NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 1
SPRING SESSION 1968

RALEIGH

CITE THIS VOLUME

1 N.C.App.

James Colly Farthing

WHEREAS, James Colly Farthing, a member of the Court of Appeals of North Carolina, died on December 6, 1967 in Raleigh, North Carolina; and

WHEREAS, Judge Farthing was born on January 12, 1913 in Lenoir, North Carolina, and was educated in the public schools of Lenoir, Lenoir-Rhyne College, and the University of North Carolina Law School; and

WHEREAS, after his admission to the North Carolina Bar in July 1938, he practiced law in Lenoir, North Carolina, until he became Solicitor of the Sixteenth Solicitorial District in January 1947, having also served as Solicitor of Caldwell County Recorder's Court from 1941-46 with the exception of time spent in active military service; and

WHEREAS, Judge Farthing served with outstanding ability as Solicitor of the Sixteenth Solicitorial District from January 1947 until his appointment to the Superior Court, his oath of office as a Superior Court Judge having been administered on July 3, 1957; and

WHEREAS, he served the State in this capacity with distinction until his appointment to the Court of Appeals on July 1, 1967; and

WHEREAS, Judge Farthing was a devoted member of the Methodist Church in Lenoir where he served as chairman of its official board in 1951 and as a Sunday School teacher for many years; and

WHEREAS, Judge Farthing was an active member of the Lions Club which he served in many capacities, including State President; and

WHEREAS, he was highly esteemed for his able service as Solicitor and Judge; and

WHEREAS, his outstanding ability; his devotion to his family, church, community and friends; his love of his state and his coun-

try; and the warmth and loyalty of his friendship have won for him the admiration and respect of all who knew him; and

WHEREAS, in his passing, the legal profession and the judiciary of the State of North Carolina have lost an outstanding member;

NOW, THEREFORE, Be it Resolved:

That in the passing of James Colly Farthing the North Carolina Court of Appeals has lost an outstanding member and the State of North Carolina has lost an able servant.

That a copy of this Resolution be incorporated as a part of the record of the proceedings of this Court in conference, and a copy be transmitted to the family of James Colly Farthing.

Adopted by the Court of Appeals 22 January 1968.

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THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge
RAYMOND B. MALLARD

Associate Judges
HUGH B. CAMPBELL
WALTER E. BROCK
DAVID M. BRITT
NAOMI E. MORRIS
FRANK M. PARKER[1]

Clerk
THEODORE C. BROWN, JR.

ADMINISTRATIVE OFFICE OF THE COURTS

Director
BERT M. MONTAGUE

Assistant Director and Administrative Assistant to the Chief Justice
FRANK W. BULLOCK, JR.

OFFICE OF APPELLATE DIVISION REPORTER

Reporter
WILSON B. PARTIN, JR.

Assistant Reporter
RALPH A. WHITE, JR.

[1] Appointed by Gov. Dan K. Moore to succeed James C. Farthing, deceased, and sworn in by Chief Justice R. Hunt Parker on 23 January 1968.

JUDGES OF THE SUPERIOR COURT OF NORTH CAROLINA

FIRST DIVISION

Name	*District*	*Address*
WALTER W. COHOON	First	Elizabeth City
ELBERT S. PEEL, JR.	Second	Williamston
WILLIAM J. BUNDY	Third	Greenville
HOWARD H. HUBBARD	Fourth	Clinton
RUDOLPH I. MINTZ	Fifth	Wilmington
JOSEPH W. PARKER	Sixth	Windsor
GEORGE M. FOUNTAIN	Seventh	Tarboro
ALBERT W. COWPER	Eighth	Kinston

SECOND DIVISION

HAMILTON H. HOBGOOD	Ninth	Louisburg
WILLIAM Y. BICKETT	Tenth	Raleigh
JAMES H. POU BAILEY	Tenth	Raleigh
HARRY E. CANADAY	Eleventh	Smithfield
E. MAURICE BRASWELL	Twelfth	Fayetteville
COY E. BREWER	Twelfth	Fayetteville
EDWARD B. CLARK	Thirteenth	Elizabethtown
CLARENCE W. HALL	Fourteenth	Durham
LEO CARR	Fifteenth	Burlington
HENRY A. MCKINNON, JR.	Sixteenth	Lumberton

THIRD DIVISION

ALLEN H. GWYN	Seventeenth	Reidsville
WALTER E. CRISSMAN	Eighteenth	High Point
EUGENE G. SHAW	Eighteenth	Greensboro
JAMES G. EXUM, JR.	Eighteenth	Greensboro
FRANK M. ARMSTRONG	Nineteenth	Troy
THOMAS W. SEAY, JR.	Nineteenth	Spencer
JOHN D. MCCONNELL	Twentieth	Southern Pines
WALTER E. JOHNSTON, JR.	Twenty-first	Winston-Salem
HARVEY A. LUPTON	Twenty-first	Winston-Salem
R. A. COLLIER, JR.	Twenty-second	Statesville
ROBERT M. GAMBILL	Twenty-third	North Wilkesboro

FOURTH DIVISION

W. E. ANGLIN	Twenty-fourth	Burnsville
SAM J. ERVIN, III	Twenty-fifth	Morganton
WILLIAM T. GRIST	Twenty-sixth	Charlotte
FRED H. HASTY	Twenty-sixth	Charlotte
FRANK W. SNEPP, JR.	Twenty-sixth	Charlotte
P. C. FRONEBERGER	Twenty-seventh	Gastonia
B. T. FALLS, JR.	Twenty-seventh	Shelby
W. K. MCLEAN	Twenty-eighth	Asheville
HARRY C. MARTIN	Twenty-eighth	Asheville
J. W. JACKSON	Twenty-ninth	Hendersonville
T. D. BRYSON	Thirtieth	Bryson City

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

Emergency Judges: W. H. S. Burgwyn, Woodland; Zeb V. Nettles, Asheville; Walter J. Bone, Nashville; Hubert E. Olive, Lexington; F. Donald Phillips, Rockingham; Henry L. Stevens, Jr., Warsaw; George B. Patton, Franklin; Chester R. Morris, Coinjock; Francis O. Clarkson, Charlotte.

[1]Appointed 7 October 1968.

JUDGES OF THE DISTRICT COURT OF NORTH CAROLINA

Name	*District*	*Address*
*Fentress Horner	First	Elizabeth City
William S. Privott	First	Edenton
*Derb S. Carter	Twelfth	Fayetteville
Joseph E. Dupree	Twelfth	Raeford
Darius B. Herring, Jr.	Twelfth	Fayetteville
George Z. Stuhl	Twelfth	Fayetteville
Thomas H. Lee	Fourteenth	Durham
*E. Lawson Moore	Fourteenth	Durham
Samuel O. Riley	Fourteenth	Durham
Samuel E. Britt	Sixteenth	Lumberton
*Robert F. Floyd	Sixteenth	Fairmont
John S. Gardner	Sixteenth	Lumberton
Joe H. Evans	Twenty-fifth	Hickory
Keith S. Snyder	Twenty-fifth	Lenoir
*Mary Gaither Whitener	Twenty-fifth	Hickory
*F. E. Alley, Jr.	Thirtieth	Waynesville
Robert J. Leatherwood III	Thirtieth	Bryson City

*Chief Judges

NORTH CAROLINA UTILITIES COMMISSION

Chairman

Harry T. Westcott

Commissioners

Thomas R. Eller, Jr.
John W. McDevitt
M. Alexander Biggs, Jr.
Clawson L. Williams, Jr.

NORTH CAROLINA INDUSTRIAL COMMISSION

Chairman

J. W. Bean

Commissioners

Forrest H. Shuford II
Wm. F. Marshall, Jr.

Deputy Commissioners

Robert F. Thomas
W. C. Delbridge
C. A. Dandelake
A. E. Leake

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

THOMAS WADE BRUTON

Deputy Attorneys General

HARRY W. MCGALLIARD
RALPH MOODY
HARRISON LEWIS
JAMES F. BULLOCK

Assistant Attorneys General

PARKS H. ICENHOUR
ANDREW H. MCDANIEL
WILLIAM W. MELVIN
BERNARD A. HARRELL
GEORGE A. GOODWYN
MILLARD R. RICH, JR.
HENRY T. ROSSER
ROBERT L. GUNN
MYRON C. BANKS

SOLICITORS

Name	*District*	*Address*
HERBERT SMALL	First	Elizabeth City
ROY R. HOLDFORD, JR.	Second	Wilson
W. H. S. BURGWYN, JR.	Third	Woodland
ARCHIE TAYLOR	Fourth	Lillington
LUTHER HAMILTON, JR.	Fifth	Morehead City
WALTER T. BRITT	Sixth	Clinton
WILLIAM G. RANSDELL, JR.	Seventh	Raleigh
WILLIAM ALLEN COBB	Eighth	Wilmington
DORAN J. BERRY	Ninth	Fayetteville
JOHN B. REGAN	Ninth-A	St. Pauls
DAN K. EDWARDS	Tenth	Durham
THOMAS D. COOPER, JR.	Tenth-A	Burlington
THOMAS W. MOORE, JR.	Eleventh	Winston-Salem
CHARLES T. KIVETT	Twelfth	Greensboro
M. G. BOYETTE	Thirteenth	Carthage
HENRY M. WHITESIDES	Fourteenth	Gastonia
ELLIOTT M. SCHWARTZ	Fourteenth-A	Charlotte
ZEB A. MORRIS	Fifteenth	Concord
W. HAMPTON CHILDS, JR.	Sixteenth	Lincolnton
J. ALLIE HAYES	Seventeenth	North Wilkesboro
LEONARD LOWE	Eighteenth	Caroleen
CLYDE M. ROBERTS	Nineteenth	Marshall
MARCELLUS BUCHANAN	Twentieth	Sylva
CHARLES M. NEAVES	Twenty-first	Elkin

CALL OF CALENDAR IN THE COURT OF APPEALS

SPRING SESSION, 1968.

The Court of Appeals will meet in Raleigh in the State Legislative Building, Room 1327, on Tuesdays for the Call of the Calendar as follows:

THIRD DIVISION

SEVENTEENTH AND TWENTY-FIRST DISTRICTS appeals will be called Tuesday, January 23, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, December 26, 1967.

Appellant's brief must be filed by noon of January 2.

Appellee's brief must be filed by noon of January 9.

EIGHTEENTH AND NINETEENTH DISTRICTS appeals will be called Tuesday, January 30, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, January 2.

Appellant's brief must be filed by noon of January 9.

Appellee's brief must be filed by noon of January 16.

TWENTIETH, TWENTY-SECOND AND TWENTY-THIRD DISTRICTS appeals will be called Tuesday, February 6, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, January 9.

Appellant's brief must be filed by noon of January 16.

Appellee's brief must be filed by noon of January 23.

SECOND DIVISION

NINTH, TWELFTH AND THIRTEENTH DISTRICTS appeals will be called Tuesday, February 20, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, January 23.

Appellant's brief must be filed by noon of January 30.

Appellee's brief must be filed by noon of February 6.

TENTH AND ELEVENTH DISTRICTS appeals will be called Tuesday, February 27, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, January 30.

Appellant's brief must be filed by noon of February 6.

Appellee's brief must be filed by noon of February 13.

FOURTEENTH, FIFTEENTH AND SIXTEENTH DISTRICTS appeals will be called Tuesday, March 5, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, February 6.

Appellant's brief must be filed by noon of February 13.

Appellee's brief must be filed by noon of February 20.

FOURTH DIVISION

TWENTY-SIXTH, TWENTY-NINTH AND THIRTIETH DISTRICTS appeals will be called Tuesday, March 26, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, February 27.

Appellant's brief must be filed by noon of March 5.

Appellee's brief must be filed by noon of March 12.

TWENTY-FOURTH, TWENTY-FIFTH, TWENTY-SEVENTH AND TWENTY-EIGHTH DISTRICTS appeals will be called Tuesday, April 2, and succeeding days.

In order for an appeal to be heard at this Call, the Record on appeal must be docketed by 10 A.M. Tuesday, March 5.

Appellant's brief must be filed by noon of March 12.

Appellee's brief must be filed by noon of March 19.

FIRST DIVISION

FIRST, SECOND, THIRD AND SEVENTH DISTRICTS appeals will be called Tuesday, April 23, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, March 26.

Appellant's brief must be filed by noon of April 2.

Appellee's brief must be filed by noon of April 9.

FOURTH, FIFTH, SIXTH AND EIGHTH DISTRICTS appeals will be called Tuesday, April 30, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, April 2.

Appellant's brief must be filed by noon of April 9.

Appellee's brief must be filed by noon of April 16.

(Second Call for Each District in Spring Session)

THIRD DIVISION

SEVENTEENTH, EIGHTEENTH, AND TWENTY-FIRST DISTRICTS appeals will be called Tuesday. May 21, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, April 23.

Appellant's brief must be filed by noon of April 30.

Appellee's brief must be filed by noon of May 7.

NINETEENTH, TWENTIETH, TWENTY-SECOND, AND TWENTY-THIRD DISTRICTS appeals will be called Tuesday, May 28, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, April 30.

Appellant's brief must be filed by noon of May 7.

Appellee's brief must be filed by noon of May 14.

SECOND DIVISION

NINTH, TENTH, ELEVENTH, TWELFTH, THIRTEENTH, FOURTEENTH, FIFTEENTH AND SIXTEENTH DISTRICTS appeals will be called Tuesday, June 11, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, May 14.

Appellant's brief must be filed by noon of May 21.

Appellee's brief must be filed by noon of May 28.

FOURTH AND FIRST DIVISIONS

TWENTY-FOURTH, TWENTY-FIFTH, TWENTY-SIXTH, TWENTY-SEVENTH, TWENTY-EIGHTH, TWENTY-NINTH, THIRTIETH, the FIRST, SECOND, THIRD, FOURTH, FIFTH, SIXTH, SEVENTH AND EIGHTH DISTRICTS appeals will be called Tuesday, June 18, and succeeding days.

In order for an appeal to be heard at this Call, the Record on Appeal must be docketed by 10 A.M. Tuesday, May 21.

Appellant's brief must be filed by noon of May 28.

Appellee's brief must be filed by noon of June 4.

Opinions will be filed on the following dates, Spring Session, 1968.

February 21	March 20	April 17	May 15	June 12	July 10
February 28	March 27	April 24	May 22	June 19	

The following fees are payable in advance.

Upon docketing the appeal	$10.00
Motion to docket and dismiss under Rule 17	10.00
Petition for certiorari	10.00
In pauper appeal (in civil cases only)	2.00
Mimeographing ($1.60 per page, Records and Briefs)	1.60

The above as to advance fees does not apply in criminal cases.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

SPRING SESSION, 1968

PHILLIP LEE COBLE AND GLADYS MARIE COBLE, PLAINTIFFS, v. LLOYD DEWITT BROWN, DEFENDANT.

(Filed 21 February, 1968.)

1. Appeal and Error § 57—

The court's findings of fact are conclusive on appeal if supported by competent evidence.

2. Process § 15—

A resident of the State who, subsequent to the accident or collision complained of, (1) has established a residence outside the State or (2) has left the State and remained absent for sixty days or more continuously, is amenable to service of process under G.S. 1-105 and G.S. 1-105.1.

