior,* notwithstanding the employer exercised due care in the supervision of the employee. *Ibid.*

§ 45. Nature and Construction of Workmen's Compensation Act.

The Workmen's Compensation Act should be liberally construed to effectuate its purpose of providing compensation for injured employees or their dependents, and its benefits should not be denied by a technical, narrow or strict construction. *Hollman v. City of Raleigh,* 240.

§ 64. Whether the Accident Produces the Injury; Pre-existing Physical Conditions and Diseases.

The evidence was to the effect that plaintiff, who had never worn glasses nor had trouble with his vision, came into contact with a high voltage wire

MASTER AND SERVANT—*Continued.*

during the course of his employment and sustained an electric shock. A medical expert in the field of eye diseases testified that his examination disclosed that claimant's vision was 20/200 in each eye and that it was his opinion the impaired vision was caused by the electric shock. On cross-examination the witness repeated his opinion but admitted that he had never known any myopia patients whose impairment was caused by shock nor had he read of such a case in any medical textbook. *Held:* The evidence was sufficient to support a finding by the Industrial Commission that the injury resulted from the accident. *Hollman v. City of Raleigh,* 240.

§ 67. Amount of Compensation for Injury in General.

To obtain an award of compensation for an injury under the Workmen's Compensation Act, an employee must establish that his injury caused his disability, unless it is included in the schedule of injuries made compensable by G.S. 97-31 without regard to loss of wage-earning power. *Hollman v. City of Raleigh,* 240.

§ 71. Compensation for Loss of Specific Members.

Compensation for partial loss of vision by a claimant should be awarded on the basis of the vision remaining without the use of corrective lenses. *Hollman v. City of Raleigh,* 240.

§ 73. Amount of Recovery — Medical and Hospital Expenses.

Findings of fact of the Industrial Commission, except for jurisdictional findings, are conclusive on appeal when supported by competent evidence, even though there is evidence that would support a finding to the contrary. *Hollman v. City of Raleigh,* 240.

§ 93. Review in the Superior Court of an Award by the Industrial Commission.

The Industrial Commission is vested with full authority to find essential facts, G.S. 97-86, and the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Hollman v. City of Raleigh,* 240.

§ 97. Construction and Operation of Employment Security Law.

The public policy of the State in enacting the Employment Security Act is to provide for the compulsory setting aside of unemployment reserves for the benefit of persons unemployed through no fault of their own. *In re Watson,* 629.

The Employment Security Act must be construed so as to provide its benefits to one who becomes involuntarily unemployed, who is physically able to work, who is available for work at suitable employment and who, though actively seeking such employment, cannot find it through no fault of his own. *Ibid.*

§ 105. Right to Unemployment Compensation Generally.

The term "suitable work", G.S. 96-14(3), relates primarily to the skills required, the compensation to be paid, and the risks incurred by the employee by reason of either the nature of the work to be done, or the environment or time in which it is to be done. *In re Watson,* 629.

Although the job rejected by claimant for unemployment insurance benefits constituted "suitable work," her rejection of it does not necessarily disqualify her for benefits unless the rejection was "without good cause." *Ibid.*

MASTER AND SERVANT—*Continued.*

A worker in an electrical plant who was involuntarily discharged from her job on the first shift and who thereafter rejects the tender of a job on the second shift solely upon the ground that she is unable to obtain adequate care and supervision for her nine-year-old child during the hours of the second shift, *held* available for work within the purview of G.S. 96-13. *Ibid.*

MONOPOLIES.

§ 2. Agreements and Combinations Unlawful.

A contract whereby plaintiff and defendant jointly undertake to provide a coin-operated phonograph for the use of patrons in defendant's restaurant, the plaintiff agreeing to furnish and service the machine and the defendant agreeing to furnish the space and the cost of electricity, is not a contract for the sale of goods, wares or merchandise within the contemplation of the statutes against restraint of trade. *Knutton v. Cofield,* 355.

MORTGAGES AND DEEDS OF TRUST.

§ 1. Mortgages and Equitable Liens in General.

Where it appears from the evidence that the plaintiffs were indebted to defendants and that they executed a deed conveying to defendants a fee simple title to their house and lot, and contemporaneously therewith, defendants executed a "rent" agreement contracting to reconvey the house and lot to plaintiffs upon their payment of the indebtedness, the documents will be held to have the effect of a mortgage by the plaintiffs to the defendants. *Henderson v. Finance Co.,* 253.

§ 17. Payment and Satisfaction.

Where the record fails to show how the mortgagee allocated the debtor's payments for obligations owing to him, the law will allocate those payments to the lawful and valid obligations of the debtors rather than to interest illegally charged. *Henderson v. Finance Co.,* 253.

§ 28. Parties Who May Bid in and Purchase the Property.

Where a deed and a contract constitute an equitable mortgage, and there is no showing of a default by the mortgagors in any provision of the contract, the mortgagee, having knowledge that there was no default, cannot by his purchase of the property at a foreclosure sale engineered by him under another deed of trust acquire a good title as against the demands of the mortgagors for reconveyance upon their payment of the indebtedness pursuant to the contract. *Henderson v. Finance Co.,* 253.

MUNICIPAL CORPORATIONS.

§ 24. Nature and Extent of Municipal Police Power in General.

If the manner in which a trade or occupation is conducted will probably result in injury to the public health, safety or morals, the police power of a municipality may lawfully be used to eliminate the hazard. *Cheek v. City of Charlotte,* 293.

§ 27. Regulations Relating to Public Morals.

If the manner in which a trade or occupation is conducted will probably result in injury to the public health, safety or morals, the police power of a

MUNICIPAL CORPORATIONS—*Continued.*

municipality may lawfully be used to eliminate the hazard. *Cheek v. City of Charlotte*, 293.

The occupation of a massagist and the business of massage parlors and similar establishments are proper subjects for regulation under the police power of a municipality, provided, however, that such regulation be uniform, fair and impartial in its operation. *Ibid.*

A municipal ordinance which prohibits a person of one sex from giving a massage to a patron of the opposite sex in a massage parlor, health salon or physical culture studio, but which permits such conduct in a barber shop, beauty parlor or YMCA or YWCA health club, is unconstitutional, since it arbitrarily discriminates between businesses of the same class. *Ibid.*

§ 30. Zoning Ordinances and Building Permits.

In the absence of a valid zoning ordinance prohibiting the use of property for a shopping center or for multiple-family apartment houses, the owner of land may use it for such purpose even though he thereby makes the adjoining property less desirable, neither of such uses being a nuisance *per se* or an encroachment, and in such instance the diminution in the value of the adjoining property is *damnum absque injuria. Zopfi v. City of Wilmington*, 430.

Zoning laws are an exercise of the police power of the sovereign reasonably to regulate or restrict the use of private property to promote the public health, safety, morals or welfare. *Ibid.*

There is a presumption in favor of the validity of a zoning ordinance. *Ibid.*

The board of county commissioners may prescribe an orderly procedure for conducting the public hearing required by G.S. 153-266.15 to be held upon a proposed county zoning ordinance. *Freeland v. Orange Co.*, 452.

§ 31. Review of Orders of Municipal Zoning Boards.

Upon review of the amendment of a zoning ordinance by a municipal legislative body, the courts may not substitute their opinion for that of the legislative body so long as there is some plausible basis for the conclusion reached by that body. *Zopfi v. City of Wilmington*, 430.

In an action under the Declaratory Judgment Act to review the authority of a municipality to adopt a rezoning ordinance, trial by jury is properly refused where the controverted facts to be determined by the court present questions of fact and not issues of fact. *Ibid.*

NARCOTICS.

§ 3. Competency and Relevancy of Evidence.

A lay witness may give an opinion as to whether or not defendant was under the influence of barbiturates on a given occasion when the witness observed him, and such evidence is relevant to the issue of defendant's alleged unlawful possession of barbiturates. *S. v. Cook*, 377.

§ 4. Sufficiency of Evidence and Nonsuit.

Evidence that barbiturate capsules were found in an apartment occupied by three defendants, that in the opinion of an arresting officer the defendants were under the influence of drugs, and that while in jail two of the defendants surrendered a quantity of barbiturate capsules, *is held* sufficient to be submitted to the jury on the issue of the three defendants' guilt of unlawful possession of barbiturates. *S. v. Cook*, 377.

NEGLIGENCE.

§ 1. Acts and Omissions Constituting Negligence in General.

Ordinarily, a plaintiff must prove circumstances tending to show some fault of omission or commission on the part of defendant in addition to those which indicate the physical cause of an accident, but where the doctrine of *res ipsa loquitur* applies, it is distinctive in permitting negligence to be inferred by the jury from the physical cause of an accident, without the aid of circumstances as to the responsible human cause. *Kekelis v. Machine Works*, 439.