3. Process § 1—

Substituted or constructive service of process is a radical departure from the common law, and statutes authorizing such service must be strictly construed, both in regard to the proper grant of authority and in determining whether effective service under the statute has been made.

4. Same; Constitutional Law § 24—

The object of all process is to give the person to be affected by the judgment notice that an action has been brought against him and an opportunity to defend.

5. Process § 15—

A mere averment that after due diligence personal service on the defendant could not be had in the State *is held* not sufficient to support service of process under G.S. 1-105.1.

6. Same—

Upon special appearance and motion by defendant to quash service of process under G.S. 1-105.1, it is incumbent upon plaintiff to show that defendant is amenable to process under the statute.

7. Same—

In an action to recover for personal injuries sustained by plaintiff in an automobile accident, evidence tending to show that a deputy sheriff went to defendant's last known address on two occasions and that defendant was not there, and that further investigation did not reveal the defendant's whereabouts, *is held* insufficient to make out a *prima facie* case under G.S. 1-105 and G.S. 1-105.1 that defendant had departed the State and remained absent for 60 days or more continuously, and defendant's motion to quash service of process under the statutes should be allowed.

APPEAL by defendant from *Exum, J.*, at the October 9, 1967, Civil Session of GUILFORD Superior Court, Greensboro Division.

On February 28, 1967, plaintiffs instituted suit to recover for personal injuries resulting from an automobile collision and on that date summons, with a copy of the complaint, was delivered to the sheriff for service on defendant. On March 15, 1967, the summons was returned with the sheriff's notation "not to be found in Guilford County." The clerk subsequently endorsed the summons to the sheriff and the sheriff again returned the summons with the notation that after due and diligent search the defendant was not to be found in Guilford County. Plaintiffs then resorted to service under G.S. 1-105 and G.S. 1-105.1. The clerk endorsed the summons to the Sheriff of Wake County, who noted thereon that it was served on May 29, 1967 along with a copy of the complaint "together with the sum of $....." in the office of A. Pilston Godwin, Jr., Commissioner of Motor Vehicles of North Carolina. The Commissioner forwarded by registered mail, return receipt requested, the papers to defendant at 1311 Vine Street, Greensboro, on May 29, 1967. The envelope containing the letter and papers shows a notation "Addressee Unknown at this Address." On July 12, 1967, plaintiffs by first class mail, sent a letter to defendant at 1311 Vine Street, and this envelope bears a notation "Addressee Unknown." On July 27, 1967, plaintiff, Phillip Lee Coble, filed an affidavit of compliance with the statute and setting forth that he was informed and believed that defendant had removed himself from his last known address, had left the State of North Carolina, remained absent for more than sixty days continuously subsequent to the collision complained of and was residing somewhere in Florida.

On September 12, 1967, defendant filed a special appearance and moved to quash the purported service of process for that defendant

was at all times a citizen and resident of the State of North Carolina and had not departed the State for any sixty-day period.

The motion was heard upon the affidavit of the plaintiff, Phillip Lee Coble, the affidavit of Roy L. Strader, Deputy Sheriff, and the affidavit of the defendant.

In support of the service of summons under G.S. 1-105 and G.S. 1-105.1, the plaintiffs rely on the affidavits of plaintiff, Phillip Lee Coble, and Roy Strader, Deputy Sheriff. The pertinent portions of the Coble affidavit are as follows:

> "That on information and belief your affiant is informed and believes that the defendant has removed himself from his last known address and has left no forwarding address; that the defendant has removed himself from the state of North Carolina and has remained absent from the state of North Carolina for more than sixty days, continuously, subsequent to the collision complained of in the above entitled action; and that the defendant is now residing somewhere in the state of Florida."

The pertinent portions of the Strader affidavit are:

> "That he . . . went to the last known address of Lloyd Dewitt Brown, to wit: 1311 Vine Street, Greensboro, North Carolina, in order to obtain service of process upon the said Lloyd Dewitt Brown; that Lloyd Dewitt Brown was not at his last known address and that your affiant talked to a woman who he is informed and believes and therefore alleges is the sister of Lloyd Dewitt Brown; that the said sister of Lloyd Dewitt Brown stated to your affiant that it was her information and belief that the defendant, Lloyd Dewitt Brown, was residing in the State of Florida, address unknown.
>
> That after further investigation your affiant then made the return of the summons on March 15, 1967, with the notation that Lloyd Dewitt Brown was 'not to be found in Guilford County'; that later your affiant again received, during the month of May, 1967, the original summons, together with a copy of the summons and a copy of the complaint in the above-entitled action to be served on Lloyd Dewitt Brown; that your affiant made another investigation of the whereabouts of Lloyd Dewitt Brown including returning to the said defendant's last known address, 1311 Vine Street, Greensboro, North Carolina; that at the said address your affiant again talked with a woman who your affiant is informed and believes and therefore said is the sister of Lloyd Dewitt Brown and that this woman again told your affiant that

it was her information that Lloyd Dewitt Brown was residing in the State of Florida, address unknown.

That your affiant then undertook a further investigation to locate the whereabouts of Lloyd Dewitt Brown and that he was unable to locate him in Guilford County or to obtain information which indicated that he was located at any place in the State of North Carolina; that your affiant, on May 22, 1967, again returned the original summons in the above-entitled civil action to the office of the Clerk of Superior Court of Guilford County with the following notation: 'After due and diligent search, Lloyd Dewitt Brown not to be found in Guilford County, this 22 day of 5, 1967, time 12:00 Noon. Paul H. Gibson, Sheriff, by: R. L. Strader, D.S.' That your affiant is informed and believes and therefore says that the only information he was able to obtain concerning the whereabouts of Lloyd Dewitt Brown indicated that the said defendant was residing in the State of Florida, address unknown."

Upon consideration of these affidavits and the affidavit of defendant in support of his motion to quash stating that he had lived in Greensboro all of his life, giving his residence address, stating that he had lived at that address since February 1965 and had not left the State since 1964, the Court found as facts that the deputy sheriff went to defendant's last known address, could not locate the defendant but talked with a woman identifying herself as defendant's sister, who stated that it was her information that defendant was residing in Florida, address unknown; that the deputy sheriff made further investigation and after due and diligent search, was unable to find the defendant; that he again undertook to serve the summons on defendant, returned to defendant's last known address and again talked with a woman who had identified herself as defendant's sister, who again told the deputy that it was her information that Lloyd Dewitt Brown was residing in the State of Florida, address unknown; that he undertook a further investigation and could not locate defendant in Guilford County or obtain information to indicate that the defendant was in North Carolina; that the registered letter of the Commissioner of Motor Vehicles and the letter of plaintiff giving notice were both returned address unknown; "That the defendant, Lloyd Dewitt Brown, was a resident of the State at the time of the collision complained of in the above-entitled civil action, who departed from the State subsequent to the collision and who remained absent therefrom for sixty days or more continuously."

On these findings of fact the Court concluded "That the defendant was duly served with process in this cause under and pursuant

to the provisions of North Carolina General Statute 1-105 and 1-105.1, as amended, and that the plaintiff has wholly complied with the provisions of said statute." From the entry of this order, the defendant appealed.

Smith, Moore, Smith, Schell and Hunter for defendant appellant.
Douglas, Ravenel, Hardy and Crihfield for plaintiff appellees.

MORRIS, J. Defendant assigns as error the Court's consideration of hearsay evidence contained in the Coble and Strader affidavits; making certain findings of fact based on this incompetent evidence; and concluding as a matter of law that defendant was duly served with process under G.S. 1-105 and G.S. 1-105.1 and defendant had wholly complied with the provisions of said statutes. If there is competent evidence to support the Court's findings of fact, we are, of course, bound by the findings. *Bigham v. Foor,* 201 N.C. 14, 158 S.E. 548 (1931).

G.S. 1-105 sets out the procedures to be followed in effecting service on nonresident drivers of motor vehicles and upon the personal representatives of deceased nonresident drivers of motor vehicles. By General Statutes 1-105.1, the provisions of § 1-105 are made applicable "to a resident of the State at the time of the accident or collision who establishes residence outside the State subsequent to the accident or collision and to a resident of the State at the time of the accident or collision who departs from the State subsequent to the accident or collision and remains absent therefrom for sixty (60) days or more continuously whether such absence is intended to be temporary or permanent."

No question is raised as to whether defendant was a resident of the State at the time of the collision complained of.

To sustain service of process upon defendant under these statutes, the plaintiffs must show one of two circumstances; either: (1) that defendant had established a residence outside the State subsequent to the accident or collision, or (2) that he had left the State subsequent to the collision complained of and remained absent from the State for sixty days or more continuously.

Service of process, in order to acquire jurisdiction of the court over the person and property of citizens of the State, has always been, and properly so, carefully regulated. Careful regulation becomes even more necessary in situations where the parties must resort to constructive or substituted service. At the outset, it must be noted that we are here dealing with a proceeding *in personam* and not a proceeding *in rem.* Substituted or constructive service of process

is a radical departure from the rule of the common law, and therefore statutes authorizing it must be strictly construed both as to the proper grant of authority for such service and in determining whether effective service under the statute has been made. *Harrison v. Hanvey,* 265 N.C. 243, 143 S.E. 2d 593 (1965).

The object of all process is to give the person to be affected by the judgment notice that an action has been brought against him and an opportunity to defend. The possibility of defendant's receiving notice must be even more zealously guarded where the action is *in personam.*

G.S. 1-98.2, providing for service by publication in certain actions, is designed to provide for a constructive service of process on nonresidents in certain instances in *in rem* or *quasi in rem* actions, and in actions *in personam* where the defendant, a resident of the State, has departed the State or conceals himself with intent to defraud his creditors or avoid service of process. This statute specifically provides that where the person to be served cannot after due diligence be found in the State and that fact appears by affidavit to the satisfaction of the court, the court may grant an order that the service be made by publication.

The Supreme Court has held that an averment in the words of the statute [G.S. 1-98.2] of the ultimate fact "that, after due diligence, personal service cannot be had within the state," was a sufficient averment of due diligence and sufficient compliance with statutory requirements without stating any of the probative, or evidentiary facts. *Brown v. Doby,* 242 N.C. 462, 87 S.E. 2d 921 (1955).

The North Carolina Supreme Court, in *Harrison v. Hanvey, supra,* recognized that, although the weight of authority is to the contrary, the rule of *Brown v. Doby, supra,* is the law applicable in this State. In the *Harrison* case, however, the section of G.S. 1-98.2 before the Court was Section (6) providing for service by publication "where the defendant, a resident of this State, has departed therefrom or keeps himself concealed therein with intent to defraud his creditors or to avoid the service of summons". The action was an *in personam* action brought to recover for personal injuries resulting from an automobile collision allegedly caused by defendant's negligence. Defendant entered a special appearance and moved to quash the purported service and for dismissal of the action for want of jurisdiction, contending, among other things, that defendant was not a member of the class defined by G.S. 1-98.2(6). The Court said, "Assuming that the same rule (referring to *Brown v. Doby, supra*) would apply to an averment of absconding or concealment, the court must hear the evidence, find the facts, and determine the validity of the ser-

vice, when a defendant, upon a motion to vacate an order for publication and to quash the service based upon it, questions the sufficiency of the affidavit or evidence upon which plaintiff proceeds or offers evidence contradicting it".

The case before us arises under G.S. 1-105.1, and a mere averment of due diligence sufficient to support service by publication in an *in rem* action under G.S. 1-98.2 is not sufficient here.

Here defendant contends that he is not within the class of persons covered by G.S. 1-105.1 for that he was a resident of North Carolina at the time of the accident and remained a resident of North Carolina, made no attempt to conceal his whereabouts and was a resident of Guilford County at the time of the purported service of process, and had not left the State for any period of time after the collision complained of.

Upon his motion to quash the service and dismiss the action, it became incumbent upon plaintiffs to present evidence to support the service of process.

It is true that the statute does not require that plaintiffs must set forth in their complaint or by affidavit the facts giving rise to the conclusion that defendant comes within the purview of the statute; nevertheless, upon attack by special appearance and motion to quash, a showing is required of the facts essential to jurisdiction. *Robinson v. D'Odom,* 150 N.Y.S. 2d 700 (1956); *Hart v. Coach Co.,* 241 N.C. 389, 85 S.E. 2d 319 (1954); *Bigham v. Foor, supra.*

We now look at the evidence submitted by plaintiffs in support of the service on defendant.

The affidavit of plaintiffs contains no competent evidence on which a finding of fact could be based. Plaintiff Coble simply averred that he was "informed and believed" that defendant had removed himself from his last known address and had left the State and remained absent for more than sixty days continuously subsequent to the collision complained of and was residing somewhere in Florida. Strader's affidavit avers that he talked with a woman who he "was informed" and believed was defendant's sister who told him that it was her "information and belief" that defendant was living in Florida; that he was "informed and believes and therefore says" that the only information he was able to obtain concerning the whereabouts of Lloyd Dewitt Brown indicated that the said defendant was residing in the State of Florida, address unknown. This evidence is manifestly hearsay evidence, not admissible and defendant's objection thereto is entirely proper. When plaintiffs' affidavits are stripped of incompetent evidence, they are left with the statement of the deputy sheriff that

he went to defendant's last known address on two occasions and defendant was not there; that he made further investigations and could not locate the whereabouts of Lloyd Dewitt Brown. Conceding, for the purpose of argument only, that this might be held sufficient to support an averment of due diligence under the requirements of G.S. 1-98.2, we hold that it is insufficient to make out a *prima facie* case to support service of process under G.S. 1-105 and 1-105.1.

Plaintiff relies on *Scott & Co. v. Jones,* 230 N.C. 74, 52 S.E. 2d 219 (1949). However, that case involved service of process by publication under G.S. 1-98.2; and, in addition to the evidence of the sheriff that from information derived from defendant's family he testified on information and belief that defendant had moved from the State and was not a resident of North Carolina, the plaintiff introduced testimony of defendant's employer to the effect that defendant had been employed by him in Virginia and gave his home address as 620 South Street, Portsmouth, Virginia.

We have not been cited to a case in this or any other jurisdiction holding that such scant competent evidence as is before the Court is sufficient to support a finding that defendant had departed the State and remained absent for a period of sixty days or more. Since the element of jurisdiction is necessary for plaintiffs' case, the failure of proof must lie with plaintiffs.

The trial court erred in denying the motion to quash. There was not sufficient competent evidence upon which to base a finding of fact that defendant departed from the State subsequent to the collision and remained absent therefrom for sixty days or more continuously.

Under this view of the case, defendant's assignment of error as to whether plaintiffs wholly complied with the provisions of G.S. 1-105 and 1-105.1 is not considered.

Reversed.

CAMPBELL and PARKER, JJ., concur.

NATIONWIDE MUTUAL INSURANCE COMPANY, PLAINTIFF, v. AETNA CASUALTY AND SURETY COMPANY; PENNSYLVANIA NATIONAL MUTUAL CASUALTY COMPANY; BILLY RAY CHAMBERS; ETHEL E. PARRISH; JUDITH A. SMITH, A MINOR; BONNELL S. SMITH; RACHEL FULK WOOD; LARRY A. WOOD, A MINOR; AND TERRY WOOD, DEFENDANTS.