The law imposes upon a person *sui juris* the duty to use due care to protect himself from injury, and the degree of such care should be commensurate with the danger to be avoided. *Warren v. Lewis*, 457.

The term "act of God" is used to designate the cause of an injury to person or property where such injury is due directly and exclusively to natural causes without human intervention and could not have been prevented by the exercise of reasonable care and foresight. *Mills, Inc. v. Terminal, Inc.*, 519.

§ 5. Res Ipsa Loquitur.

The doctrine of *res ipsa loquitur* applies to make an occurrence itself some evidence that it arose from want of care when an instrumentality causing an injury to the plaintiff is shown to be under the control and operation of the defendant, and the accident is one which, in the ordinary course of events, does not happen if those who have the management of it use the proper care. *Kekelis v. Machine Works*, 439.

Res ipsa loquitur does not apply when more than one inference can be drawn from the evidence as to whose negligence caused the injury or when the instrument causing the injury is not under the exclusive control and management of the defendant. *Ibid.*

Ordinarily, a plaintiff must prove circumstances tending to show some fault of omission or commission on the part of defendant in addition to those which indicate the physical cause of an accident, but where the doctrine of *res ipsa loquitur* applies, it is distinctive in permitting negligence to be inferred by the jury from the physical cause of an accident, without the aid of circumstances as to the responsible human cause. *Ibid.*

§ 7. Proximate Cause.

Proximate cause is that cause which produces the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all of the facts then existing. *Kanoy v. Hinshaw*, 418.

An instruction to the effect that the defendant should have been able to foresee the precise injury which resulted from his conduct is prejudicial, since all that plaintiff is required to prove on the question of foreseeability is that the defendant might have foreseen that some injury would probably result from his conduct. *Johnson v. Lamb*, 701.

§ 8. Concurring and Intervening Negligence — Act of God.

Legal responsibility for negligence joined with an act of God depends upon the fact that the negligence operated as an efficient and contributing cause of injury. *Mills, Inc. v. Terminal, Inc.*, 519.

§ 9. Primary and Secondary Liability and Indemnity.

Primary and secondary liability between defendants exists only when they are jointly and severally liable to plaintiff and the one passively negligent is exposed to liability through the active negligence of the other or the one is de-

NEGLIGENCE—*Continued.*

rivatively liable for the negligence of the other, and the doctrine cannot arise if one defendant is solely liable to plaintiff. *Hendricks v. Fay, Inc.*, 59.

Where a party secondarily liable under the doctrine of *respondeat superior* is sued alone, he is entitled to set up a cross-action for indemnity against the party primarily liable and have the matter adjudicated in that action. *Ibid.*

§ 11. Contributory Negligence.

Plaintiff's negligence which concurs with that of defendant in producing the occurrence causing the original injury bars all recovery, even though plaintiff's negligence was comparatively small, the doctrine of comparative negligence being inapplicable in this State. *Miller v. Miller*, 228.

Contributory negligence occurs either before or at the time of defendant's negligence, while the doctrine of avoidable consequences arises after defendant's wrongful act. *Ibid.*

Contributory negligence is an affirmative defense which must be pleaded and established by proof. *Warren v. Lewis*, 457.

§ 13. Comparative Negligence.

Plaintiff's negligence which concurs with that of defendant in producing the occurrences causing the original injury bars all recovery, even though plaintiff's negligence was comparatively small, the doctrine of comparative negligence being inapplicable in this State. *Miller v. Miller*, 228.

§ 20. Pleadings in Negligence Actions.

A complaint which alleges negligence in a general way without setting forth with some reasonable degree of particularity the things done, or omitted to be done, by which the court can see that there has been a breach of duty is defective and open to demurrer. *Pardue v. Speedway, Inc.*, 314.

An "act of God" must be specifically pleaded. *Mills, Inc. v. Terminal, Inc.*, 519.

§ 21. Presumptions and Burden of Proof.

Negligence may not be inferred from the mere fact of an occurrence which injures a plaintiff. *Kekelis v. Machine Works*, 439.

§ 23. Actions: Questions of Law and Fact.

Proximate cause is ordinarily to be determined by the jury as a fact from the attendant circumstances, and conflicting inferences of causation arising from the evidence carry the issue to the jury. *Mills, Inc. v. Terminal, Inc.*, 519.

§ 24b. Sufficiency of Evidence and Nonsuit — Res Ipsa Loquitur.

The rule of *res ipsa loquitur* does not apply when the facts of the occurrence merely indicates negligence by some person and do not point to defendant as the only probable tortfeasor, and in such case the action must be nonsuited unless additional evidence is introduced which eliminates negligence on the part of all others who had control of the instrument causing plaintiff's injury. *Kekelis v. Machine Works*, 439.

§ 24c. Sufficiency of Evidence and Nonsuit — Circumstantial Evidence.

Negligence and causation may be proved by circumstantial evidence. *Kekelis v. Machine Works*, 439.

The rule of *res ipsa loquitur* does not apply when the facts of the occurrence merely indicate negligence by some person and do not point to defendant as the only probable tortfeasor, and in such case the action must be nonsuited

NEGLIGENCE—*Continued.*

unless additional evidence is introduced which eliminates negligence on the part of all others who had control of the instrument causing plaintiff's injury. *Ibid.*

§ 26. Nonsuit for Contributory Negligence.

Ordinarily, contributory negligence is an issue of fact to be decided by the jury, but when plaintiff's own evidence so clearly establishes defendant's plea of contributory negligence that no reasonable inference to the contrary may be drawn therefrom, the court, in the absence of a last clear chance issue, is required to grant defendant's motion for nonsuit. *Warren v. Lewis*, 457.

Nonsuit for contributory negligence is not proper unless plaintiff's evidence establishes the facts necessary to show contributory negligence so clearly that no other reasonable conclusion can be drawn therefrom. *Ibid.*

§ 28. Instructions on Intervening and Concurrent Causes.

An instruction that plaintiff could not recover if the sole proximate cause of its damage was an act of God but that if defendant were negligent and if such negligence joined with a storm as one of the proximate causes of plaintiff's damages, then defendant would be liable, *held* without error. *Mills, Inc. v. Terminal, Inc.*, 519.

§ 31. Elements of Culpable Negligence.

The wilful, wanton or intentional violation of a safety statute, or the inadvertent or unintentional violation of such statute when accompanied by recklessness amounting to a thoughtless disregard of consequences or a heedless indifference to the safety of others, constitutes culpable negligence, but the inadvertent or unintentional violation of a safety statute, standing alone, does not constitute culpable negligence. *S. v. Weston*, 275.

§ 37b. Duties and Liabilities to Invitees.

The operator of a swimming pool for hire is not an insurer of the safety of his invitees, but he does, however, owe them the duty to exercise due care to maintain his premises in a reasonably safe condition for the purpose for which he offers them to the public. *Sneed v. Lions Club*, 98.

The operator of a swimming pool for hire is under a duty to mark the depths of the water, to provide a suitable number of competent attendants, and to institute a timely search for a missing bather. *Ibid.*

Plaintiff's evidence was to the effect that her intestate, a 14 year old boy who was unable to swim, entered defendant's pool which had a range in depth from 2½ to 8 feet, that a 16 year old lifeguard was the only attendant in charge, that the only notice as to the depth of the water was at the deep end of the pool, that a lime treatment of the water rendered objects invisible at a depth of more than two feet, and that upon plaintiff's inquiry as to her son's disappearance the guard made a belated search of the pool where the body was discovered. *Held:* The evidence is sufficient to be submitted to the jury on the issue of defendant's negligence. *Ibid.*

NOTICE

§ 2. Sufficiency and Requisites of Notice.

Ordinarily, where a specified mode of giving notice is prescribed by statute, that method must be strictly followed. *In re Appeal of Harris*, 20.

The failure of a party aggrieved to file a petition for the judicial review of an administrative order not later than 30 days after a written copy of the

NOTICE—*Continued.*

order had been served upon him by regular mail, *is held* not to constitute a waiver or forfeiture of the party's right to petition for review pursuant to G.S. 143-309, since the right of review under the statute continues until 30 days have expired from service of the order by personal service or by registered mail, return receipt requested. *Ibid.*

Statutory requirements with reference to notice are strictly construed where the giving of notice must be relied upon to divest the recipient of a right. *Holsomback v. Holsomback*, 728.

PARENT AND CHILD.

§ 1. The Relationship of Parent and Child.

The law presumes the legitimacy of a child born in wedlock, but such presumption may be rebutted by proof of the husband's impotency or his nonaccess to the wife, or, if the husband had the opportunity of access, then by proof of the wife's living in open adultery. *Eubanks v. Eubanks*, 189.