(Filed 21 February, 1968.)

1. Appeal and Error § 6—

An order allowing a motion to strike an answer in its entirety on the ground that the facts alleged therein do not constitute a legal defense is in effect an order sustaining a demurrer and is immediately appealable. Rule of Practice in the Court of Appeals No. 4(a).

2. Declaratory Judgment Act § 1—

The liability of an insurance company under its policy of insurance is a proper subject for a declaratory judgment proceeding when a genuine controversy exists.

3. Insurance §§ 99, 100—

The settlement by a liability insurer of certain claims arising out of an automobile accident does not waive insurer's defense of noncoverage as to other claims when the insurer's settlement worked no detriment to its insured or to others having rights under the policy.

4. Compromise and Settlement § 1—

The law favors the settlement of controversies out of court.

5. Pleadings § 34—

Allegations in the answer setting up matter ineffectual as a defense are properly stricken.

APPEAL by defendants, Pennsylvania National Mutual Casualty Company, Ethel E. Parrish, Bonnell S. Smith, and Judith A. Smith, from *Crissman, J.*, at the 11 September 1967 Civil Session of the Superior Court of GUILFORD County, High Point Division.

Plaintiff's complaint filed 11 May 1967 for a declaratory judgment alleged:

On 31 July 1965 the defendant, Terry Wood, was the owner of a Chevrolet Corvair automobile on which plaintiff had in effect its automobile liability insurance policy issued to Rachel Fulk Wood and Terry Lee Wood. On that date the Corvair was being operated by the defendant, Billy Ray Chambers, when it was involved in an accident in the City of Winston-Salem with a Plymouth station wagon, owned and operated by the defendant, Bonnell S. Smith. At the time of the accident the defendant, Billy Ray Chambers, was operating the Corvair automobile without the knowledge or permission of Terry Lee Wood, or his brother, Larry A. Wood, and in violation of an express prohibition by Larry A. Wood. The defendant, Penn-

sylvania National Mutual Casualty Company, had in effect on that date its automobile liability insurance policy affording uninsured motorist coverage to occupants of the Plymouth station wagon owned by Bonnell S. Smith. Bonnell S. Smith, Ethel E. Parrish, and Judith A. Smith, occupants of the Plymouth station wagon, brought actions for personal injuries against Billy Ray Chambers in the Superior Court of Guilford County, and plaintiff has been called upon to defend Billy Ray Chambers in these actions by virtue of its policy of insurance issued to Rachel Fulk Wood and Terry Lee Wood. Plaintiff has denied coverage and is defending Billy Ray Chambers under a full reservation of rights and denial of coverage. Plaintiff further alleged that the defendant, Billy Ray Chambers, was insured under a policy of automobile liability insurance issued by the defendant, Aetna Casualty and Surety Company, to his father, and that said policy provides sole coverage to all claims arising out of said accident. In the alternative plaintiff alleged that if coverage is not afforded under the policy of Aetna Casualty and Surety Company, then Billy Ray Chambers was uninsured at the time of the accident and the uninsured motorist coverage of the policy issued by the defendant, Pennsylvania National Mutual Casualty Company, to Bonnell S. Smith affords coverage to all claims arising out of said accident. Plaintiff asks for a declaratory judgment adjudicating that it has no coverage for, or obligation to defend, Billy Ray Chambers as to claims arising out of said accident, and that either the defendant, Aetna Casualty and Surety Company, under its policy issued to Chambers' father, or Pennsylvania National Mutual Casualty Company, under its policy of uninsured motorist insurance, afford coverage to all such claims.

The defendant, Pennsylvania National Mutual Casualty Company and the defendants, Ethel E. Parrish, Bonnell S. Smith, and Judith A. Smith, filed separate answers denying the material allegations in the complaint relative to the nonpermissive use by Chambers of the Corvair automobile owned by the Woods, and alleging, by way of further answer, the following:

After the accident of 31 July 1965 the plaintiff, through its adjusters and agents, conducted an investigation of the accident and the coverage available to its insureds and persons injured and damaged in the collision. After making such investigation, the plaintiff, under the coverage of its insurance policy, on 31 August 1965 settled the personal injury claim of one Kenneth W. Porter, a passenger in the Corvair at the time of the accident, by paying to Porter the sum of $21.00 and taking a release from Porter releasing Rachel Fulk Wood, Billy Ray Chambers, and any and all other persons, firms,

and corporations, whether named in the release or not, from any further liability as a result of the accident. The plaintiff also under the coverage of its insurance policy, on 8 November 1965 settled the property damage claim of Bonnell S. Smith, owner of the Plymouth station wagon, by paying to Bonnell S. Smith the sum of $572.59 for damages to Smith's automobile and taking a release from Bonnell S. Smith releasing Rachel Fulk Wood and Billy Chambers, and any and all other persons, firms, and corporations, whether named in the release or not, from any further liability as a result of damages to the Smith automobile.

The defendants in their further answers further alleged that the plaintiff, by investigating the collision with respect to liability and with respect to its insurance policy coverage and by subsequently accepting coverage by taking the stated releases from the claimants, Porter and Bonnell S. Smith, waived any rights which it might have had to deny coverage to its insureds or to any claimants in the action as a result of the automobile accident which occurred on 31 July 1965, and defendants contend that this waiver on the part of the plaintiff now estops the plaintiff from denying its coverage to all such insureds, claimants, and defendants in this action, and estops the plaintiff to deny its policy holders, the owner or owners of the Chevrolet Corvair automobile, and the person driving said automobile, the right to a defense under its policy. The answering defendants pled such estoppel in bar of any affirmative relief requested in the complaint, and asked the court to declare judgment to the effect that the plaintiff's policy covers the accident of 31 July 1965 as to its insureds and all claims involved in the accident.

Plaintiff filed motions to strike such further answers and defenses and the trial court allowed plaintiff's motions. The defendants, Pennsylvania National Mutual Casualty Company, Ethel E. Parrish, Bonnell S. Smith, and Judith A. Smith, appealed.

Bencini & Wyatt for defendant appellants, Ethel E. Parrish, Judith A. Smith and Bonnell S. Smith.

Jordan, Wright, Henson & Nichols for defendant appellant, Pennsylvania National Mutual Casualty Company.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson for plaintiff appellee.

PARKER, J. Ordinarily, the Court of Appeals will not entertain an appeal from an order striking or denying a motion to strike allegations contained in pleadings. Rule 4(b); Rules of Practice in the Court of Appeals. In this case, however, the plaintiff's motions to

strike are addressed to each further answer and defense in its entirety on the grounds that the facts alleged therein do not constitute a legal defense. The plaintiff's motions are, therefore, in substance demurrers to the further answers in their entirety and will be so considered. *Jewell v. Price,* 259 N.C. 345, 130 S.E. 2d 668 (1963); *Mercer v. Hilliard,* 249 N.C. 725, 107 S.E. 2d 554 (1959). The trial court's order was thus in effect an order sustaining a demurrer and defendants may immediately appeal therefrom. Rule 4(a) of the Rules of Practice in the Court of Appeals, when otherwise applicable, limits the right of immediate appeal only in instances where the demurrer is overruled and not where, as here, the demurrer is sustained.

Questions involving the liability of an insurance company under its policy, in cases where a genuine controversy exists, are a proper subject for a declaratory judgment. *Nationwide Mutual Insurance Company v. Roberts,* 261 N.C. 285, 134 S.E. 2d 654 (1964). The case before us does present such a controversy and determination of the controversy by a declaratory judgment is, therefore, proper.

Plaintiff alleged in its complaint that Chambers, the driver of the Corvair automobile as to which plaintiff had issued its liability insurance policy, was operating such car at the time of the accident without the knowledge or permission of the insured owner. See, *Torres v. Smith,* 269 N.C. 546, 153 S.E. 2d 129 (1967); *Bailey v. General Insurance Company of America,* 265 N.C. 675, 144 S.E. 2d 898 (1965). The defendants in their answers have denied plaintiff's allegations as to the nonpermissive use by Chambers and that issue is not presently before us.

The defendants appellants alleged in their further answers and defenses facts relating to the conduct of the plaintiff in settling certain claims arising from the accident, and contend that the plaintiff, by such conduct, waived any rights which it may have had to deny coverage under its policy and thereby became estopped from doing so. The trial court allowed plaintiff's motions to strike these allegations. Taking the facts alleged in the further answers to be true, as we must for purposes of testing the correctness of the trial court's action, the only matter now before us for decision is whether or not such facts establish any affirmative defense to the judgment being sought by the plaintiff in this action. If they do, the motions should have been disallowed. If they do not, the further answers were properly stricken.

At the outset it should be observed that the present appeal does not present any controversy between an insurance company and its named insured. Plaintiff simply seeks to obtain a judicial determination on the question of the nature of the use, whether permissive

or nonpermissive, which was being made by the driver of its named insured's automobile at the time it became involved in the accident. The defendants appellants, who were occupants of the other automobile and an insurance carrier for one of them, contend that plaintiff became estopped as to them to raise the question of nonpermissive use of its insured's automobile because plaintiff had effected settlement of the two claims with Porter and Smith.

Nothing prevents a liability insurer from waiving a defense that a particular liability is not within the coverage of its policy. Indeed, the insurer waives this defense as to a particular claim under its policy, just as it waives all other defenses, when it makes settlement of that claim. But such a waiver does not in all circumstances and by itself automatically and necessarily preclude the insurer from thereafter asserting the objection of noncoverage. Estoppel to assert noncoverage occurs when the insurer's action results in some detriment to the insured or to someone else having rights under the policy. Such a detriment and the resulting estoppel are found in cases in which the insurer, having knowledge of facts which would result in noncoverage, nevertheless assumes and conducts the defense of an action brought against its insured, such cases finding the elements of an estoppel in the fact that the insurer's action in actively conducting the defense has deprived its insured of his right to control his own lawsuit. Such a case was presented in *Early v. Farm Bureau Mutual Automobile Insurance Company,* 224 N.C. 172, 29 S.E. 2d 558 (1944), in which the court said (page 174):

> "The apposite rule as we gather it from the decisions of various jurisdictions is that an objection that the liability is not one within the terms of the policy may be waived, and where the insurer undertakes the defense of the action by the injured person against the insured, with full information as to the character of the injury, it will be deemed to have waived such objection. *Royle Mining Company v. Fidelity & Casualty Company of New York,* 103 S.W. 1098 (Mo.). The effect of this rule would seem to be that by having elected to defend the action of the plaintiff against its insured the insurer deprived its insured of his right to control his own lawsuit, and thereby assured the insured that the insurer would recognize the liability as falling within the terms of the policy."

Other cases illustrative of the principle involved may be found in Annotations in 81 A.L.R. 1326 and in 38 A.L.R. 2d 1148. Even in such cases, however, the insurer will not be held estopped if it defends under a full reservation of its right to deny coverage, *Shearin*

v. Globe Indemnity Company, 267 N.C. 505, 148 S.E. 2d 560 (1966); or if it gives timely notice to its insured of reservation of its right to assert the defense of noncoverage, *Jamestown Mutual Insurance Company v. Nationwide Mutual Insurance Company,* 266 N.C. 430, 146 S.E. 2d 410 (1965).

In the case before us plaintiff insurer has denied coverage under its policy to the driver of its named insured's automobile and is defending the pending actions brought in the Superior Court of Guilford County under a full reservation of rights and denial of coverage. The defendants by their further answers seek to assert, however, that plaintiff became estopped from denying coverage under its policy by its prior actions in making out-of-court settlements of two claims. But plaintiff's actions in making these settlements worked no detriment to its insured or to anyone else who might acquire rights under its policy. No suit to recover damages has been brought against plaintiff's named insured, and should any such suit be brought nothing which plaintiff has done in making the settlements with Porter and with Smith would in any way prejudice its insured in conducting a defense. On the contrary, to the extent such settlements may have absolved the plaintiff's insured from any liability to Porter and to Smith, the insured would have reason to be well pleased. Therefore such settlements could not work an estoppel to prevent plaintiff from later asserting the defense of noncoverage even as against its named insured. Still less is plaintiff estopped as against the defendants presently seeking to assert the estoppel. One of these, Bonnell S. Smith, even benefited directly when plaintiff settled Smith's claim for damages to his automobile. Another, the defendant insurance company, may have benefited indirectly in having its potential liability reduced.

"The law favors the settlement of controversies out of court." *Penn Dixie Lines, Inc. v. Grannick,* 238 N.C. 552, 78 S.E. 2d 410 (1953). A liability insurance carrier which acts in conformity with this sound policy of the law by settling certain claims does not thereby in all circumstances automatically and irrevocably waive its defenses as to other claims. The settlements made by plaintiff in this case caused no detriment to anyone except possibly to plaintiff itself. No one else having present or potential future rights under plaintiff's policy was thereby induced to change any position or to surrender any rights to his detriment. An essential element of an estoppel is here lacking.

The cases cited and relied on by defendants in support of their contention that plaintiff, by making the settlements with Porter and Smith, became estopped as to the defendants to raise the question

of the nonpermissive use of plaintiff's insured's automobile are not apposite.

Since the facts alleged in the further answers do not establish any defense, there was no error in the trial court's order that they be stricken, and the trial court's order is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. JOSEPH JOHNSON.

(Filed 21 February, 1968.)

1. Criminal Law § 104—

On motion to nonsuit, the evidence must be considered in the light most favorable to the State.

2. Burglary and Unlawful Breakings § 5—

Evidence of the State tending to show that the owner of a store inventoried his goods on the day of the offense, that when he left the store in the afternoon the doors were locked and boarded, that the defendant was found inside the store by an officer later that night, that the bottom part of a door had been kicked in, and that merchandise of a value of $500 had been taken from the premises, *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of felonious breaking and entering. G.S. 14-54.

3. Burglary and Unlawful Breakings § 2—

Nonfelonious breaking and entering is a lesser included offense of the felony of breaking and entering with intent to commit a felony. G.S. 14-54.

4. Burglary and Unlawful Breakings § 6—

Where all the evidence tended to show that defendant was apprehended inside a store, that the bottom portion of a door to the store had been kicked out, and that approximately $500 in merchandise was stolen from the premises, there was no error in the court's failure to submit the question of defendant's guilt of the lesser crime of nonfelonious breaking or entering.

APPEAL by defendant from *Armstrong, J.*, November 1967 Regular Session of the Superior Court of FORSYTH County.

This is a criminal prosecution on a written information signed by the solicitor correctly charging the defendant in the first count with the felony of breaking and entering with intent to commit the crime of larceny, in violation of G.S. 14-54, and in the second count

with the crime of larceny. Defendant and his counsel signed a waiver of the finding by a Grand Jury of a bill of indictment and pleaded not guilty to the charges contained in the written information.

Trial was by jury on the written information. At the close of the State's evidence Judge Armstrong, upon motion, dismissed the larceny charge. The jury returned a verdict of guilty of the felony as charged in the first count.

From a judgment of imprisonment of not less than seven nor more than ten years, defendant appeals to the Court of Appeals.

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

Booe, Mitchell & Goodson by William S. Mitchell, Attorneys for the defendant.

MALLARD, C.J. Defendant, an indigent person, was represented at the trial in the Superior Court, and in this Court, by William S. Mitchell, his court-appointed attorney. Judge Armstrong ordered Forsyth County to pay for the transcript of the record of the trial and the cost of having the defendant's brief mimeographed.

Defendant assigns as error the failure to allow his motion for judgment of compulsory nonsuit made at the close of the evidence.

C. A. West testified: That he was an officer with the Winston-Salem Police Department and was on duty on the nights of November 2, 3, and 4, 1967. That on November 4, 1967, at about 8:30 p.m. he was patrolling the area around Tenth and Cleveland in Winston-Salem. He received a call and went to Shore's Shop Rite Grocery at the corner of Tenth and Cleveland and found somebody in the building. When he arrived he saw two children about eight or nine years old running from the building. He noticed that the door on the northwest corner of the building had an opening near the bottom. This opening in the door was about three feet high and eighteen inches wide, and it appeared to him that the bottom part of the door had been kicked in. He entered through this opening in the door and saw a man standing on the inside and told him to stand where he was. The man did not stand where he was but ran into the back part of the store. There were no lights on in the building, and West was using his flashlight. After he entered the store, he looked all over the store and in the northeast corner of the building he found the defendant under a foam rubber mattress with his head sticking out. He personally searched the store and found no one else inside the building. The defendant was searched, and he had in his pocket a ten cent Danish pastry or cake (which was received in evidence as

State's Exhibit No. 1). There was merchandise in the store at that time.

Thad W. Shore, a witness for the State, testified: That he is the owner and operator of the business at Tenth and Cleveland known as Shore's Shop Rite. The store had been entered and damaged on the evening of November 2, 1967. On Friday, November 3, he cleaned up the store and tried to ascertain how much merchandise had been stolen and damaged. He secured the doors of the building by nailing boards and other doors over the openings that had been made on November 2 to the front door and the stockroom door. On Saturday, November 4, 1967, he inventoried the stock of goods and left the building around 4:00 p.m. The condition of the building when he left was not as good as it was before the damage on November 2 because he had nailed boards over the damaged doors. He returned Saturday night after being called by the officer and found the boards that he had nailed over the openings in the door on Friday morning knocked off. When he left his place of business on Saturday afternoon, it was locked and the doors were boarded up and secure. The doors to his store were in a different condition when he returned that night than they were at 4:00 p.m. when he left. The boards over one of the doors had been knocked off, the store had been entered, and quite a bit of merchandise had been stolen. Among the merchandise stolen from him were several cases of wine, some beer, and several cases of dry salt fish. He had in his store on that date, cakes similar to State's Exhibit No. 1, but there were no markings on the cake that was introduced into evidence as State's Exhibit No. 1 by which he could identify it as coming from his store. Approximately $500 damage was done to his property from the loss of merchandise and the breaking in on November 4. That no one person could have carried all of the merchandise that was missing from his place of business on this date at one time.

R. T. Masten, a witness for the State, testified: That he was with Officer West on this occasion, and he saw a young boy, who appeared to be about ten or twelve years old, running from the store. After Masten called to him, the young boy dropped a box of crackers and ran around the corner of the building. Masten looked inside the building and saw a man that he later identified as the defendant. He saw the hole in the door and was there when Mr. West brought the defendant to this door and he, Mr. Masten, took hold of the defendant, pulled the defendant through the hole in the door, and stood him up.

The evidence of the State, when considered in the light most favorable to the State as we must do, 2 Strong, N. C. Index 2d, Crim-

inal Law, § 104, would permit but not compel the jury to find the following facts:

That Thad W. Shore owned and operated a place of business known as the Shop Rite Grocery at Tenth and Cleveland Avenue in Winston-Salem on November 4, 1967. On this date the building was unlawfully entered and several cases of wine, several cases of dry salt fish, and other merchandise of some bulk and volume, of the value of around $500, had been stolen. That Mr. Shore's place of business was unlawfully and feloniously entered by the defendant between the hours of 4:00 p.m. and 8:30 p.m. on Saturday, November 4, 1967, with the felonious intent to steal merchandise owned by Mr. Shore and situate therein.

The defendant, Joseph Johnson, a witness for himself, testified: He was not inside the Shore's Shop Rite Store on the night of November 4, 1967, or any other night. He was arrested on the night of November 4 at about 8:30 p.m. near this store, but not in it. On this night he had been with Willie Brown but left Willie at Mary Lou Gentry's house. Then he went over on Ninth and Ivy and got as far as Russell's Funeral Home when he noticed that it was getting late and remembered that the curfew was at ten or ten thirty p.m. He thereupon turned around and as he came up the sidewalk near the store, an officer told him to put his hands up over his head. He told the officer that he had not done anything, and the officer told him to shut up. The officer searched him and made him put his hands behind his back. The officers put the defendant and three other male persons in the paddy wagon, carried him to the police station, and took fingerprints. He was not arrested inside of the store; he did not go into that store that night. It was dark out around the store that night, and there was a little light inside. He got the bun that he had that night from Willie at about 5:30 p.m. while he and Willie were inside the Center Theatre. He wasn't in the store under a mattress. He didn't see any little boys running from the store or anyone else coming from the store. That in 1959 in the Superior Court of Forsyth County, he pleaded guilty to two charges of store breaking and larceny, and in 1960 he pleaded guilty to robbery.

Willie Wesley Brown, a witness for the defendant, testified: That he knew Joseph Johnson and saw him on the afternoon of November 4, 1967, at the Center Theatre and talked to him there in the theatre giving him a bun, a cinnamon bun. It was a bun like the one offered as State's Exhibit No. 1. That he, Brown, left the defendant at Mary Lou Gentry's house at approximately 7:00 or 7:30 p.m.

Defendant's evidence would permit but not compel the jury to find that:

Defendant was arrested on the street near Shore's Shop Rite Store on November 4, 1967, as he was walking towards his home from Russell's Funeral Home. He was going home in order to get there before a ten thirty p.m. curfew. (The record is silent as to why the curfew had been imposed.) Defendant was not in and had not been in Shore's place of business on that occasion, and he was not apprehended in Shore's place of business. Defendant had been given the bun or cookie by Willie Brown while they were together in the Center Theatre. Defendant did not break or enter the store of Mr. Shore on this occasion. The defendant did not enter the place of business of Mr. Shore at any time on November 4, 1967, and he had no intent to steal from Mr. Shore, and that he was not guilty of the crime with which he was charged.

Defendant's motion for judgment as of nonsuit was properly overruled. The circumstances in this case make it a question for the jury. *State v. Emory Joseph Roux,* 266 N.C. 555, 146 S.E. 2d 654; *State v. Williams,* 269 N.C. 376, 152 S.E. 2d 478. Also, for the rule as to circumstantial evidence see *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431; *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741.

Defendant also assigns as error the failure of the judge to instruct the jury that they might find the defendant guilty of the lesser offense of nonfelonious breaking or entering. Each of the defendant's assignments of error, numbers two, three, four and five, present this question in a different manner but are so interrelated that they may be treated as one.

The misdemeanor of nonfelonious breaking and entering, *if there is evidence to support it,* is a lesser included offense of the felony of breaking and entering with intent to commit a felony as described in G.S. 14-54. *State v. Worthey,* 270 N.C. 444, 154 S.E. 2d 515.

According to the police officer, the defendant was apprehended in the building. Defendant denied he was in the building. The defendant, by his evidence, does not contradict the State's evidence that Mr. Shore's building was entered by someone with the intent to steal therefrom. All the evidence tends to show that the breaking or entering of Mr. Shore's building on November 4, 1967, was done with the intent to commit the crime of larceny of merchandise therein, and larceny under such circumstances is a felony. G.S. 14-72. The evidence shows that approximately $500 of the merchandise belonging to Mr. Shore was stolen from this building on this date, and included in the merchandise in the building were buns or cookies such as the one the defendant had on his person when apprehended. This distinguishes this case from *State v. Jones,* 264 N.C. 134, 141 S.E. 2d 27, in which there was no evidence of any property having been

stolen. No one else but the defendant was in the building, and when the officers approached, he attempted to hide. There was no evidence of a nonfelonious breaking or entry. There was no evidence from which the jury could have found that the lesser crime of nonfelonious breaking or entering had been committed. *State v. Jones,* 267 N.C. 434, 148 S.E. 2d 236.

A careful reading of the charge reveals that Judge Armstrong fully, adequately and correctly charged the jury in this case.

In the trial, we find

No error.

BROCK and BRITT, JJ., concur.

CLAUDIA BOYD, BY HER NEXT FRIEND, CHARLES B. DEANE, JR., v. VIRGINIA DARE BLAKE.

(Filed 21 February, 1968.)

1. Trial § 21—

On motion to nonsuit, the evidence must be accepted as true and considered in the light most favorable to plaintiff, disregarding all evidence in conflict therewith, including any contradictions in plaintiff's evidence.

2. Same—

On motion to nonsuit, the court may consider evidence offered by defendant that tends to clarify or explain plaintiff's evidence and is not in conflict therewith.

3. Automobiles § 39—

The presence of a young child riding a bicycle on the highway is, in itself, a danger signal to a motorist approaching the bicycle from the front.

4. Automobiles § 41—

A motorist who sees children on or near the highway must exercise care in proportion to the incapacity of the children to foresee or to appreciate and avoid peril.

5. Automobiles § 69—

Evidence that a five-year-old child was riding a training bicycle on the paved portion of a highway and was clearly visible to the *femme* defendant from a distance of 1000 feet, that the child began to lose control of the bicycle and to veer toward the center of the highway when defendant's car was about 60 feet away, and that the automobile struck the child, *held* sufficient to be submitted to the jury on the issue of defendant's negligence, notwithstanding evidence that defendant had reduced her speed at the time of impact.

6. Automobiles § 46—

Testimony of an eyewitness that he "guessed" the speed of an automobile to be 35, 40, or 45 miles per hour is not incompetent as mere speculation on the part of the witness, it appearing that the word was used colloquially to express an estimate or opinion.

APPEAL by plaintiff from *McConnell, J.*, October 1967 Civil Session, RICHMOND Superior Court.

This is an action for damages for personal injuries sustained by plaintiff, a five-year-old girl.

The complaint alleges that around noon on 27 February 1966, plaintiff was riding a small bicycle in a westerly direction on R.P. Highway 1304 in Richmond County and was run into by defendant who was operating a 1957 Ford in an easterly direction on said highway. Among the allegations of negligence, the complaint charges that defendant failed to keep her automobile under proper control, failed to keep a proper lookout, failed to use due care commensurate with existing conditions, and negligently allowed her automobile to strike plaintiff.

In her answer, defendant admits the operation of the Ford at the time and place complained of. In her further answer, she says: "that as she reached a straight stretch of road she observed the plaintiff some distance away riding a bicycle on the northernmost portion of the highway and proceeding in a westerly direction; that the defendant, who at all times remained in the eastbound lane of traffic and was keeping a proper lookout, immediately slowed her automobile and sounded the horn on her automobile; that just as the plaintiff and the defendant were meeting on opposite sides of the highway and at a time when they were almost abreast of one another, the plaintiff, without any warning whatsoever, suddenly steered the bicycle she was riding across the highway and directly into the front bumper of defendant's automobile, slightly injuring plaintiff."

Plaintiff's principal witness was her eighteen-year-old uncle, Robert Nicholson, who was with her at the time of the occurrence. His pertinent testimony can be summarized as follows: The paved portion of the road was 17 feet wide. The little bicycle on which plaintiff was riding had a training wheel on its left side and he was walking some 15 or 20 feet behind plaintiff "trying to keep up with her." He saw the defendant's car approaching some 1000 feet away and "guessed" it was running at least 35, 40 or 45 miles per hour at that time. When he first saw the car, the bicycle was on the right-hand side of the road but as the car got nearer, plaintiff began losing control of the bicycle and moving toward the center of the highway; "I tried to run to catch up with her and I ran faster to try to catch

her. I saw she was losing control of the bicycle. I did not catch up with her." The accident happened about the center of the road, "just a little on Mrs. Blake's side of the center line of the highway." He estimated that plaintiff and defendant's car were about 50 to 60 feet apart when plaintiff began having trouble with the bicycle and "guessed" that defendant was going about 35 at that time. All four wheels of defendant's automobile were on the pavement at the time plaintiff was struck by defendant's left-front tire.

Plaintiff's principal injuries were to her right arm. On cross-examination, Nicholson testified that the left-front wheel did not pass over plaintiff's arm but slid it on the pavement; that defendant came to a complete stop within 3 or 4 feet from the time plaintiff got on defendant's side of the road.

Defendant's pertinent testimony was as follows: She saw plaintiff on the bicycle and Robert Nicholson when she was 1000 feet or more away from them; they were on their side of the road near the edge. She was driving approximately 35 miles per hour when she first saw them and as she drew near them, she kept slowing down and blew her horn three times. "(A)s we got closer to one another, I kept slowing up and I thought, well, I'll ease on by, and she came over." Defendant was going between 5 and 10 miles an hour with her foot on the brake when plaintiff rode the bicycle into defendant's lane; plaintiff was half a car length away when she turned in front of defendant, after which defendant slammed on brakes and her car did not travel its length beyond plaintiff.

Defendant's motion for compulsory nonsuit at the close of the plaintiff's evidence was overruled but was allowed at the close of all the evidence. From judgment predicated thereon, plaintiff appealed.

Pittman, Pittman & Pittman, attorneys for plaintiff appellant.

Leath, Bynum, Blount & Hinson, attorneys for defendant appellee.

BRITT, J. Although defendant in her answer pleads contributory negligence on the part of plaintiff and the doctrine of "sudden appearance," defendant's counsel with his usual candor admits that neither of these is applicable to the facts in this case. Therefore, the only question presented by this appeal is whether there was sufficient evidence of actionable negligence on the part of defendant to be considered by the jury.

In reviewing a judgment of nonsuit, we are required to consider the evidence in the light most favorable to the plaintiff, accept the

evidence so construed as true, and disregard all evidence in conflict therewith, including any inconsistencies or contradictions in the plaintiff's evidence. *Waycaster v. Sparks,* 267 N.C. 87, 147 S.E. 2d 535; *Thomas v. Morgan,* 262 N.C. 292, 136 S.E. 2d 700; *White v. Roach,* 261 N.C. 371, 134 S.E. 2d 651.

In *Ammons v. Britt,* 256 N.C. 248, 123 S.E. 2d 579, in an opinion written by Bobbitt, J., we read:

> "The only motion for judgment of nonsuit to be considered is that made at the close of all the evidence. G.S. 1-183. In determining its sufficiency for submission to the jury, the evidence, whether offered by plaintiffs or by defendant, must be considered in the light most favorable to plaintiffs. *Murray v. Wyatt,* 245 N.C. 123, 128, 95 S.E. 2d 541; *Eason v. Grimsley,* 255 N.C. 494, 496, 121 S.E. 2d 885. True, the court may consider evidence offered by defendant that 'tends to clarify or explain evidence offered by plaintiff not inconsistent therewith, but it must ignore that which tends to establish another and different state of facts or which tends to contradict or impeach the testimony presented by plaintiff. (Citations.) Otherwise, consideration would not be in the light most favorable to plaintiff. (Citations.)' *Watters v. Parrish,* 252 N.C. 787, 795, 115 S.E. 2d 1."