Society, as well as the parent, has a very material interest in the supervision and care of children after their release from school at the end of the day, and, accordingly, the Employment Security Act should not be construed so as to deny its benefits to a mother who rejected a tender of employment on the sole ground that she is unable to obtain adequate care for her child during the working hours of the proffered employment. *In re Watson*, 629.

§ 5. Duty to Support and Right of Child to Sue for Support.

A father is legally obligated to support his children until they reach the age of twenty-one years and cease to be dependent, or until they become emancipated by marriage or otherwise. *Gray v. Gray*, 319.

An order relieving the father from making payments to his former wife for the support of a daughter of the marriage, which is based upon a finding that the daughter has attained the age of 18 years, is erroneous in the absence of findings that the daughter has become emancipated by marriage or otherwise. *Ibid.*

The court entered an order reducing a father's payments for the support of a minor daughter upon a finding from the evidence that the father's income had materially changed, but the court heard no evidence as to the needs of the daughter. The order further provided that, upon dissatisfaction of either party, a further hearing would be held to review defendant's income and the daughter's needs. *Held:* The order is vacated and the cause remanded for a hearing *de novo* on the father's motion to reduce support payments. *Ibid.*

PARTIES.

§ 1. Necessary Parties.

Only parties of record to a suit have a standing therein which will enable them to take part in or control the proceedings. *Strickland v. Hughes*, 481.

§ 4. Proper Parties.

It is ordinarily within the discretion of the court to permit proper parties to intervene. *Strickland v. Hughes*, 481.

§ 6. Intervenors.

Intervention is the proceeding by which one not originally a party to an action is permitted, on his own application, to appear therein and join one of the original parties in maintaining the action or defense, or to assert a claim or defense against some or all of the parties to the proceeding as originally instituted. *Strickland v. Hughes*, 481.

PARTIES—*Continued.*

Refusal to permit a necessary party to intervene is error. *Ibid.*

In an action by an injured party against an insured under a policy of assigned risk automobile insurance to recover for injuries arising out of an automobile accident, the insurer is neither a necessary nor a proper party to intervene therein on the ground that the parties have conspired to defraud the insurer, since (1) the issue of fraud and collusion raised by the intervenor will be detrimental to the integrity of the issues raised by the original pleadings, and (2) since any judgment procured by fraud or collusion will not be conclusive against the insurer in a subsequent action upon the judgment by the injured party. *Ibid.*

§ 8. Joinder of Additional Parties.

The trial court should bring in all parties who have such an interest in the subject matter of the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without their presence. *Strickland v. Hughes*, 481.

PARTITION.

§ 12. Partition by Exchange of Deeds.

Where tenants in common exchange deeds for the purpose of partitioning land, the deeds employed merely sever the unity of possession and create no new title, and therefore if any one of such deeds names the tenant and his spouse as grantees, no estate by the entitrety is thereby created, even though the tenant consents thereto, since the grantees must be jointly named and jointly entitled to create an estate by the entirety. *Combs v. Combs*, 462.

A partition deed creates no new or different title even though it is in the form of a deed of bargain and sale with covenants of title, seisin and warranty. *Ibid.*

PAYMENT.

§ 1. Transactions Constituting Payment.

In the absence of an agreement to the contrary the giving of a check operates only as a conditional payment until the check is paid. *Homes, Inc. v. Bryson*, 84.

§ 3. Application of Payment.

Where the record fails to show how the mortgagee allocated the debtor's payments for obligations owing to him, the law will allocate those payments to the lawful and valid obligations cf the debtors rather than to interest illegally charged. *Henderson v. Finance Co.*, 253.

PLEADINGS.

§ 2. Statement of Cause of Action in General.

A complaint must be fatally defective before it will be rejected as insufficient. *Givens v. Sellars*, 44.

The complaint must allege the facts constituting the cause of action so as to disclose the issuable facts determinative of plaintiff's right to relief. *Pardue v. Speedway, Inc.*, 314.

A general allegation of unskillful work is a defective statement of a cause of action, not a statement of a defective cause, and plaintiff's introduction of evidence tending to show latent defects caused by defendant's poor workman-

PLEADINGS—*Continued.*

ship does not result in a variance between such allegation and proof, since variance occurs when the proof does not conform to the cause pleaded. *Cantrell v. Woodhill Enterprises, Inc.*, 490.

§ 8. Counterclaims and Cross-Actions.

Whether defendant stated a permissible cross-action against a party sought to be joined as an additional defendant is determinable by the factual allegations in the pleading and not by the legal conclusions. *Hendricks v. Fay, Inc.*, 59.

Where a party secondarily liable under the doctrine of *respondeat superior* is sued alone, he is entitled to set up a cross-action for indemnity against the party primarily liable and have the matter adjudicated in that action. *Ibid.*

§ 12. Office and Effect of Demurrer.

A pleading will be liberally construed upon demurrer with a view to substantial justice between the parties, and the demurrer admits the truth of factual averments well stated and such inferences of fact as may be deduced therefrom. *Givens v. Sellars*, 44; *Pardue v. Speedway, Inc.*, 314; *Gas Co. v. Leggett*, 547.

§ 15. Demurrer for Defects Appearing on Face of Pleading and "Speaking" Demurrers.

Matters *dehors* the pleading may not be considered in passing upon a demurrer. *Givens v. Sellars*, 44.

§ 19. Demurrer for Failure to State a Cause of Action.

A complaint which alleges generally that defendant erected a building "in an unskillful manner" is subject to demurrer for failure to allege facts constituting the faulty workmanship, but when the demurrer is sustained the plaintiff may then move for leave to amend his complaint to allege his cause of action properly. *Cantrell v. Woodhill Enterprises, Inc.*, 490.

§ 25. Scope of Amendment to Pleadings.

Motion to amend a complaint made after trial is properly denied where the amendment sets up a wholly different cause of action or an inconsistent cause. G.S. 1-163. *Lane v. Griswold*, 1.

§ 28. Variance Between Proof and Allegation.

A general allegation of unskillful work is a defective statement of a cause of action, not a statement of a defective cause, and plaintiff's introduction of evidence tending to show latent defects caused by defendant's poor workmanship does not result in a variance between such allegation and proof, since variance occurs when the proof does not conform to the cause pleaded. *Cantrell v. Woodhill Enterprises, Inc.*, 490.

§ 29. Issues Raised by the Pleadings and Necessity for Proof.

An issue arises upon the pleadings when a material fact is alleged by one party and controverted by the other. *Johnson v. Lamb*, 701.

A material fact is one which constitutes a part of plaintiff's cause of action or of defendant's defense. *Ibid.*

§ 30. Motions for Judgment on the Pleadings.

A motion for judgment on the pleadings on the ground that the complaint fails to state a cause of action is tantamount to a demurrer, and upon the hearing of such motion the court is limited solely to a consideration of the pleadings. *Lane v. Griswold*, 1.

Upon the hearing of a motion for judgment on the pleadings, error by the

PLEADINGS—*Continued.*

trial court in considering facts stipulated by the parties *is held* not prejudicial when the facts stipulated are within the scope of the factual allegations in the complaint and no objection was entered to the consideration thereof. *Ibid.*

Judgment on the pleadings is proper when the pleadings raise no issue of fact on any material proposition, but raise only questions of law for the court. *McRorie v. Creswell*, 615.

§ 34. Right to Have Allegations Stricken on Motion.

A motion to strike allegations relating to the recovery of punitive damages on the ground that the complaint fails to state a cause of action supporting such a recovery is in the nature of a demurrer, and an appeal will lie from an order allowing the motion to strike, Rule of Practice in the Supreme Court No. 4(a) not being applicable. *King v. Insurance Co.*, 396.

PRINCIPAL AND AGENT.

§ 1. Creation and Existence of Relationship of Principal and Agent.

The ordinary relationship of a stockbroker to his customer is that of principal and agent. *Lane v. Griswold*, 1.

§ 9. Liability of Principal for Torts of Agent.

The duties performed by a private detective firm in maintaining a security watch over the property and the employees of a principal are non-delegable, and the firm has the status of an agent and not of an independent contractor in the performance of its duties, and the liability of the detective firm for the malicious prosecution or the false arrest of an employee of the principal is imputable to the principal under the doctrine of *respondeat superior*. *Hendricks v. Fay, Inc.*, 59.

PROCESS.

§ 2. Issuance and Service in General.

A summons is "issued" within the meaning of G.S. 1-88 when it is delivered by the clerk, expressly or impliedly, to the sheriff, or to someone for him, for service. *Williams v. Bray*, 198.

Where the evidence shows the summons was given by the issuing clerk to plaintiff's attorney who then transmitted it to the proper officer for service, and where defendant's evidence fails to rebut the presumption that the summons was issued when dated, the summons is "issued" within the meaning of G.S. 1-88 and is a proper basis for the issuance of an alias summons. *Ibid.*

§ 3. Time of Service, Alias and Pluries Summons.