The cases in our reports involving small children struck by automobiles upon the streets and highways are as varied in their factual situations as are the impulses and instantaneous reactions of children. Consequently, they vary in ultimate results. While the principles of law concerning the care required of a motorist who sees, or ought to see, a small child on or near the highway are constant, their application is different because the facts vary from case to case. *Rodgers v. Carter,* 266 N.C. 564, 146 S.E. 2d 806.

The very presence of a five-year-old child riding a bicycle on the highway is, in itself, a danger signal to a motorist approaching the child. Ordinarily, it is a question for the jury as to whether the motorist has responded to such danger signal as a reasonable person would have done. *Champion v. Waller,* 268 N.C. 426, 150 S.E. 2d 783. *Rodgers v. Carter, supra.*

It has been declared repeatedly by our Supreme Court that a legal duty rests upon a motorist to exercise due care to avoid injuring children whom he sees, or by the exercise of reasonable care should see, on or near the highway. A motorist must recognize that children have less judgment and capacity to appreciate and avoid danger than adults, and that children are entitled to a care in pro-

portion to their incapacity to foresee, to appreciate and to avoid peril. Parker, J., (now C.J.) in *Pope v. Patterson,* 243 N.C. 425, 90 S.E. 2d 706 (citing numerous authorities).

"Where an automobile driver sees a child in a place of danger, or has reason to apprehend that it might run into a place of danger, and has sufficient time to stop his car if under proper control, it is his duty to exercise such care as would be reasonably necessary to avoid a collision." Quoted in *Pope v. Patterson, supra,* from *Lucas v. Busko,* 314 Pa. 310, 171 A. 460.

Plaintiff was on the paved portion of the highway and clearly visible to defendant at all times while she traveled a distance of 1000 feet. It was to be anticipated that plaintiff might be inattentive to danger, and, upon the near approach of a vehicle, might allow her bicycle to veer to the opposite side of the highway. [See *Henderson v. Locklear,* 260 N.C. 582, 133 S.E. 2d 164]. Plaintiff did not suddenly dart from a place of concealment into the path of defendant's vehicle as was the case in *Johns v. Day,* 257 N.C. 751, 127 S.E. 2d 543, and *Dixon v. Lilly,* 257 N.C. 228, 125 S.E. 2d 426. She was not in a place of apparent safety when seen by the motorist as was the case in *Brewer v. Green,* 254 N.C. 615, 119 S.E. 2d 610, and *Brinson v. Mabry,* 251 N.C. 435, 111 S.E. 2d 540.

Plaintiff's witness Nicholson "guessed" the speed of defendant's car. The term "guess" is not regarded as being a mere conjecture or speculation but as a colloquial way of expressing an estimate or opinion. It is a word frequently used where a witness is called upon to make estimates of speed or distance or size or time. Like the words "suppose" or "think", it is commonly used as meaning the expression of a judgment with the implication of uncertainty. *State v. Clayton,* 272 N.C. 377.

In the light of duty of the motorist in such circumstance, the questions whether the defendant in the instant case was driving her vehicle at a greater speed than was reasonable and prudent, or whether she decreased speed to the extent that an ordinarily prudent person would have done, are for jury determination. *Henderson v. Locklear, supra.*

The judgment below is

Reversed.

MALLARD, C.J., and BROCK, J., concur.

STATE v. WILLIE LEGRANDE.

(Filed 21 February, 1968.)

1. Criminal Law § 169—

The admission of testimony over objection is rendered harmless when testimony of the same import is thereafter introduced without objection.

2. Criminal Law § 99—

It is not an expression of opinion for the trial court to direct the defendant to reply to the solicitor's question.

3. Same—

A remark of the court during trial will not entitle defendant to a new trial unless it tends to prejudice defendant.

4. Criminal Law § 115—

The trial court is not required to charge the jury upon the question of defendant's guilt of lesser degrees of the crime charged in the indictment when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees.

5. Robbery § 5—

Where all the evidence tends to show that a completed robbery with firearms was committed upon the prosecuting witness, and there is no conflicting evidence relating to the elements of this offense, the court is not required to submit the question of defendant's guilt of assault.

6. Same—

Where all the evidence is uncontradicted that the money taken by the use of firearms was the property of the prosecuting witness, the defendant not contending that the money was his, and the charge, when considered in its entirety, accurately reflects the evidence as to the ownership of the money, the failure of the court to charge more fully that the jury must find that the money taken was the property of another, *is held* without error.

APPEAL by defendant from *Crissman, J.*, October 30, 1967, Criminal Session, GUILFORD County Superior Court, High Point Division.

Defendant was tried under an indictment charging armed robbery. From a verdict of guilty as charged and a judgment of the court that the defendant be confined in the State Department of Correction for a period of not less than fourteen nor more than twenty-one years to be assigned to work under the supervision of the State Department of Correction as provided by law, the defendant appeals.

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

Stephen E. Lawing for defendant.

CAMPBELL, J. The defendant makes, through his court-appointed attorney, five assignments of error. The facts sufficiently appear in the opinion.

1. The defendant assigns as the first error that a police officer was permitted to testify that upon going to the store where the alleged offense occurred he found the victim walking around in the store with injuries on the left side of his face and that "Mr. Strickland (the victim) stated that a colored subject had been in the store and that * * *". There was nothing further elicited from this witness along this line. The defendant asserts that this constituted hearsay testimony and that it was prejudicial to the defendant. This assignment of error is overruled, for that later Mr. Strickland, the victim, testified that he told the investigating officers when they first came to his store that "it was a colored man that robbed me". This was admitted without objection and what the officer had previously started to testify to would be corroborative thereof.

Subsequently, the police officer returned to the stand and testified without objection that the victim "stated that a colored subject had come into his store".

It thus follows that even if it had been error to permit the officer to testify originally as he did the error was cured by the same evidence being admitted thereafter without objection. Under such circumstances the benefit of the objection would have been lost. Stansbury, N. C. Evidence, 2d Edition, Section 30; *State v. Tyson,* 242 N.C. 574, 89 S.E. (2d) 138 (1955); *Davis v. Vaughn,* 243 N.C. 486, 91 S.E. (2d) 165 (1955).

2. The defendant assigns as the second error that the court expressed an opinion in the course of the trial in statements made by the court before the jury and that these statements were prejudicial to the defendant. We have examined the record pertaining to the alleged expressions of opinion by the court. We fail to find that the record supports the contention of the defendant. A typical instance in the record shows, at a time when the witness was reluctant to answer certain questions and, in fact, did not answer several questions, the following:

> "Q. Do you work anywhere?
> A. Do I work anywhere?
> The Court: You heard him; answer his question."

We fail to find that this is an expression of an opinion on behalf of the court that could in any way be considered prejudicial to the defendant, but to the contrary, it was an effort on the part of the court

to expedite the trial and keep the proceedings moving. This is a proper function of the trial judge.

Another instance complained of by the defendant is where the solicitor on behalf of the State objected to repetition on the re-direct examination by defendant's attorney and the court sustained the objection. Defendant's attorney protested and the court changed the ruling and the following occurred:

"The Court. Go ahead and ask him. Maybe he will answer it different.

Mr. Floyd (Defendant's attorney). Maybe he will. I want to ask my client about it, too. It works both ways.

The Court: Go ahead."

We hold that the record does not show the court expressed any opinion on the defendant's credibility. This assignment of error is overruled.

3. The defendant's third assignment of error is to the failure of the court to charge the jury with respect to a lesser degree of the crime included in the bill of indictment, in that the court failed to charge the jury with respect to an assault.

The court is not required to submit to the jury a lesser included offense when there is no evidence of such lesser included offense.

In *State v. Hicks,* 241 N.C. 156, at pp. 159-160, 84 S.E. (2d) 545 (1954), the Supreme Court said:

"The distinction is this: The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. *The presence of such evidence* is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is *no conflicting evidence* relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice."

In *State v. Smith,* 268 N.C. 167, at 173, 150 S.E. (2d) 194 (1966), Justice Sharp, writing for the Supreme Court, stated:

"In this case, there is no conflicting evidence relating to the element of the armed robbery charged in the indictment. The words of Connor, J., in *State v. Cox, supra* at 361, 160 S.E. at 360 are pertinent:

'The statute (G.S. 15-169) is not applicable, where, as in the instant case, all the evidence for the State, uncontradicted by any evidence for the defendant, if believed by the jury, shows that the crime charged in the indictment was committed as alleged therein . . .

(T)here was no evidence tending to support a contention that the defendants, if not guilty of the crime charged in the indictment, were guilty of a crime of less degree.'

"We hold that the evidence in this case necessarily restricted the jury to return one of two verdicts, namely, guilty of robbery with firearms as charged in the indictment, or not guilty."

In the instant case, all of the evidence tends to show that robbery with firearms was committed upon the prosecuting witness. The prosecuting witness testified that he opened the cash register in his store, took out the bills, and put a rubber band around the bills, and as he was doing that, the defendant struck him in the back and told him to give him the money; that when he looked around the defendant had a pistol in his hand, and said: "Man, give me that money; I will kill you; I have got to have it." The prosecuting witness further testified that at this time he grabbed the pistol and was trying to keep the pistol away from him, and at this time he was kicked and struck and the last he remembered before being rendered unconscious was the defendant saying: "Where is that money? I have got to have that money." When the prosecuting witness regained consciousness the money and the defendant were both gone.

The defendant, on the other hand, contended that he was not present at the time and was not the person who committed the offense. All the evidence in this case shows the assaults were committed in connection with, and as a part of, and included in the robbery. There was no occasion to charge on the lesser offense of an assault only. This assignment of error is overruled.

4. The defendant's fourth assignment of error is that the court erred in failing to explain to the jury what constituted felonious intent in the law of robbery with firearms or other dangerous weapons.

When the charge is read as a whole, the court did require the State to satisfy the jury beyond a reasonable doubt that the defendant feloniously took money from the person of the prosecuting witness and did adequately explain the expression "feloniously took money."

This assignment of error is overruled.

5. The defendant's fifth assignment of error is to the effect that the court erred by failing to charge the jury that the jury must find that the property taken was "the property of another".

In the instant case, the evidence was uncontradicted that the money taken was the money which the prosecuting witness had just removed from his cash register in his store. The defendant at no time made any contention that he had any right to the money and

his whole defense was that he was not the person present on that occasion and that he took no money at all.

In *State v. Mull,* 224 N.C. 574, 31 S.E. (2d) 764 (1944) Chief Justice Stacy stated that "it is not necessary or material to describe accurately or prove the particular identity or value of the property, further than to show that it was the property of the person assaulted *or* in his care, and had a value, (our italics) * * * In robbery the kind and value of the property is not material, because force or fear is the main element of the offense." In the instant case, considered as a whole, the charge was sufficient and the jury clearly understood that the property taken had to be the property of the prosecuting witness and that the defendant did not have and did not claim any right to same.

A more specific instruction than was given was not required. This assignment of error is overruled.

The defendant has had a full and open hearing, with no suggestion of surprise, and it is not perceived wherein he has been prejudiced.

A careful perusal of the entire record leaves us with the impression that the verdict and judgment should be upheld.

No error.

MORRIS and PARKER, JJ., concur.

RUTH ESTELLE CONNOR, PLAINTIFF, v. THALHIMERS GREENSBORO, INC., DEFENDANT.

(Filed 21 February, 1968.)

1. Negligence § 37b—

The owner of a store is not an insurer of the safety of his patrons, and a customer, in order to recover for injury sustained on the premises, must introduce evidence tending to establish actionable negligence on the part of the proprietor, the doctrine of *res ipsa loquitur* not being applicable.

2. Negligence § 37f—

The evidence tended to show that defendant maintained swinging entrance and exit doors with panel glass, that plaintiff attempted to make an exit by a door that had been propped open by a turn screw at the top of the door, but that the door suddenly and without warning closed inward, causing plaintiff's injuries. There was no evidence that the door with its turn screw device was in a defective condition or was improperly maintained. *Held:* Involuntary nonsuit was properly entered.

APPEAL from *Crissman, J.*, November 20, 1967, Regular Civil Session of GUILFORD Superior Court, Greensboro Division.

This is a civil action instituted to recover damages for personal injuries alleged to have been sustained due to the actionable negligence of the defendant. From a judgment of nonsuit entered at the close of the plaintiff's evidence, the plaintiff appealed.

The plaintiff's allegations and evidence tend to show that on July 29, 1963, at about 11:00 a.m. plaintiff entered defendant's store located on South Elm Street in Greensboro, North Carolina, for the purpose of purchasing shoes. After going through the doors on the street, she entered a foyer or lobby area which was separated from the main portion of the store by five large glass doors. Each door was a separately contained unit, some seven feet high and four feet wide. All five of the doors were all the way open into the foyer or lobby at the time the plaintiff entered. After making a purchase of shoes, the plaintiff started to leave the store carrying a pocketbook in her left hand and the package of shoes cradled in her left arm. Her right arm and hand were free. The plaintiff stopped at the bag display counter some five or six feet from the door and, after looking, turned and stepped through the open door, the same door by which she had entered. Just after she crossed the threshold, the large heavy glass door suddenly and without warning — "just like a flash" — swung towards the plaintiff from her left, striking her in the face and left side, causing personal injuries.

The plaintiff saw no other customers and no other persons either in the lobby area of the store or going through the doors. The plaintiff saw no props or devices of any kind maintaining the open door. The plaintiff was a frequent visitor to the store — some two or three times a week — over a period of years and had never seen the doors open before.

The plaintiff's evidence further revealed that at the top of the door there was a turn screw which could be turned when the door was open and thereby maintain the door in an open position. The door opens into the lobby only and does not swing into the store. It stops at the threshold and has a self-closing mechanism. The operation of the doors was inspected and checked several times a day by the defendant, and it had been inspected during the morning before plaintiff was hurt. It was against company policy to keep the doors in an open position; and no one, other than the maintenance engineer and his assistant, was authorized by the defendant to open the doors and turn the turn screw for the purpose of maintaining the open position. The turn screw would not retain the doors in an open position unless the turn screw was turned completely. In other words,

when partially turned, the turn screw would not operate to keep the door open. The personnel of the defendant in charge of maintenance were authorized to keep the door open, but they did so only for the purpose of cleaning the premises, and they used only the turn screw device for this purpose and reset the turn screw by reversing the turn in order to close the door. When the door was open and retained open by the turn screw device, a sudden sharp jerk or push on the door would be sufficient to disengage the turn screw and cause the door to close. There was no evidence as to any sudden jerk or pull on the door on the occasion in question, and the evidence is entirely lacking as to any cause for the door to close suddenly as the plaintiff was going through it on her way out of the store. There was no evidence as to any defect in the door or in the turn screw device; and, from the plaintiff's evidence, it appears that the doors were originally installed at the time the store was opened about the year 1950 and that these doors had been in constant operation from that time until the time of the plaintiff's injury. There is no evidence that the doors had ever closed on any person prior to this time or that the doors had ever been repaired. The evidence further reveals that, subsequent to the injuries sustained by the plaintiff on this occasion, the doors were inspected some several hours later by the maintenance engineer of the defendant. At that time the door was found to be working properly and no defect in the door or in the turn screw device was found.

At the close of the plaintiff's evidence, upon motion of the defendant for judgment as of nonsuit, the motion was allowed. The plaintiff appealed.

Hoyle, Boone, Dees and Johnson for plaintiff appellant.
Smith, Moore, Smith, Schell, and Hunter for defendant appellee.

CAMPBELL, J. Plaintiff's sole assignment of error is to the allowance of defendant's motion for judgment as of nonsuit at the close of the plaintiff's evidence.

The plaintiff alleged the defendant was negligent in failing "to keep and maintain its premises in a reasonably safe condition for its customers and, in particular, in that the defendant was in control of the heavy glass door, which the defendant had caused to be propped open and failed properly to brace to keep stationary and open, and in that the defendant's neglect in not properly securing the door caused the door to close quickly and without warning while the plaintiff was attempting to make her exit from the defendant's premises.

That the defendant knew or should have known of the condition of the door and failed to see that it worked properly."

The plaintiff's evidence fails to show that the defendant had propped the door open or even knew that the door was open at the time the plaintiff sought to exit or that there was any defect in the operation of the door.

In the case of *Watkins v. Furnishing Co.*, 224 N.C. 674, 31 S.E. 2d 917 (1944), the plaintiff sought to recover damages for personal injuries alleged to have been caused by the negligence of the defendant in the erection, operation and maintenance of "magic eye" doors in the entrance to its store building on Fayetteville Street in the City of Raleigh.

The evidence tended to show that the plaintiff in that case entered through the left side of the double door opening where the door on the left side was partially open, and the door suddenly closed and caught the plaintiff between said left door and the other door or door frame.

On appeal from a judgment of nonsuit, the Supreme Court of North Carolina said, "There is a total lack of evidence of negligence in the erection, operation or maintenance of the 'magic eye' doors. There is no evidence that the doors involved in the occurrence under investigation ever suddenly closed before said occurrence, or ever before caught anyone attempting to enter the store, notwithstanding the doors had been installed several months and thousands of customers had entered through the door openings. * * *

"* * * The owner of a store is not an insurer of the safety of those who enter his store for the purpose of making purchases, and the doctrine of *res ipsa loquitur* is not applicable. Before the plaintiff can recover he must, by evidence, establish actionable negligence. * * *

"* * * Persons are held liable by the law for the consequence of occurrences which they can and should foresee, and by reasonable care and prudence guard against. * * *"

In the case of *Hamilton v. Parker,* 264 N.C. 47, 140 S.E. 2d 726 (1965), the plaintiff sought to recover damages for injuries received when struck by a swinging door as she was entering the defendant's grocery store and from a judgment of nonsuit the plaintiff appealed. The Supreme Court of North Carolina in that case stated: "In the instant case, while the plaintiff alleged that the defendant maintained such swinging doors in an unsafe and hazardous condition, she offered no evidence to support such allegation. Furthermore, she offered no evidence tending to show that the doors complained of were improperly constructed, or that they had any me-

chanical defect or were improperly maintained. Neither is there any evidence on the record tending to show that such doors were not the customary type used in grocery stores, nor any evidence to the effect that a similar accident had occurred previously."

In the present case, the plaintiff relies on the fact that she entered through an open door to make a purchase and a short time thereafter attempted to exit by the same open door when suddenly and for no explainable reason the door closed, thereby causing injuries to her.

In our opinion, this does not establish actionable negligence as the doctrine *res ipsa loquitur* is not applicable, and a store owner is not an insurer of the safety of those who enter the store for the purpose of making purchases. Consequently, plaintiff's assignment of error is overruled, and the judgment entered below is

Affirmed.

MORRIS and PARKER, JJ., concur.

HARRY E. JONES v. NASH COUNTY GENERAL HOSPITAL AND ITS OFFICIAL BOARD OF TRUSTEES AND NASH COUNTY AND ITS OFFICIAL BOARD OF COMMISSIONERS.

(Filed 21 February, 1968.)

1. Hospitals § 2—

County commissioners and boards of trustees of the county hospitals authorized by Chapter 131 of the General Statutes are vested with the authority to select suitable hospital sites. G.S. 153-9, G.S. 131-126.18 *et seq.*

2. Administrative Law § 5—

The courts will not interfere with the exercise of discretionary power by a local administrative board except upon a showing of oppressive and manifest abuse of discretion.

3. Public Officers § 8—

There is a presumption that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law.

4. Hospitals § 2; Administrative Law § 5—

In a suit to restrain the construction of a hospital on a site selected by the commissioners of the county and by the trustees of the hospital, allegations that the defendants unexpectedly chose the site in question and that the location is unsuitable because of its proximity to plaintiff's rock quarry and because of its distance from the center of the county, *are held* insuffi-

cient to state a cause of action, and defendants' demurrer was properly sustained.

APPEAL by plaintiff from *Fountain, J.,* in Chambers at Tarboro, N. C., 30 October 1967. From NASH.

Civil action in which plaintiff seeks injunctive relief.

Plaintiff is a citizen, resident and taxpayer of Nash County and purported to institute this action for himself and on behalf of others similarly aggrieved who desire to join as parties-plaintiff and adopt his complaint.

The Board of Commissioners for Nash County has taken the necessary action to establish a county hospital under the name of Nash General Hospital and has appointed a Board of Trustees for the hospital. The two Boards are the defendants in this action.

The County Board and the Hospital Board, after considering several sites, decided to locate the new hospital on a 102-acre tract of land located about 1.7 miles west of the city limits of Rocky Mount, in Nash County. They publicly announced this decision on 2 October 1967 and proceeded to complete the purchase of the site on 5 October 1967.

Plaintiff owns a tract of land used as a rock quarry adjacent to and across Stoney Creek from the 102-acre site. He brings this action asking that the defendants be enjoined from constructing a hospital on said site. He contends (1) that the defendants unexpectedly selected the site in question, (2) that said site is not suited for a hospital because of its proximity to plaintiff's rock quarry, and (3) that said site is not suitable because it is not near the center of Nash County.

Defendants filed a demurrer to the complaint and from the judgment of Judge Fountain sustaining the demurrer, plaintiff appealed to this Court.

Parker & Dickens for plaintiff appellant.

Keel & Keel, Valentine & Valentine, Battle, Winslow, Scott & Wiley and Thomas L. Young for defendant appellees.

BRITT, J. Authority and responsibility for the selection of sites for county hospitals authorized under Chapter 131 of the General Statutes are vested in the county commissioners and the official board of the hospital. G.S. § 153-9; G.S. § 131-126.18, *et seq.*

The courts may not interfere with the exercise of the discretionary powers of local administrative boards for the public welfare "unless their action is so clearly unreasonable as to amount to an op-

pressive and manifest abuse of their discretion." Barnhill, J., (later C.J.) speaking for our Supreme Court in *Mullen v. Louisburg,* 225 N.C. 53, 33 S.E. 2d 484. This well-established principle has been restated in numerous decisions including *Kistler v. Board of Education,* 233 N.C. 400, 64 S.E. 2d 403; *Reed v. Highway Commission,* 209 N.C. 648, 184 S.E. 513; *McInnish v. Board of Education,* 187 N.C. 494, 122 S.E. 182; and *Lee v. Waynesville,* 184 N.C. 565, 115 S.E. 51.

There is a presumption that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. *Housing Authority v. Wooten,* 257 N.C. 358, 126 S.E. 2d 101; *In Re Housing Authority of the City of Charlotte,* 233 N.C. 649, 65 S.E. 2d 761.

As a general rule the acts of a municipal corporation, which are within its powers, are not subject to judicial review unless there is a manifest and palpable abuse of power. 62 C.J.S. § 199. In *McInnish v. Board of Education, supra,* it is said: "In our jurisprudence the principle is established that in the absence of gross abuse the courts will not undertake to direct or control the discretion conferred by law upon a public officer." Citing *"School Com. v. Bd. of Ed.,* 186 N.C. 643; *Davenport v. Bd. of Ed.,* 183 N.C. 570; *Newton v. School Com.,* 158 N.C. 187; *Jeffress v. Greenville,* 154 N.C. 492, 500."

The defendants were not compelled by law to invite the public to attend their meeting at which the site was selected. *Kistler v. Board of Education, supra.*

Confronted with these well-established principles of law, long recognized in this jurisdiction, the complaint fails to meet the test and does not allege sufficient facts to state a cause of action.

The cases cited and heavily relied upon by plaintiff in his brief are clearly distinguishable from the facts in the case at bar.

The judgment of the Superior Court sustaining the demurrer is Affirmed.

MALLARD, C.J., and BROCK, J., concur.

ANGLE *v.* BLACK.

MARY LEONA PIERCE ANGLE (A SINGLE WOMAN); RESSIE PIERCE HUGHES AND HUSBAND, WILLIAM WALTER HUGHES; ESSIE PIERCE STROUD AND HUSBAND, DENNIS E. STROUD, PLAINTIFFS, v. MYRTLE VIOLA PIERCE BLACK AND HUSBAND, JESSIE JAMES BLACK; IDA MAE PIERCE DAVIS AND HUSBAND, ARMAN DAVIS, AND CHARLIE OSCAR PIERCE (SINGLE), DEFENDANTS, AND B. WALTON BROWN, ADMINISTRATOR OF THE ESTATE OF BESSIE R. BRYANT PIERCE, ADDITIONAL DEFENDANT.

(Filed 21 February, 1968.)

Notice § 1—

Parties are fixed with notice of all motions or orders made in pending causes during term, and the statutory provisions for notice of motions are not applicable in such instances.

APPEAL by plaintiffs from *Seay, J.*, October 6, 1967, Civil Session of the Superior Court of RANDOLPH County.

On March 14, 1966, plaintiffs filed a petition for partition of the lands of Bessie R. Bryant Pierce who died intestate on August 28, 1964. On March 15, 1966, B. Walton Brown qualified as administrator of the estate of Bessie Pierce. On March 18, 1966, defendants answered the petition of plaintiffs setting out, among other things, that the lands described in the petition were subject to the payment of the debts of the decedent; that Brown has qualified as administrator; that it was or might be necessary to sell the land to make assets, and asking that the proceedings be dismissed. Plaintiffs replied on May 23, 1966, denying that Brown has qualified as administrator and that any debts existed. On February 2, 1967 Brown, Administrator, filed a petition for the sale of the land to make assets and on February 16, 1967, moved the court that he be made a party to the partition proceedings. By order of Latham, J., dated May 7, 1967, the administrator was made a party to the partition proceedings and the plaintiffs excepted and gave notice of appeal. This appeal was never perfected. On March 6, Brown, Administrator, filed answer in the partition proceedings averring that there was pending a proceedings instituted by him as administrator to sell the same property described in the petition to make assets to pay the debts of the decedent and this was plead as a bar to the partitioning proceedings. On September 13, 1967, Brown, Administrator, additional defendant, filed a motion to dismiss the plaintiffs' appeal from the order making him an additional defendant. Notice thereof was served on the plaintiffs on September 14. The partition proceedings was placed on the motion calendar for hearing on September 25, the first day of a two-week term of court. The plea in bar was heard before Seay, J., on October 6, and judgment was entered October 6, 1967,

sustaining the plea in bar and dismissing the partition proceedings. From this judgment, the plaintiffs appealed.

Ottway Burton for plaintiff appellants.

Miller, Beck and O'Briant for Brown, Administrator, additional defendant.

MORRIS, J. The appellant failed to file a brief within the time provided in Rule 28 and appellee moved to dismiss under Rule 28. Appellant answered the motion asserting that he was not aware of the time requirement of the rules for the filing of briefs and tendered his brief. Since we are not inadvertent to the possibility that all members of the bar may not have familiarized themselves with the rules, despite their opportunity to do so, we accepted plaintiffs' brief and heard oral arguments.

Plaintiffs contend that they were given no specific notice by administrator, additional defendant, of his intention to have heard the plea in bar, and this is their only contention. It appears that the partitioning proceedings was placed upon the motion docket of the court for hearing on September 25, the first day of a two-week term and was continued, at plaintiffs' request, until the last day of the term, October 6, to give plaintiffs time for additional preparation. The answer of the administrator, the additional defendant, was filed March 6, 1967 setting up the plea in bar and asking dismissal of the proceedings. The matter was pending in court and had been for some six months. The term at which it was heard was a regular term. Parties are fixed with notice of all motions or orders made during the term of court in causes pending therein, and the statutory provisions for notice of motions are not applicable in such instances. *Jones v. Jones,* 173 N.C. 279, 91 S.E. 960 (1917); *Harris v. Board of Education,* 217 N.C. 281, 7 S.E. 2d 538 (1940).

Plaintiffs' assignment of error is without merit.

The judgment of the superior court allowing the plea in bar and dismissing the proceedings is

Affirmed.

CAMPBELL and PARKER, JJ., concur.

OPAL BRANNOCK TATE v. SANDRA LEE GOLDING AND WILLIE A. GOLDING, BY FOY CLARK, GUARDIAN AD LITEM.

(Filed 21 February, 1968.)

1. Trial § 33—

It is the duty of the trial court to explain and apply the law arising on the evidence as to all substantial features of the case, and a statement of what the parties contend the law to be is not sufficient to comply with G.S. 1-180.

2. Automobiles § 90—

Where the evidence presents the question of plaintiff's contributory negligence in suddenly pulling from an unpaved road and onto an intersection of a dominant highway without keeping a proper lookout, it is error for the court to fail to charge the jury with respect to the law of contributory negligence and apply the law to the evidence, and a mere statement of what the parties contend the law to be is insufficient.

APPEAL by the plaintiff from *Shaw, J.*, October 9, 1967 Civil Session, SURRY County Superior Court.

This is a civil action by the plaintiff to recover damages for personal injury and property damage which she alleges she suffered when her automobile, being operated by the plaintiff, was involved in a collision with an automobile being driven by Sandra Golding and owned by Willie Golding. Both defendants filed answers and cross-actions. The defendants conditionally pleaded contributory negligence on the part of plaintiff.

The collision occurred on August 22, 1965, at approximately 7:45 p.m., near the intersection of U. S. Highway Number 52, which runs generally north and south, and Fowler Road, which runs generally east and west. The intersection is located about one mile north of the town of Mount Airy.

The plaintiff's evidence tended to show that she was traveling from east to west on Fowler Road; that she stopped at a stop sign on the east side of Highway 52; waited for traffic on Highway 52 to pass, and then entered the highway; and that as she attained a speed of approximately 35 miles per hour along Highway 52, her vehicle was struck from behind by the defendants' automobile.

The defendants' evidence tended to show that Sandra Golding, a minor, was operating her father's automobile in a southerly direction on Highway 52; that as the defendants' automobile approached the intersection with Fowler Road, the plaintiff's automobile suddenly pulled out of Fowler Road and made a left turn onto Highway 52 directly in front of the defendants' car; that the defendant Sandra Golding applied the brakes, but could not avoid the collision.