The summons must be served on defendant by the officer to whom it is addressed within twenty days of its issuance, and if the summons is not served within the twenty days it must be returned to the clerk who issued it with a notation thereon of its nonservice and the reasons therefor. G.S. 1-89. *Williams v. Bray*, 198.

A summons is "issued" within the meaning of G.S. 1-88 when it is delivered by the clerk, expressly or impliedly, to the sheriff, or to someone for him, for service. *Ibid.*

Where the evidence shows the summons was given by the issuing clerk to plaintiff's attorney who then transmitted it to the proper officer for service, and where defendant's evidence fails to rebut the presumption that the summons was issued when dated, the summons is "issued" within the meaning of G.S. 1-88 and is a proper basis for the issuance of an alias summons. *Ibid.*

PROCESS—*Continued.*

If the original summons is not served on defendant within twenty days of its issuance it becomes *functus officio*, and plaintiff must then cause an alias summons to be issued and served in accordance with G.S. 1-95 to prevent a discontinuance of the action. *Ibid.*

Plaintiff may sue out an alias or pluries summons either by oral or written application to the clerk, and no order of court is necessary to the issuance of such process. *Ibid.*

An alias summons issues only when the original summons has not been served. *Ibid.*

Where the return on the original summons was that defendant could not be found, and where it appeared on the face of the summons that service had not been made within twenty days of its issuance, which is tantamount to a return of nonservice, the original summons was a proper basis for the issuance of an alias summons. *Ibid.*

A summons issued within ninety days from the date of the original summons, and which referred back to the original summons, is a valid alias summons and prevents a discontinuance of the action as originally instituted. *Ibid.*

§ 4. Proof of Service.

On motion to dismiss for invalid service on defendant, the court is not required to make findings of fact, absent a request, and it is presumed that the court on proper evidence found facts sufficient to support its judgment. *Williams v. Bray*, 198.

PUBLIC OFFICERS.

§ 5. Prohibition Against Holding More Than One Public Office.

A clerk of a county recorder's court vacates his office *eo instanti* he accepts the office of justice of the peace, since both are public offices under the State within the purview of Art. XIV, § 7, of the Constitution of North Carolina, and he is thereafter authorized to issue search warrants for barbiturates as a justice of the peace. G.S. 15-25.1. *S. v. Cook*, 377.

§ 9. Personal Liability of Public Officers to Private Individuals.

An employee of a governmental agency is personally liable for negligence in the performance of his duties proximately causing injury to the property of another, even though his employer is clothed with immunity. *Givens v. Sellars*, 44.

A public officer who willfully, wantonly and maliciously destroys personal property of another is personally liable for the injury inflicted. *Ibid.*

Allegations that plaintiff owned a leasehold estate on which he maintained a billboard adjacent to a highway, that defendant employees of the Highway Commission and defendant employee of a private contractor, in their capacity of supervising the construction of a road, negligently, and willfully and maliciously issued orders for the destruction of the billboard without first ascertaining plaintiff's property rights in the sign, thereby causing plaintiff the loss of profits from rental of the sign, *are held* sufficient to state a cause of action against defendants in their individual capacity. *Ibid.*

RAPE.

§ 5. Sufficiency of Evidence and Nonsuit.

Evidence in this case is held sufficient to be submitted to the jury on the issue of defendant's guilt of rape. *S. v. White*, 736.

RAPE—*Continued.*

§ 17. Assault with Intent to Commit Rape Defined.

In order to constitute an assault with intent to commit rape, it is not necessary that the intent continue throughout the assault, but it is sufficient if at any time during the assault the defendant intended to accomplish his purpose notwithstanding any resistance on the part of the prosecutrix. *S. v. Goines*, 509.

§ 18. Assault with Intent to Commit Rape — Prosecutions.

Evidence in this case is held sufficient to be submitted to jury on issue of defendant's guilt of assault with intent to commit rape. *S. v. Goines*, 509.

RELIGIOUS SOCIETIES AND CORPORATIONS.

§ 3. Actions.

In a hearing upon the Board of Elders' application for an interlocutory injunction to restrain defendants from using the names "Moravian" or "Unitas Fratrum" in connection with their religious activities, the granting of an injunction *pendente lite is held* erroneous in the absence of a showing that plaintiff would probably suffer substantial injury to its reputation, doctrine, membership or contributions. *Board of Elders v. Jones*, 174.

ROBBERY.

§ 1. Nature and Elements of the Offense.

G.S. 14-87 does not create a new offense but merely provides a more severe punishment when firearms or other dangerous weapons are used in the commission of common law robbery. *S. v. Rogers*, 208.

§ 2. Indictment.

It is not essential in an indictment charging robbery with firearms that there be an allegation as to the place where the offense occurred, it being sufficient that the county of the offense be named in order to establish the jurisdiction of the court. *S. v. Rogers*, 208.

§ 4. Sufficiency of Evidence and Nonsuit.

A variance between the indictment and the proof as to the ownership of property taken is not fatal in a prosecution for robbery, it being sufficient that the property described be such as is the subject of larceny, and allegations in the indictment as to the ownership will be treated as surplusage. *S. v. Rogers*, 208.

Evidence in this case *held* sufficient to be submitted to the jury on the question of defendant's guilt of robbery with firearms or other dangerous weapons. *Ibid; S. v. Davis*, 349.

§ 5. Instructions and Submission of the Question of Guilt of Less Degrees of the Crime.

There was no error in submitting to the jury the issue of defendant's guilt of the lesser offense of common law robbery even though there was sufficient evidence to show the use of a deadly weapon, since there was testimony by the prosecuting witness that he suffered a cut on the neck from some instrument used by defendant in the commission of the robbery but that he did not see the weapon. *S. v. Rogers*, 208.

An instruction to the effect that defendant might be convicted of armed robbery if the jury should find that he took personal property from the prosecuting witness by the use of force or intimidation sufficient to create an appre-

ROBBERY—*Continued.*

hension of danger is erroneous in failing to instruct the jury as to the elements of armed robbery as distinguished from common law robbery, since to convict for armed robbery the jury must find that the life of the victim was endangered or threatened by the use or threatened use of firearms or other dangerous implement or means. G.S. 14-87. *S. v. Covington*, 690.

In a prosecution for three separate offenses of armed robbery, an instruction to the effect that both defendants would be guilty if either defendant robbed either of three named victims, such instruction not being predicated upon a jury finding that defendants were acting in concert before one would be responsible for the criminal acts of the other, is erroneous since a verdict of guilty in response to such instruction would leave undetermined the jury's findings as to what each defendant had done and which victims had been robbed. *Ibid.*

SALES.

§ 1. Nature and Requisites of Contract of Sale.

The word "sale" as used in the North Carolina Securities Law, G.S. 78-2(f), will be presumed, in the absence of a contrary intent in the statute, to have its usual meaning of a transfer of property from one person to another for a valuable consideration. *Lane v. Griswold*, 1.

§ 3. Transfer of Title.

A cash sale is one in which the title to the property and the purchase price pass simultaneously, and title remains in the seller until the purchase price is paid, even though possession of the property is delivered to the buyer. *Homes, Inc. v. Bryson*, 84.

Even though the contract be for a cash sale, title will pass to the buyer without payment if the seller by language or conduct waives his right to immediate cash payment, but the acceptance of a check is not such a waiver and if the check is dishonored title does not pass. *Ibid.*

If the possessor of a chattel has no title, a *bona fide* purchaser from him acquires no property right therein unless the true owner authorizes or ratifies the sale or is estopped to assert his title. *Ibid.*

In the absence of estoppel, the true owner who is induced to part with possession by fraud may reclaim his chattel from a *bona fide* purchaser from or under the person obtaining such possession, but if the true owner is induced to part with title by fraud, he may not reclaim the chattel from a *bona fide* purchaser from the fraudulent buyer. *Ibid.*

The fact that he has entrusted the bare possession of a chattel to another does not estop the true owner from denying such possessor's authority to sell or encumber it, but if the true owner invests the possession with *indicia* of title, the true owner is estopped to claim ownership of the chattel as against an innocent purchaser. *Ibid.*

The plaintiff, a manufacturer of mobile homes, delivered a unit to a dealer with instructions for payment by certified check. Upon assurances by the dealer that he had sufficient funds in the bank, the manufacturer accepted the dealer's personal check and gave the dealer possession of the mobile home. The evidence fails to show that plaintiff invested the dealer with a manufacturer's certificate of origin or any other *indicia* of title. Thereafter the dealer sold the mobile home to the defendant. The dealer's check was subsequently dishonored. *Held:* Plaintiff's evidence is sufficient to withstand a motion for nonsuit since, assuming the evidence to be true, plaintiff retained title to the mobile home and is not estopped to assert it even against an innocent purchaser. *Ibid.*

SALES—*Continued.*

§ 6. Implied Warranties.

A contractor or builder impliedly represents that he possesses the skill necessary to perform the job undertaken, and he has a duty to perform the work in a proper and workmanlike manner. *Cantrell v. Woodhill Enterprises, Inc.*, 490.

§ 10. Remedies of Seller — Recovery of Goods or Purchase Price.

Where the seller accepts the purchaser's check in payment of a cash sale and the check is thereafter dishonored, the seller has the election to treat the transaction as void, leaving title to the chattel in himself, or to treat it as a sale, thereby transferring title to the buyer so as to make the buyer liable to him for the agreed purchase price. *Redmond v. Lilly*, 446.

The institution of an action by the seller against the buyer of goods to recover the purchase price is an election by the seller to treat the transaction as a sale, and title to the goods is thereby vested in the buyer, and plaintiff is thereafter precluded from maintaining an action for the recovery of the goods or for their conversion by a purchaser from his vendee. *Ibid.*

§ 13. Actions or Counterclaims to Rescind and Recover the Purchase Price.

In an action by the purchaser of stock to render void a contract of stock purchase and recover the purchase price thereof, allegations that plaintiff in this State placed an unsolicited order for the purchase of stock with defendant stockbrokers in another state and that this order was filled by defendants, as agent for plaintiff, through its own office or clearinghouse in another state, *are held* ineffectual to allege a sale or an offer for sale of unregistered securities within the purview of G.S. 78-6 and G.S. 78-22, since it appears from the complaint that defendants were acting solely as the agent of plaintiff and not as a seller of the securities or as seller's agent. *Lane v. Griswold*, 1.

Allegations that defendant stockbrokers, as agent for plaintiff, purchased shares of stock through its office or clearinghouse in another state and that the stock was subsequently delivered to plaintiff upon plaintiff's payment in this State of a sight draft attached to the securities, *are held* ineffectual to allege a sale of unregistered securities in this State within the meaning of G.S. 78-6 and G.S. 78-22, since the sale was consummated in the other state upon the purchase of the stock, the title having vested immediately in the plaintiff. *Ibid.*

Evidence in this case is *held* sufficient to permit a jury finding that defendant automobile dealer breached a contractual obligation to "trade back" the automobile of a purchaser upon the latter's dissatisfaction with a car purchased from the dealer. *Fulcher v. Nelson*, 221.

SCHOOLS.

§ 4. Duties and Authority of Boards of Education in General.

To effectuate a transfer of school bond funds from one project to another, the county board of education must, by resolution, request such reallocation and apprise the county commissioners of the conditions necessitating the transfer, and the board of county commissioners must then make an investigation and record their findings upon their official minutes, and authorize or reject the proposed reallocation. *Dilday v. Board of Education*, 679.

County commissioners approval of a reallocation of county school bond funds for construction of a central high school is held insufficient to dissolve a temporary restraining order where the commissioners made no specific find-

SCHOOLS—*Continued.*

ings as to the buildings planned for the proposed school and the sufficiency of available funds for such construction. *Ibid.*

§ 7. Taxation, Bonds and Allocation of Proceeds.

To effectuate a transfer of school bond funds from one project to another, the county board of education must, by resolution, request such reallocation and apprise the county commissioners of the conditions necessitating the transfer, and the board of county commissioners must then make an investigation and record their findings upon their official minutes, and authorize or reject the proposed reallocation. *Dilday v. Board of Education,* 679.

The board of county commissioners may reallocate school bond funds in accordance with a request of the county board of education upon finding (1) that conditions have so changed since the bonds were authorized that the funds are no longer necessary for the original purpose, or that the proposed new project will eliminate the necessity for the originally contemplated expenditure and better serve the district involved, or that the law will not permit the original purpose to be accomplished in the manner intended, and (2) that the total proposed expenditure for the changed purpose is not excessive. *Ibid.*

STATE.

§ 2. State Lands.

The eastern boundary of this State is fixed at one marine league eastward from the seashore of the Atlantic Ocean bordering the State, measured from the extreme low water mark of the seashore, and the State is entitled to exercise jurisdiction over the territory within, and ownership of the lands under, the littoral waters within the boundaries of the State, subject only to the jurisdiction of the United States over navigation within the territorial waters. *Bruton v. Enterprises, Inc.,* 399.

By 43 U.S.C.A. § 1312, the United States has in effect quitclaimed and confirmed the ownership of the State in lands beneath the Atlantic Ocean within a marine league seaward from the eastern boundary of the State. *Ibid.*

The submerged hulks of certain Confederate blockade runners and the wreck of a Spanish privateer sunk during the eighteenth century, together with their cargoes, all of which are resting within the territorial waters of the State and below the surface of the waters at low tide, are derelicts or wrecks within the purview of the common law and belong to the State in its sovereign capacity, and the activities of defendants in going upon the vessels and removing therefrom historical artifacts constitute a trespass, entitling the State to an order permanently enjoining defendants from disturbing the vessels or their cargoes. *Ibid.*

Subject to the authority and rights of the United States respecting navigation, flood control and production of power, Congress has relinquished to the states the entire interest of the United States in all lands beneath navigable waters within state boundaries, inclusive of submerged lands within three geographical miles seaward from the coast of each state. *Capune v. Robbins,* 581.

No submerged lands of the State may be conveyed in fee, but easements therein may be granted by the State in the manner prescribed by statute. *Ibid.*

§ 4. Actions Against the State.

Injuries intentionally inflicted by an employee of a State agency are not compensable under the Tort Claims Act. G.S. 143-291 *et seq. Givens v. Sellars,* 44.

STATE—*Continued.*

§ 5c. Filing and Procedure for Tort Claims Against the State.

The Industrial Commission is constituted the trial court for the hearing of tort claims against the State. G.S. 143-291. *Mason v. Highway Commission,* 36.

The affidavit filed by a claimant pursuant to the Tort Claims Act, G.S. 143-297, is in the nature of a complaint in an ordinary tort action, and the allowance of an amendment thereto after the expiration of the time allowed by statute rests in the sound discretion of the Industrial Commission and its ruling thereon is not subject to review in the absence of an abuse of such discretion. *Ibid.*

§ 5f. Appeal and Review of Proceedings Under Tort Claims Act.

A motion for a further hearing on the ground of introducing additional or newly discovered evidence rests in the sound discretion of the Industrial Commission and its ruling thereon is not reviewable in the Superior Court in the absence of an abuse of discretion by the Commission. *Mason v. Highway Commission,* 35.

§ 6. Actions by the State.

The State is entitled to an order permanently restraining diving and salvage operations by defendants to remove irreplaceable historical artifacts from sunken vessels lying within the territorial waters of the State, and the State is also entitled to a mandatory injunction to compel defendants to return such articles taken from the vessels. *Bruton v. Enterprises, Inc.,* 399.

The State, as *parens patriæ,* through its Attorney General, has the common law right and power to protect the beneficiaries of charitable trusts and the property to which they are or may be entitled. *Sternberger v. Tannenbaum,* 658.

STATUTES.

§ 5. General Rules of Construction.

Where the language of a statute is plain and unambiguous, it needs no construction, and the statute must be applied according to its plain and obvious meaning. *Wake County v. Ingle,* 343.

A statute must be construed to effectuate the legislative intent. *Freeland v. Orange Co.,* 452.

Where a literal interpretation of a statute would lead to absurd results and contravene the manifest purpose of the statute, the reason and purpose of the law will be given effect and the strict letter thereof disregarded. *Ibid.*

The words of a statute must be given their natural or ordinary meaning. *Cemetery, Inc. v. Rockingham County,* 467.

The controlling principle in the interpretation of a statute is that it must be given the meaning which the legislature intended it to have. *In re Watson,* 629.

Where the legislature has erected within the statute itself a guide to its interpretation, that guide must be considered by the courts in the construction of other provisions of the act which, in themselves, are not clear and explicit. *Ibid.*

TAXATION.

§ 7. Public Purpose.

The power of taxation and the power of appropriation of tax monies are subject to the constitutional proscription that tax revenues may not be used

TAXATION—*Continued.*

for private individuals or corporations, no matter how benevolent. *Mitchell v. Financing Authority*, 137.