The jury answered the issue of the negligence of the defendant

Sandra Golding, "Yes"; and the issue of plaintiff's contributory negligence, "Yes." The plaintiff appealed.

Blalock and Swanson by Edward N. Swanson, attorneys for plaintiff appellant.

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

BROCK, J. Plaintiff appellant's assignments of error 1 through 6 are to the action of the judge in allowing into evidence, over plaintiff's objections, testimony of statements made by plaintiff to defendant. Plaintiff cites G.S. 8-45.5 in support of her objection. We have carefully considered these assignments of error and, finding them without merit, they are overruled.

The appellant assigns as error four portions of the charge to the jury on the issue of contributory negligence. The following two portions are illustrative:

> "The defendants assert that the plaintiff, herself, in driving a motor vehicle from an unpaved road and into the intersection of Highway Number 52, without keeping a proper lookout and in failing to keep her vehicle under proper control, was in violation of the law."
>
> * * *
>
> "The defendants contend that a driver of a motor vehicle about to enter a highway protected by stop signs must stop, as directed, looking *(sic)* both directions and permit all vehicles to pass, which are at such a distance and traveling at such a speed as would be imprudent for him to proceed into the intersection."

These portions of the charge upon the law are in the form of contentions; in the record before us, there is no additional charge upon the law covered by these stated contentions. G.S. 1-180 imposes upon the trial judge the duty to declare and explain the law arising on the evidence as to all substantial features of the case. A statement of what the parties contend the law to be is not sufficient. *Saunders v. Warren,* 267 N.C. 735, 149 S.E. 2d 19. The judge must explain and apply the law to the specific facts pertinent to the issue involved. *Therrell v. Freeman,* 256 N.C. 552, 124 S.E. 2d 522.

For the errors in the charge upon the issue of contributory negligence, a new trial upon all issues is ordered.

New trial.

MALLARD, C.J., and BRITT, J., concur.

BERNICE T. HAGINS v. REDEVELOPMENT COMMISSION OF GREENSBORO, NORTH CAROLINA, A BODY CORPORATE.

(Filed 28 February, 1968.)

1. Judgments § 6—

The trial court may, prior to the expiration of the session, vacate on its own motion a judgment rendered during the session.

2. Appeal and Error § 28—

Upon exception to a judgment without exception to any findings of fact, the findings set forth by the trial court will be accepted as established.

3. Parties § 2; Infants § 5; Attorney and Client § 3—

Findings of fact by the trial court that the adult plaintiff consistently refused to take advice from her counsel, that on the day of trial plaintiff peremptorily dismissed her attorneys and stated that all lawyers are crooked, and further, that plaintiff appears completely incapable of protecting her rights, *is held* sufficient to authorize the trial court to appoint a next friend for plaintiff in her action to recover compensation for land taken by eminent domain. G.S. 1-64.

4. Notice § 1—

Parties to actions are fixed with notice of all motions or orders made during the session of court in causes pending therein.

5. Infants § 5; Judgments § 8—

The next friend is an officer of the court and may negotiate, compromise and settle the rights of his ward, subject to approval by the court.

6. Infants § 5—

Evidence in this case *held* sufficient to show that plaintiff had actual notice of the appointment of her next friend.

7. Same; Appeal and Error § 6—

An order appointing a next friend for an adult plaintiff is an order affecting a substantial right from which plaintiff may appeal. G.S. 1-277.

8. Appeal and Error § 14—

Where plaintiff excepted to order by the trial court appointing her next friend, such order being made in a pending cause during session, her remedy was to give notice of appeal within ten days after notice of the judgment or within ten days after its rendition, G.S. 1-279, and a motion to vacate the order pursuant to G.S. 1-582 is ineffectual.

9. Appeal and Error § 45—

Assignment of error not brought forward and discussed in appellant's brief is deemed abandoned. Rule of Practice in the Court of Appeals No. 28.

APPEAL by plaintiff from *Crissman, J.*, October 2, 1967 Civil Session of GUILFORD Superior Court, Greensboro Division, from a judgment denying her motion to set aside the order dated January 26,

1967, appointing a next friend, the judgment dated March 17, 1967, and the order dated May 18, 1967, allowing compensation to the next friend.

The defendant is a North Carolina corporation created, organized and existing under and by virtue of Article 37, Chapter 160, of the General Statutes of North Carolina known as the "Urban Redevelopment Law" and has the power of eminent domain in proper cases. It has been determined in another action that the real property referred to herein was properly taken.

There has been considerable litigation over the defendant's acquisition of the title to two lots in Greensboro formerly owned by the plaintiff.

The first action was instituted on August 7, 1961, by the defendant herein against the plaintiff to acquire title to the two lots under the power of eminent domain. In that case appraisers were appointed and appraised one of the lots at $17,500 and the other at $9,300. This sum was awarded and confirmed by the Clerk of the Superior Court and later by the Judge of the Superior Court. Plaintiff appealed and the Supreme Court of North Carolina, in an opinion filed December 12, 1962, reversed the judgment of the Superior Court, holding that the petitions in the proceedings were fatally defective. See *Redevelopment Commission of Greensboro v. Bernice T. Hagins (Hagan) and J. G. Hagins,* 258 N.C. 220, 128 S.E. 2d 391.

Thereafter, on January 14, 1963, another action was instituted by the defendant herein against Bernice T. Hagins (Hagan), et al., to acquire the fee simple title to the two lots. On the trial of that case, a jury awarded the plaintiff $3,300 as just compensation for the taking of both lots. From the judgment on this verdict, the plaintiff appealed to the Supreme Court of North Carolina. In a decision filed June 16, 1966, in the case of *Redevelopment Commission of Greensboro v. Bernice T. Hagins, et al.,* 267 N.C. 622, 148 S.E. 2d 585, the judgment of the Superior Court was affirmed. Thereafter, Mrs. Bernice T. Hagins applied to the United States Supreme Court for a writ of *certiorari* to review this decision, and her petition was denied November 14, 1966. *Bernice T. Hagins, Petitioner v. Redevelopment Commission of Greensboro,* 385 U.S. 952, 17 L. ed. 2d 230. On January 9, 1967, the Supreme Court of the United States denied a petition by Bernice T. Hagins for a rehearing of the matter. 385 U.S. 1021, 17 L. ed. 2d 561.

In the opinion affirming the judgment of the Superior Court, the Supreme Court of North Carolina said in 267 N.C. 622, 625, 148 S.E. 2d 585, "The stipulations disclose that between the time Judge Shaw rendered judgment in the first proceeding, decreeing that the

title to the lots and the improvements had passed to the Redevelopment Commission, and the time this Court reversed the judgment, the . . . structures had been removed and destroyed by the petitioner under an order of the Superior Court . . . that there is now pending in the Superior Court of Guilford County a suit against the petitioner, Redevelopment Commission of Greensboro, et al., to recover damages for the taking and destroying of the improvements on said lands and for other causes alleged in said suit."

The case at bar involves the action referred to in this Supreme Court opinion. It was instituted on May 14, 1963, to recover compensatory damages and punitive damages in the total amount of $407,460 for the taking and destroying of the improvements on said land and for other causes alleged in the complaint. There were three other related cases instituted by the plaintiff against the defendant and others in connection with the taking of plaintiff's real property by the defendant. The three other cases were instituted in March 1963, and all were consolidated for argument in this Court. The defendant, Redevelopment Commission of Greensboro, was a defendant in each of the three cases, and as to this defendant, all four of the cases were consolidated for judgment in the judgment of March 17, 1967, referred to in this action. The other three cases are:

Bernice T. Hagins v. Aero Mayflower Transit Company, Incorporated, Champion Storage and Trucking Company, Incorporated, and Redevelopment Commission of Greensboro, which was No. 4468 in the Superior Court and is No. 67SC12 in this Court.

Bernice T. Hagins v. South Atlantic Bonded Warehouse Corporation, Allied Van Lines, Inc., and Redevelopment Commission of Greensboro, which was No. 4439 in the Superior Court and is No. 67SC13 in this Court.

State of North Carolina, Upon the Relation of Bernice T. Hagins, and Bernice T. Hagins v. E. R. Phipps, E. E. Ballinger, Deputy Sheriffs of Guilford County in May 1962, John E. Walters, Sheriff of Guilford County in May, 1962, and National Surety Corporation of New York, a Foreign Corporation and Surety upon the Official Bond of Sheriff John E. Walters, Redevelopment Commission of Greensboro, a body corporate, which was No. 5045 in the Superior Court and is No. 67SC14 in this Court.

Comer & Harrelson, attorneys for plaintiff appellant.

Cannon, Wolfe & Coggin by J. Archie Cannon, attorneys for defendant appellees.

MALLARD, C.J. The plaintiff appellant assigns as error the action of the court in appointing a next friend on January 26, 1967, in the absence of the plaintiff, without notice to her and without her knowledge or consent.

The case was calendared for trial January 23, 1967, and the plaintiff did not appear; however, her attorneys, Mr. Samuel S. Mitchell and Mr. Earl Whitted, Jr., did appear and informed the Court that the plaintiff had told them she was sick. The next day, January 24, 1967, the case was called again, and the plaintiff was present with her attorneys. At that time the plaintiff personally presented to the Court a paper writing in which she requested that her attorneys be discharged, after which the following occurred:

THE COURT: (To Mrs. Hagins) "In other words, you're firing them. Is that what you're doing? That is what you're asking, isn't it?

MRS. HAGINS: Yes, sir.

THE COURT: You have a right to put on your evidence and try the cases. That is the reason I suggested that you confer with them for fifteen minutes and see if you couldn't arrive at something that would be sensible and helpful to you. We'll take a fifteen minute recess.

RECESS

THE COURT: (To Mrs. Hagins) You want to proceed with your cases?

MRS. HAGINS: I don't know anything about the cases.

THE COURT: I know you have been made a proposition of settlement. Let the record show that the plaintiff in these cases—*Bernice T. Hagins v. Redevelopment Commission of Greensboro, N. C.;*

State of North Carolina, upon the Relation of Bernice T. Hagins, and *Bernice T. Hagins v. E. R. Phipps, E. E. Ballinger, Deputy Sheriffs of Guilford County;*

Bernice T. Hagins v. South Atlantic Bonded Warehouse Corporation, et al.;

Bernice T. Hagins v. Aero Mayflower Transit Co., Inc., et al. That in open court this date she dismissed her attorneys and has stated in open court that she is not in position to proceed

with the cases that are calendared for trial on this date, and the court orders judgment of nonsuit in each of the four cases."

The record does not corroborate Mrs. Hagins' statement in her affidavit filed in all four cases, "that the Judge . . . told the plaintiff that she would have one year in which to start over" after entering the nonsuit in all four of the cases.

The record does not disclose that either of the plaintiff's attorneys requested the court to permit them to withdraw at this time. There is nothing in the record that indicates that the court gave them permission to withdraw at this time.

On January 25, 1967, Earl Whitted, Jr., one of the plaintiff's attorneys, filed an affidavit in this and the other cases which states in substance that the plaintiff had refused to cooperate with her attorneys and that "Mrs. Bernice T. Hagins has a fixation about this case beyond which she will not go; that she will neither listen to the advice of counsel nor to reason or understanding; that she is both illogical and incapable of handling her affairs in this matter."

On January 25, 1967, Samuel S. Mitchell, one of plaintiff's attorneys, filed an affidavit in which he refers to her as "his former client." Also, in this affidavit Mr. Mitchell asserts: "Affiant has found Mrs. Hagins to be mentally aware and alert in all matters, excepting in regards to her relationship to her land, which was recently condemned by the Redevelopment Commission of Greensboro in the Cumberland Project, and in regards to claims for damages which grew out of these condemnation proceedings; that in regards to these matters affiant has found her to be totally irrational and without a rational base from which to counsel with her attorneys in litigation or in negotiation concerning these matters; that affiant has found her to be totally impervious to logic, reason or understanding in regards to these matters and totally without willingness or apparent capability to evaluate or accept evaluation in regards to the condemnation of her land and in regards to claims arising therefrom; that affiant does not believe that his former client has the willingness or capacity to understand and appreciate the circumstances attendant upon a dismissal of her legal actions without trial, although affiant and his associate have many times explained these circumstances to her.

"That affiant believes that his former client is so obsessed with the repossession of her condemned land that her ability to manage her claims for damages for the taking is nonexistent; that affiant knows that she is in need of the court in the matter referred to above; that affiant believes that her legal posture in reference to

the actions above mentioned will so deteriorate that she is now in danger of losing value amounting to thousands of dollars; that affiant believes that because of Mrs. Hagins' obsessions, as indicated above, she is incapable of managing her affairs insofar as they relate to the actions listed herein and to matters arising from the recent condemnation proceedings."

On January 26, 1967, the court, in this case and the other three cases, made the following entry:

> "Let the record show that the Court in its discretion is setting aside the judgments of nonsuit that were announced in Court when the cases were called on Monday and is continuing all of these cases for the term *and they will be open for further proceeding.*" (Emphasis added.)

The Court had the authority on its own motion to vacate the judgments of nonsuit during that session of court, and none of the parties have taken exception thereto. *Shaver v. Shaver,* 248 N.C. 113, 102 S.E. 2d 791; *Insurance Company v. Walton,* 256 N.C. 345, 123 S.E. 2d 780. On January 26, 1967, Judge Crissman entered the following order:

> "THIS CAUSE coming on to be heard before the Honorable Walter E. Crissman, Resident Judge of the Eighteenth Judicial District, and being heard at the January 16th Term of Superior Court, Civil Division, upon Affidavits filed by counsel for the plaintiff, upon observations made by the Court and upon statements of fact as contained in the record, the Court is of the opinion and finds as a fact, that the plaintiff in this action is completely incapable of protecting her own rights, is ignorant of court procedure, and that her actions have been detrimental to her own interests; that the course of action or conduct shown by the plaintiff, dating back to 1961, whereby she refused to obey any orders entered by any court of competent jurisdiction, having to be taken into custody by the Sheriff to permit Commissioners of Appraisal to enter upon her property for the sole purpose of appraising same, by writing letters to the Department of Justice in Washington, to the President of the United States and to Mrs. Johnson to the effect that she was being mistreated, by her refusal of advice from her own selected counsel, and by her discharge of said selected counsel in open court when trial was just beginning, by her statement that 'all lawyers are crooked,' by her apparent inability to comprehend what is transpiring, and by her complete indifference and defiance as

manifest throughout the entire records on file in the Clerk's Office, the Court *ex mero motu* finds it imperative to appoint a next friend for this plaintiff to look after and manage her affairs in the present litigation.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Joseph Franks, Jr., is hereby appointed next friend for Bernice T. Hagins in the cases herein set out, for the sole purpose of inquiring into her cause of action, to consider all elements of damage and offers to settle, to pursue all remedies offered by law to the end that plaintiff's property and personal rights are protected in full, and that her best interests be protected, as provided by law."

The record shows that the plaintiff took exception to this order appointing the next friend. We assume that the record is correct and that it was taken at the time of the entry of the order. This is plaintiff's assignment of error no. 1.