The initial responsibility for determining what is a public purpose rests with the legislature and its findings are entitled to great weight, but an enactment for a private purpose is unconstitutional and cannot be saved by a legislative declaration to the contrary. *Ibid.*

The concept of public purpose is incapable of fixed definition but expands with the population, economy, scientific knowledge, and with changing conditions. *Ibid.*

For a use to be public it must benefit the public in common and not particular persons, interests or estates. *Ibid.*

The term "public purpose" is generally used in the same sense in the law of taxation and in the law of eminent domain. *Ibid.*

It is the rule in this State that government may not engage in private enterprise, nor may the power of eminent domain be used in behalf of a private interest. *Ibid.*

The issuance of revenue bonds by the Industrial Development Financing Authority, pursuant to G.S. Chapter 123A, in order to acquire sites and to construct and equip buildings and other facilities thereon for lease to private industry, such bonds to be retired by the rental payments, is not a public use or purpose for which State tax funds may be appropriated to enable the Authority to commence its operations. N. C. Constitution, Art. V, § 3. *Ibid.*

§ 12. Application of Proceeds of Bonds or Tax.

County commissioners' approval of a reallocation of county school bond funds for construction of a central high school is held insufficient to dissolve a temporary restraining order where the commissioners made no specific findings as to the buildings planned for the proposed school and the sufficiency of available funds for such construction. *Dilday v. Board of Education*, 679.

§ 14. Excise, License and Franchise Taxes.

The tax on motor fuels imposed by G.S. 105-434 is a privilege tax. *In re Oil Company*, 383.

§ 19. Exemption of Property and Transactions from Taxation in General.

Statutes enacted by the Legislature in the exercise of its constitutional authority to exempt certain classes of property from taxation, Constitution of N. C., Article V, § 5, are to be strictly construed, when there is room for construction, against exemption and in favor of taxation, but this rule of strict construction does not require that the statute be narrowly construed but only that its application should be restricted to those classifications coming within its terms. *Wake County v. Ingle*, 343.

§ 22. Property of Religious, Charitable and Educational Institutions.

Property owned or occupied gratuitously by a church and used solely for religious worship is exempt from *ad valorem* taxation. G.S. 105-296(3). *Wake County v. Ingle*, 343.

Property leased by a church for religious worship without the payment of rent to the owner is property occupied gratuitously within the meaning of G.S. 105-296(3) and is exempt from *ad valorem* taxation, notwithstanding the fact that the church maintains the property and pays the expenses connected with its use. *Ibid.*

§ 23. Construction of Taxing Statutes in General.

Statutes exempting specific property from taxation because of the purposes

TAXATION—*Continued.*

for which such property is held and used are to be strictly construed, when there is room for construction, against exemption and in favor of taxation, but this rule of strict construction does not require that the statute be stintingly or even narrowly construed. *Cemetery, Inc. v. Rockingham County,* 467.

§ 25. Ad Valorem Taxation.

Property owned by a nonprofit cemetery association for sale to purchasers for their burial purposes is not exempt from *ad valorem* taxation, since the exemption contemplated by G.S. 105-296(2) refers only to real property presently in use for burial purposes or to real property owned and held by persons for burial purposes and not for the purpose of sale or rental to others. *Cemetery, Inc. v. Rockingham County,* 467.

Upon an appeal from an order of the State Board of Assessment, the Superior Court is without authority to make its own findings of fact and to order that the State Board place a certain valuation on the property in question, and where the findings of the State Board are supported by competent, material and substantial evidence and are unaffected by error of law, it is error for the Superior Court to fail to affirm the Board's decision. *In re Appeal of Broadcasting Corp.,* 571.

All real property must be appraised for ad valorem taxation, as far as practicable, at its true market value in money, and the Board of County Commissioners must determine the assessment ratio to be applied to the appraised value of the property. G.S. 105-294. *Ibid.*

§ 29. Levy and Assessment of Sales, Use and Excise Taxes.

Taxes on gasoline collected by a licensed distributor and held for remittance to the Commissioner of Revenue pursuant to G.S. 105-434 are "taxes of any kind owing by the taxpayer" and cannot be deducted by the distributor from its accounts receivable as an account payable in computing intangibles tax liability. *In re Oil Company,* 383.

§ 30. Taxes on Solvent Credits and Intangibles.

Taxes on gasoline collected by a licensed distributor and held for remittance to the Commissioner of Revenue pursuant to G.S. 105-434 are "taxes of any kind owing by the taxpayer" and cannot be deducted by the distributor from its accounts receivable as an account payable in computing intangibles tax liability. *In re Oil Company,* 383.

§ 35. Collection, Payment, Subrogation and Discharge in General.

It is not unusual for the tax statute, as an aid to enforcement, to make the taxpayer a trustee or agent of the State for the purpose of collecting and remitting taxes. *In re Oil Company,* 383.

TORTS.

§ 6. Judgment Against Tort-Feasors.

Where one of two persons is liable to the injured party for the wrongdoing of the other solely by reason of constructive or technical fault imposed by law, as under the doctrine of *respondeat superior,* the person whose liability is secondary, upon payment by him of the injured party's recovery, is entitled to recover full indemnity against the primary wrongdoer. *Hendricks v. Fay, Inc.,* 59.

TRADEMARKS AND TRADE-NAMES.

In a hearing upon the Board of Elders' application for an interlocutory injunction to restrain defendants from using the names "Moravian" or "Unitas Fratrum" in connection with their religious activities, the granting of an injunction *pendente lite is held* erroneous in the absence of a showing that plaintiff would probably suffer substantial injury to its reputation, doctrine, membership or contributions. *Board of Elders v. Jones*, 174.

TRESPASS.

§ 1. Trespass to Realty in General.

A trespass is a wrongful invasion of the possession of another. *Bruton v. Enterprises, Inc.*, 399.

TRESPASS TO TRY TITLE.

§ 1. Nature and Essentials of Right of Action.

When one wrongfully enters upon the land of another and cuts trees thereon, the owner of the land has an election of remedies. *Freeman v. City of Charlotte*, 113.

§ 4. Sufficiency of Evidence and Nonsuit.

In an action to recover for trespass on a tract of land by the cutting and removal of timber therefrom, the failure of plaintiffs to prove their title to the land by some recognized method does not warrant judgment as of nonsuit when one of the plaintiffs testifies without objection that they are the owners of the tract and when the defendant's witnesses refer to the land as the plaintiffs' tract. *Freeman v. City of Charlotte*, 113.

TRIAL.

§ 8. Consolidation of Actions for Trial.

A trial court has the discretionary power to consolidate for trial actions which involve the same parties and subject matter if no prejudice or harmful complications will result therefrom. *Kanoy v. Hinshaw*, 418.

A discretionary order consolidating actions for trial will not be disturbed on appeal in the absence of a showing of injury or prejudice to the appealing party. *Ibid.*

Although two independent actions are consolidated for trial, they remain separate suits throughout the trial and appellate proceedings. *Ibid.*

§ 10. Expression of Opinion on Evidence by Court During Progress of the Trial.

A litigant has the right to have his cause tried before an impartial judge without expressions from the bench which intimate an opinion as to the weight, importance or effect of any facts pertinent to the issues to be decided by the jury, but such expressions of opinion must be prejudicial to appellant to result in a new trial. *Kanoy v. Hinshaw*, 418.

In explaining rulings on the admissibility of evidence, comments by the court in the jury's presence to the effect that there was no evidence that the manner in which the body of defendant's truck was attached to the chassis caused the collision, which comments were obviously true, *are held* not to be an expression of opinion as to facts pertinent to the issues being considered by the jury so as to be prejudicial to plaintiffs. *Ibid.*

TRIAL—*Continued.*

§ 13. Allowing Jury to Visit Scene of Crime.

The trial court has the discretionary power to grant or refuse a request for a jury view of the scene of the crime, and the court's refusal to permit a jury view of the scene of a crime committed thirteen months previously is not an abuse of that discretion. *S. v. Ross*, 498.

§ 15. Objections and Exceptions to Evidence and Motions to Strike.

An objection to a question asked a witness must be interposed when the question is asked and before the answer is given or the right to have the testimony excluded is waived. *Johnson v. Lamb*, 701.

§ 18. Province of the Court and Jury in General.

It is the province of the court to determine whether the evidence, circumstantial, direct, or a combination of both, considered in the light most favorable to plaintiff is sufficient to permit a legitimate inference of the facts essential to recovery, and it is the province of the jury to weigh the evidence and to determine what it proves or fails to prove. *Sneed v. Lions Club*, 98.

§ 21. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, the evidence must be taken as true and considered in the light most favorable to plaintiff, giving him the benefit of every reasonable inference which may be drawn therefrom. *Homes, Inc. v. Bryson*, 84.

Contradictions and inconsistencies in plaintiff's evidence are for the jury and do not warrant nonsuit. *Ibid.*

On motion to nonsuit, plaintiff's evidence must be considered in the light most favorable to him and with all contradictions resolved in his favor. *Sneed v. Lions Club*, 98.

In passing upon a motion for judgment of involuntary nonsuit, evidence offered by plaintiff and not challenged by defendant must be treated as before the jury with all its probative force. *Freeman v. City of Charlotte*, 113.

§ 23. Sufficiency of Evidence to Overrule Nonsuit — Prima Facie Case.

When the facts in evidence make out a *prima facie* case, it is properly submitted to the jury. *Mills, Inc. v. Terminal, Inc.*, 519.

§ 34. Instructions on Burden of Proof.

The failure of the court to instruct the jury as to which party has the burden of proof upon an issue is prejudicial error and warrants a new trial. *King v. Bass*, 353.

§ 37. Instructions — Statement of Contentions.

The trial judge is not required to give the contentions of the litigants in his charge, but when he undertakes to state the contentions of one party, he must give the equally pertinent contentions of the opposing party. *Key v. Welding Supplies*, 609.

§ 39. Additional Instructions and Redeliberation of Jury.

An instruction of the court that the jury must continue to deliberate until they indicate to the court that they are hopelessly deadlocked, together with further instructions reminding the jurors of their duty and of the result of their failure to reach a unanimous verdict, *held* not to support the contention that the verdict was coerced. *Kanoy v. Hinshaw*, 418.

§ 40. Form and Sufficiency of Issues.

It is the duty of the trial judge to submit such issues necessary to settle

TRIAL—*Continued.*

the material controversies as to facts arising on the pleadings, but the form and number of the submitted issues is a matter resting in the sound discretion of the trial judge, it being sufficient that the issues be framed so as to present the material matters in dispute, to enable each party to have the full benefit of his contentions before the jury and to enable the court, when the issues are answered, to determine the rights of the parties under the law. *Johnson v. Lamb*, 701.

§ 41. Tender of Issues.

Failure to submit to the jury an issue not material to the determination of the rights of the parties is not error. *Johnson v. Lamb*, 701.

§ 55. Waiver of Jury Trial and Agreement to Trial by the Court.

An agreed statement of facts must contain every essential element without omission, and whether the facts stipulated include all facts necessary to a decision is a question of law for the court. *In re Edmundson*, 92.

§ 57. Findings and Judgment of the Court, Appeal and Review.

When trial by jury is waived, the court is required to give its decision in writing with its findings of fact and conclusions of law stated separately, G.S. 1-185, and its findings have the force and effect of a jury verdict and are conclusive on appeal if supported by evidence, even though the evidence may sustain a finding to the contrary. *Knutton v. Cofield*, 355.

§ 56. Trial and Hearing by the Court.

Where a case is submitted for decision on stipulated facts, and the facts contained in the stipulation are insufficient for a determination of the issues raised by the pleadings, the court should proceed to trial to determine upon evidence the crucial factual issues not covered by the stipulations. *In re Edmundson*, 92.

Where a jury trial is waived, the weight and credibility of the evidence are for the trial judge. *Knutton v. Cofield*, 355.

TRUSTS.

§ 4. Charitable Trusts; Construction, Operation and Modification.

Where there is a threat to file a caveat which, if successful, would result in severe if not fatal reduction of the *corpus* of a charitable trust provided for in the will, a settlement which preserves a very large part of the estate for the beneficient purposes for which the trust was created is properly approved, since under the circumstances the threat to file the caveat creates an unseen exigency not contemplated by the testator, and the settlement is, therefore, advantageous to the trust. *Sternberger v. Tannenbaum*, 658.

§ 6. Title, Authority and Duties of Trustee in General.

Trustees of a charitable trust created by will have the authority to enter into a settlement contract beneficial to the trust whereby potential caveators withdraw their opposition to the will and permit its admission to probate. *Sternberger v. Tannenbaum*, 658.

USURY.

§ 1. Contracts and Transactions Usurious.

In order to constitute usury there must be a loan or forbearance of money, with an understanding between the parties that the money loaned shall be re-

USURY—*Continued.*

turned, and a payment or an agreement to pay a greater rate of interest than that allowed by law, with the corrupt intent to take more than the legal rate for the use of the money loaned. *Henderson v. Finance Co.*, 253.

A fee collected by the broker or agent of a borrower for procuring a loan is not usury; a commission charged by the lender in addition to the maximum rate of interest allowed by statute constitutes usury. *Ibid.*

Plaintiff's evidence to the effect that they executed a note to defendant for $1800 at six per cent interest from date, but that they received only $1200, and that for their note for $280, payable in 28 weeks, they received only $140, *is held* sufficient to show a charge of interest in excess of the maximum rate allowed by statute. G.S. 24-1. *Ibid.*

§ 2. Waiver and Estoppel.

The renewal of a usurious agreement whereby the debtor makes a new promise to pay the obligation in full, including the usurious interest, does not constitute a settlement of plaintiffs' right to invoke the statutory remedy for usury so as to purge the renewal contract of the taint. *Henderson v. Finance Co.*, 253.

§ 6. Recovery of Double Amount of Usurious Interest Paid.

A right of action to recover the penalty for usury accrues upon each payment of usurious interest when that payment is made, each payment of usurious interest giving rise to a separate cause of action which is barred by the statute of limitations at the expiration of two years from such payment. *Henderson v. Finance Co.*, 253.

VENDOR AND PURCHASER.

§ 4. Title and Restrictions and Specific Performance.

In an action to recover the amount paid for an option, plaintiffs' evidence was to the effect that they entered into an option agreement whereby the defendant agreed to convey to them a tract of land by deed containing full covenants against encumbrances. An ordinance of the municipality applicable to the land in question prohibited the transfer of the land until the plat thereof had been approved by the city upon the construction of streets, curbs and storm sewers. The city issued a restraining order enjoining defendant from the transfer of the land until the ordinance had been complied with. *Held:* The existence of the ordinance did not subject defendant's title to an encumbrance, and there being no obligation by defendant to act in compliance with the ordinance, a finding by the jury that defendant was able to deliver a sufficient deed in accordance with the option agreement is fully supported by the evidence. *Fritts v. Gerukos*, 116.

§ 7. Purchaser's Right to Recover Purchase Price Paid.

Where there is no evidence that plaintiff's tendered the remainder of the purchase price to defendant and demanded the specific performance of an option agreement, their right to recover the amount paid for the option agreement depends upon the proof of a defect in defendant's title or the existence of an encumbrance which defendant was obligated to remove under the option. *Fritts v. Gerukos*, 116.

WAIVER.

§ 3. Pleadings, Proof and Determination.

Waiver and estoppel are affirmative defenses which must be pleaded. *Cantrell v. Woodhill Enterprises, Inc.*, 490.

WATER AND WATER COURSES.

§ 6. Title and Rights in Navigable Waters.

In the absence of any special legislation on the subject, a littoral proprietor and a riparian owner have a qualified property in the water frontage belonging by nature to their land, such property consisting chiefly of the right of access and the right to construct wharves, piers or landings. *Capune v. Robbins*, 581.

The right of fishing in the navigable waters of the State belongs to the people in common. *Ibid.*

The foreshore is that strip of land that lies between the high and low water marks and that is alternately wet and dry according to the flow of the tide. *Ibid.*

Although the littoral owner has the right to construct a pier in order to provide access to ocean waters of greater depth, the owner may not lawfully prohibit the use of the ocean waters beneath his pier as a means of passage by water craft in a manner that involves no contact with the pier itself, nor may he unnecessarily obstruct the equal rights of the public to use the ocean waters seaward from the strip of land constituting the foreshore. *Ibid.*

Plaintiff's evidence tended to show that plaintiff, who was attempting a trip from New York to Florida down the Atlantic coastal waters on a paddle-board, approached defendant's fishing pier which extended one thousand feet into the Atlantic Ocean, that as plaintiff attempted to pass under the pier defendant yelled to plaintiff to turn back, and that defendant threw several bottles at plaintiff, one of which hit and injured him. *Held:* The evidence is sufficient to be submitted to the jury in plaintiff's action for civil assault, there being no evidence of any legal right of defendant to prohibit plaintiff from passing under the pier in continuation of his journey. *Ibid.*

WILLS.

§ 15. Parties.

Beneficiaries under a prior paper writing are persons interested within the purview of G.S. 31-32 and are entitled to file a caveat to a subsequent instrument probated in common form, notwithstanding they are not heirs of the deceased and are not named as beneficiaries in the writing they seek to nullify. *Sternberger v. Tannenbaum*, 658.

§ 27. General Rules of Construction.

When necessary to accomplish the testator's intent as ascertained from the context of a will, the court may disregard improper use of capital letters, punctuation, misspelling and grammatical inaccuracies, especially where the will is written by an unlearned person. *McRorie v. Creswell*, 615.

§ 32. Rule in Shelley's Case.

The Rule in *Shelley's* case applies where the words "heirs" or "heirs of the body" are used in their technical sense and are not *descriptio personarum* denoting children, issue, a particular class, or individual persons. *McRorie v. Creswell*, 615.

§ 33. Fee, Life Estates and Remainders.

The doctrine of devise or bequest by implication applies in this State. *McRorie v. Creswell*, 615.

When property is limited to a devisee for life, and if the devisee dies without issue, then to another, an inference arises that the devisor has limited an interest in favor of the issue of the devisee in the event the devisee dies survived by issue, unless a contrary intent of the devisor is found from additional language or circumstances. *Ibid.*

WILLS—*Continued.*

A devise to testator's daughter for life, followed by a provision that if the daughter "has no heirs" the land should go to the testator's son for life and upon his death to his heirs, *is held* to convey only a life estate to the daughter, the Rule in *Shelley's* case being inapplicable since it is apparent that the word "heirs" was used to mean children or issue of the daughter, and at the death of the daughter her two children took the remainder in fee by clear implication. *Ibid.*

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

SECTION
1-28(3) —*In re Edmundson*, 92.
1-28(4) —*In re Edmundson*, 92.
1-73 — *Strickland v. Hughes*, 481.
1-88 — *Williams v. Bray*, 198.
1-88.1 — *Williams v. Bray*, 198.
1-89 — *Williams v. Bray*, 198.
1-95 — *Williams v. Bray*, 198.
1-127 — *Givens v. Sellars*, 44.
1-151 — *Givens v. Sellars*, 44.
1-163 — *Lane v. Griswold*, 1.
1-180 — *Robbins v. Freight Carriers*, 600.
1-185 — *Knutton v. Cofield*, 355.
1-196 — *Johnson v. Lamb*, 701.
1-198 — *Johnson v. Lamb*, 701.
1-287.1 — *Holsomback v. Holsomback*, 728.
4-1 — *Bruton v. Enterprises*, 399.
8-46 — *Johnson v. Lamb*, 701.
Ch. 14, Art. 14 — *S. v. Sellers*, 641.
14-1 — *S. v. Massey*, 721.
14-2 — *S. v. Massey*, 721.
14-3 — *S. v. Massey*, 721.
14-54 — *S. v. Parrish*, 477; *S. v. Sellers*, 641.
14-70 — *S. v. Massey*, 721.
14-72 — *S. v. Bowers*, 652; *S. v. Massey*, 721.
14-87 — *S. v. Rogers*, 208; *S. v. Davis*, 349; *S. v. Covington*, 690.
14-269 — *S. v. Gainey*, 620.
15-25.1 — *S. v. Cook*, 377.
15-44 — *S. v. Covington*, 690.
15-173 — *S. v. Davis*, 349.
15-173.1 — *S. v. Davis*, 349.
20-16.2 — *S. v. Randolph*, 120.
20-16.2(b) — *S. v. Mobley*, 471.
20-38(17) — *Homes, Inc. v. Bryson*, 84.
20-50 — *Homes, Inc. v. Bryson*, 84.
20-52 — *Homes, Inc. v. Bryson*, 84.
20-52(b) — *Homes, Inc. v. Bryson*, 84
20-52.1(a) — *Homes, Inc. v. Bryson*, 84.
20-52.1(c) — *Homes, Inc. v. Bryson*, 84.
20-138 — *S. v. Kellum*, 348.
20-135.2 — *Miller v. Miller*, 228.
20-135.2 — *Miller v. Miller*, 228.
20-139.1 — *S. v. Randolph*, 120; *S. v. Mobley*, 471.
20-140 — *Robbins v. Freight Carriers*, 600.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

20-141 — *Kanoy v. Hinshaw*, 418.
20-154 — *Kanoy v. Hinshaw*, 418.
20-154(a) — *Roberts v. Freight Carriers*, 600.
20-154(b) — *Roberts v. Freight Carriers*, 600.
20-158 — *Warren v. Lewis*, 457.
20-217 — *S. v. Weston*, 275.
20-279.21(f)(1) — *Strickland v. Hughes*, 481.
20-310(b) — *Robinson v. Ins. Co.*, 391.
20-310(c) — *Robinson v. Ins. Co.*, 391.
24-1 — *Henderson v. Finance Co.*, 253.
28-1(4) — *In re Edmundson*, 92.
31-32 — *Sternberger v. Tannenbaum*, 658.
33-1 — *In re Michal*, 504.
33-9 — *In re Michal*, 504.
40-19 — *Redevelopment Comm. v. Panel Co.*, 368.
40-20 — *Redevelopment Comm. v. Panel Co.*, 368.
50-6 — *Eubanks v. Eubanks*, 189.
50-7(1) — *Schloss v. Schloss*, 266.
50-11 — *Becker v. Becker*, 65.
50-16 — *Gaskins v. Gaskins*, 133; *Schloss v. Schloss*, 266; *Brady v. Brady*, 299.
50-16.1 — *Brady v. Brady*, 299.
52-6. — *Combs v. Combs*, 462.
52-13 [now 52-10] — *Eubanks v. Eubanks*, 189.
55-3.1 — *Henderson v. Finance Co.*, 253.
55-68(b) — *Stein v. Outdoor Advertising*, 77.
55-72 — *Stein v. Outdoor Advertising*, 77.
55-72(a) — *Stein v. Outdoor Advertising*, 77.
55-73(a) — *Stein v. Outdoor Advertising*, 77.
55-73(b) — *Stein v. Outdoor Advertising*, 77.
55-73(c) — *Stein v. Outdoor Advertising*, 77.
75-1 — *Knutton v. Cofield*, 355.
75-2 — *Knutton v. Cofield*, 355.
75-5(b)(2) — *Knutton v. Cofield*, 355.
78-2(f) — *Lane v. Griswold*, 1.
78-6 — *Lane v. Griswold*, 1.
78-22 — *Lane v. Griswold*, 1.
82-1 — *Bruton v. Enterprises*, 399.
83-11 — *Snow v. Board of Architecture*, 559.
96-2 — *In re Watson*, 629.
96-13 — *In re Watson*, 629.
96-14 — *In re Watson*, 629.
96-14(3) — *In re Watson*, 629.
97-31(19) — *Hollman v. Raleigh*, 240.
97-31 — *Hollman v. Raleigh*, 240.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

97-86 — *Hollman v. Raleigh*, 240.
105-144 — *In re Oil Company*, 383.
105-164.7 — *In re Oil Company*, 383.
105-201 — *In re Oil Company*, 383.
105-271 — *In re Appeal of Broadcasting Corp.*, 571.
105-278 — *In re Appeal of Broadcasting Corp.*, 571.
105-279 — *In re Appeal of Broadcasting Corp.*, 571.
105-294 — *In re Appeal of Broadcasting Corp.*, 571.
105-295 — *In re Appeal of Broadcasting Corp.*, 571.
105-296(2) — *Cemetery, Inc. v. Rockingham County*, 467.
105-296(3) — *Wake County v. Ingle*, 343.
105-329 — *In re Appeal of Broadcasting Corp.*, 571.
105-434 — *In re Oil Company*, 383.
Ch. 123A — *Mitchell v. Financing Authority*, 137.
141-6 — *Bruton v. Enterprises*, 399.
Ch. 143, Art. 33 — *In re Appeal of Harris*, 20.
143-291 — *Mason v. Highway Comm.*, 36; *Givens v. Sellars*, 44.
143-297 — *Mason v. Highway Comm.*, 36.
143-307 — *In re Appeal of Harris*, 20.
143-309 — *In re Appeal of Harris*, 20.
146-3 — *Capune v. Robbins*, 581.
146-12 — *Capune v. Robbins*, 581.
148-11 — *S. v. Shoemaker*, 475.
148-13 — *S. v. McCall*, 135.
148-45 — *S. v. Shoemaker*, 475.
150-11 — *Snow v. Board of Architecture*, 559.
150-11(c) — *Snow v. Board of Architecture*, 559.
150-20 — *Snow v. Board of Architecture*, 559.
150-21 — *Snow v. Board of Architecture*, 559.
150-24 — *Snow v. Board of Architecture*, 559.
150-33 — *Snow v. Board of Architecture*, 559.
153-107 — *Dilday v. Board of Education*, 679.
153-266.15 — *Freeland v. Orange County*, 452.
153-266.16 — *Freedland v. Orange County*, 452.
160-172 — *Zopfi v. Wilmington*, 430.
160-176 — *Zopfi v. Wilmington*, 430.
160-200(6) — *Cheek v. Charlotte*, 293.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

Art I, § 11 — *S. v. Rogers*, 208.
Art. I, § 14 — *S. v. Weston*, 275.
Art. V, § 3 — *Mitchell v. Financing Authority*, 137.
Art. V, § 5 — *Wake County v. Ingle*, 343.
Art. XIV, § 7 — *S. v. Cook*, 377.