In *Moore v. Lewis,* 250 N.C. 77, 108 S.E. 2d 26, referring to the appointment of a guardian *ad litem* for a defendant who was *non compos mentis,* the Court stated, "An inquisition to determine the sanity of the defendant is not a condition precedent to the appointment. *In re Dunn,* 239 N.C. 378, 79 S.E. 2d 921. It may be made upon application of any disinterested person or by the court on its own motion." 44 C.J.S., Insane Persons, § 143(b), 307, 308.

The exception is "to the action of the court and the court's appointing a next friend without the plaintiff's consent, knowledge or notice." There is no exception to any of the court's findings of fact. Hence, we must accept as established the facts set forth in the court's findings. *Weddle v. Weddle,* 246 N.C. 336, 98 S.E. 2d 302; *In re Estate of Cogdill,* 246 N.C. 602, 99 S.E. 2d 785; *In re Hardin,* 248 N.C. 66, 102 S.E. 2d 420. Upon the facts found, we think the court had the inherent and equitable power to appoint a next friend in this case. G.S. 1-64; *Peppard v. Peppard,* Fla., 198 So. 2d 63; *Graham v. Graham,* 40 W. 2d 64, 240 P. 2d 564. Indeed, under such circumstances, it was the duty of the court to make such appointment in order that plaintiff's rights could be properly safeguarded.

The judgments of nonsuit directed by Judge Crissman on January 24th were stricken on January 26th, which had the effect of placing the causes back on the calendar at that session of court. The order appointing the next friend was made during that session of court; notice was not necessary. Parties to actions are fixed with notice of all motions or orders made during the session of court in

causes pending therein. *Speas v. Ford,* 253 N.C. 770, 117 S.E. 2d 784; *Harris v. Board of Education,* 217 N.C. 281, 7 S.E. 2d 538; *Insurance Company v. Sheek,* 272 N.C. 484. This assignment of error is overruled.

The record reveals that on January 30, 1967, the plaintiff contacted Joseph Franks, Jr. on the telephone inquiring into his appointment as her next friend; therefore, she had actual notice of the appointment. She also contacted him on January 31, 1967, and agreed to meet and confer with him but later informed him that she would be unable to keep the appointment. She did not contact the next friend thereafter.

Mr. Joseph Franks, Jr., acting as next friend, notified Mrs. Hagins on March 11, 1967, by registered letter dated March 10, 1967, with a return receipt which showed delivery to Mrs. Hagins on March 11, 1967, that he would apply to the Superior Court on March 15, 1967, for an order comprising and settling her cases and the proposed amounts of such settlement. He sent her a copy of the order appointing him as next friend dated January 26, 1967, and a copy of an affidavit setting out his reasons for such application, which had been filed by Mr. Franks on March 10, 1967, in this and the other three related cases.

Mrs. Hagins did not appear on March 15 or March 17 at the hearing, and she took no action and did not lodge any protest or otherwise contest any such settlement other than to take exception to the signing of the judgment.

The court, on March 17, 1967, entered the following judgment:

> "THIS CAUSE coming on to be heard, and being heard, upon Affidavit of Joseph Franks, Jr., Next Friend for Bernice T. Hagins, before the Honorable Walter E. Crissman, Resident Judge of the Eighteenth Judicial District, and it appearing to the Court that Joseph Franks, Jr., was duly appointed Next Friend for Bernice T. Hagins by this Court on January 26, 1967, by an order entered in this cause to the effect that the plaintiff was incapable of looking out for her own protection or making decisions that would be to her best interest in these matters of litigation due to her apparent inability to comprehend judicial proceedings or to heed advice of counsel, the Court finds as a fact that said order was necessary to preserve and protect the best interests of the plaintiff.
>
> That it appears to the Court from said Affidavit and statement of counsel that the Redevelopment Commission of Greensboro, one of the defendants in all of the above numbered cases, has

offered to pay into Court for the use and benefit of the plaintiff and as a complete release and discharge from any liability now existing or that might exist by virtue of said cases against the Redevelopment Commission of Greensboro in the sum of Forty Thousand ($40,000.00) Dollars. That defendant Redevelopment Commission of Greensboro further agrees to pay the moving and storage bills rendered against the plaintiff by virtue of her personal property being stored in the warehouses of South Atlantic Bonded Warehouse Corporation, in the sum of $2,235.23, and Champion Storage and Trucking Company, Inc., in the sum of $617.62. That said sum is in full settlement and satisfaction of the above numbered cases insofar as this defendant, Redevelopment Commission of Greensboro, is involved and in full compensation for the property formerly owned by the plaintiff and condemned by the defendant Redevelopment Commission of Greensboro.

That Joseph Franks, Jr., the duly appointed Next Friend of Bernice T. Hagins, has stated that, in his opinion, said sum is fair and reasonable; that, in his opinion, it would be to the best interest and welfare of Bernice T. Hagins to accept said sum.

The Court hereby finds as a fact that the sum offered by the defendant Redevelopment Commission of Greensboro is fair and reasonable; that it would be to the best interest and welfare of Bernice T. Hagins to accept same; that all litigation instituted by or against this defendant Redevelopment Commission of Greensboro has grown out of the same cause, to-wit, the taking of her property by condemnation proceedings; that said cases have been to the Supreme Court of North Carolina on two occasions; that a writ of *certiorari* was filed with the Supreme Court of the United States, and was denied; that a petition to re-hear was filed, and was denied; and that the Court is of the opinion that there must be an end of litigation at some point.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that upon the defendant Redevelopment Commission of Greensboro paying into Court the sum of $40,000 for the use and benefit of the plaintiff, Bernice T. Hagins, the sum of $2,235.23 to Atlantic Bonded Warehouse Corporation, the sum of $617.62 to Champion Storage and Trucking Company, Inc., and the costs of this action to be taxed by the Court, the defendant Redevelopment Commission of Greensboro in all the above numbered cases is hereby released and discharged from any and all liability now existing, or that may exist, by virtue of these actions; and that

said sum of $40,000 shall cover any and all amounts due plaintiff by virtue of condemnation actions whereby her property was heretofore taken by the defendant Redevelopment Commission of Greensboro.

That this Judgment may be pleaded in bar of any right the plaintiff or any other party to the above litigation has or may have to further, or any, recovery from the defendant Redevelopment Commission of Greensboro."

Plaintiff's assignment of error no. 2 is to the action of the court in signing the judgment, the exact wording of the exception being "to the ruling and signing of this judgment, the plaintiff excepts." Again, the plaintiff does not except to the findings of fact. The facts found support the judgment, and this assignment of error is without merit, and is overruled.

The plaintiff did not appeal from this judgment even though she excepted to it, and thus had actual notice thereof. If Mrs. Hagins was *sui juris,* she slept on her right to appeal. If Mrs. Hagins was not competent and therefore unable to protect her own rights, as found by Judge Crissman, then this omission by Mrs. Hagins obviously illustrates the necessity for the appointment of the next friend to look after her interest.

The next friend is an officer of the court and a next friend, properly appointed, may negotiate, compromise and settle his ward's rights, provided this action is approved by the court. The court found that the sums offered were fair and reasonable, and that the acceptance of the compromise offer would be to the best interest and welfare of the plaintiff. *Oates v. Texas Co.,* 203 N.C. 474, 166 S.E. 317; *Rector v. Logging Company,* 179 N.C. 59, 101 S.E. 502; 27 Am. Jur. Infants, § 131; see also *Sell v. Hotchkiss,* 264 N.C. 185, 141 S.E. 2d 259.

Plaintiff's third assignment of error is based on the exception to the action of the court in allowing a fee and ordering payment of $1,000 to Joseph D. Franks, Jr., next friend of the plaintiff. This exception was not brought forward and set out in appellant's brief. This exception is deemed abandoned under Rule 28 of the Rules of Practice in the Court of Appeals.

The plaintiff attempts to assert that her constitutional rights have been violated, mainly upon the allegation that the court appointed a next friend without notice to her; this contention, in view of what has been said heretofore, is clearly without merit. Plaintiff relies on G.S. 1-582 to have the judgment set aside. The facts in this case do not bring this case within the purview of said statute. The

present case was pending and on the calendar in the superior court and the order appointing the next friend was made during a session of court.

The plaintiff has not appealed from the aforesaid order or judgments but instead has moved to vacate same. We find in G.S. 1-277 the following: "An appeal may be taken from every judicial order or determination of a judge of a superior court, upon or involving a matter of law or legal inference, whether made in or out of term, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial."

If the plaintiff felt that the order appointing a next friend affected a substantial right, and it did, it was her privilege, if she was *sui juris,* to appeal. No appeal was taken. The plaintiff's right of appeal from the final judgment came into existence on March 17, 1967, the date of the judgment. If she was *sui juris,* she was required to give notice of appeal within ten days after notice of the judgment or within ten days after its rendition, and Mrs. Hagins did neither. G.S. 1-279.

The plaintiff's fourth assignment of error is to the action of the court in denying, overruling and dismissing plaintiff's motion to vacate and set aside the order appointing the next friend and all subsequent orders entered thereafter. In view of what is said above, this assignment of error is without merit, and is overruled.

The fifth assignment of error is to the action of the court in signing a judgment overruling the plaintiff's motion and entering the same of record. In view of what is said above, this assignment of error is without merit, and is overruled.

The order of Judge Crissman, dated October 3, 1967, denying, overruling, and dismissing plaintiff's motion to vacate and set aside the order dated January 26, 1967, and all judgments and orders subsequently entered are affirmed.

BROCK and BRITT, JJ., concur.

BERNICE T. HAGINS v. AERO MAYFLOWER TRANSIT CO., INC.; CHAMPION STORAGE AND TRUCKING COMPANY, INCORPORATED, AND REDEVELOPMENT COMMISSION OF GREENSBORO.

(Filed 28 February, 1968.)

1. Appeal and Error § 28—

Upon exception to a judgment without exception to any findings of fact, the findings set forth by the trial court will be accepted as established.

2. Infants § 9; Judgments § 8—

The next friend is an officer of the court and may negotiate, compromise and settle the rights of his ward subject to a finding by the court that the settlement is reasonable, fair and for the best interests of his ward.

3. Appeal and Error § 14—

Where plaintiff excepts to a judgment affecting a substantial right, the remedy is to give notice of appeal within ten days after notice of the judgment or within ten days after its rendition. G.S. 1-277, G.S. 1-279.

APPEAL by plaintiff from *Crissman, J.*, October 1967 Civil Session of GUILFORD Superior Court, Greensboro Division, from a judgment denying her motion to set aside the order dated January 26, 1967, appointing a next friend, the judgment dated April 14, 1967, and the order dated May 18, 1967, allowing compensation for the next friend.

This is one of the four cases growing out of a condemnation proceeding originally instituted in 1961 by the Redevelopment Commission of Greensboro against the plaintiff herein. In Superior Court this was case no. 4468, and it is no. 67SC12 in this Court.

Comer & Harrelson, attorneys for plaintiff appellant.

Cannon, Wolfe & Coggin by J. Archie Cannon, attorneys for defendant Redevelopment Commission of Greensboro.

McLendon, Brim, Brooks, Pierce & Daniels by Edgar B. Fisher, Jr., attorneys for Aero Mayflower Transit Company, Inc., and Champion Storage and Trucking Company, Incorporated.

MALLARD, C.J. This case was consolidated with the three other cases in this Court for argument. The plaintiff in this case is the plaintiff in all the other cases, and the Redevelopment Commission of Greensboro is a defendant in all four cases. The other defendants herein are not involved in the other three cases. In this Court the plaintiff filed only one brief, but a separate record was filed in each case. In the record in this case, the plaintiff sets out five assignments of error. Number one relates to the appointment of the next friend, and number three relates to the order allowing compensa-

tion of the next friend. These assignments of error are identical to the exceptions to the same orders which have been discussed and ruled on in the case of *Bernice T. Hagins v. Redevelopment Commission of Greensboro,* decided this day, *ante* page 40, and each are overruled for the reasons stated therein.

The plaintiff alleges in her complaint herein that on May 25, 1962, the defendants unlawfully took possession and control of certain of plaintiff's personal property and removed it from her premises and damaged it. She alleges that she is entitled to recover for such damages the amount of $250 plus damages for the illegal exclusion of plaintiff from the use, possession and enjoyment thereof at the rate of $200 per month, and for punitive damages in the amount of $4,500.

The defendant, Aero Mayflower Transit Company, Inc., denies the allegations of the complaint and asserts that it had nothing whatever to do with the hauling, carrying, moving, transportation or storage of any property of the plaintiff, and that it is not liable to the plaintiff in any sum.

The defendant Champion Storage and Trucking Company, Incorporated, denies the allegations of the complaint and asserts that acting in good faith and using the utmost care, it removed and stored certain personal property from the premises pursuant to a court order signed by Judge Walter E. Crissman on May 23, 1962, and at the request of the Guilford County Sheriff's Department and the Redevelopment Commission of Greensboro; that this property was stored by the South Atlantic Bonded Warehouse and not by the defendant Champion Storage and Trucking Company, Incorporated. The defendant Champion Storage and Trucking Company, Incorporated, also filed a counterclaim against the plaintiff and a cross-complaint against the co-defendant, Redevelopment Commission of Greensboro, for payment for services in the moving and storage of said property in the amount of $145.45 plus the sum of $10.45 per month from April 1, 1963, until the removal of said property from the possession of the defendant, Champion Storage and Trucking Company, Incorporated.

The Redevelopment Commission of Greensboro filed an answer denying the plaintiff's right to recover against it herein, alleging that said property was removed by the Sheriff of Guilford County acting on the Writ of Assistance signed by Judge Walter E. Crissman.

The plaintiff assigns as her second assignment of error the action of the court in entering a final judgment in this case on April 14, 1967. This judgment reads as follows:

"THIS CAUSE coming on to be heard upon opening of Court at 9:30 a.m., and being heard before the undersigned Resident Judge of the Guilford County Superior Court in High Point, N. C., on the 14th day of April, 1967;

And it appearing to the Court, and the Court finding as a fact, based on the Order of the Court dated January 26, 1967, that the plaintiff is incapable of protecting her own rights or making decisions that would be to her best interest in this matter due to her apparent inability to comprehend judicial proceedings or to heed advice of counsel, and that the said Next Friend is the proper person to act herein on behalf of the plaintiff;

And it further appearing to the Court, and the Court finding as a fact, that Joseph Franks, appearing as Next Friend, notified Bernice T. Hagins by registered letter, mailed April 10, 1967, and received by her on April 11, 1967, as evidenced by return receipt signed by her as addressee, a copy of which letter and the original receipt have been filed and made a part of the record of this case;

And it further appearing to the Court, and the Court finding as a fact, that said Next Friend was notified on April 10, 1967, by Wallace Harrelson, Attorney at Law of Greensboro, North Carolina, that he had been retained by Bernice T. Hagins, and whereupon Wallace Harrelson was then notified by said Next Friend that this matter would be heard before the undersigned Judge in open court at 9:30 a.m. Friday, April 14, 1967, in the Superior Court, High Point, North Carolina;

And it further appearing to the Court when this matter was called for hearing at 9:30 a.m., the following persons appeared: Joseph Franks, Jr., Next Friend; J. T. Williams, Jr., Esquire, for Aero Mayflower Transit Company, Inc., and Champion Storage and Trucking Company, Inc., and Archie Cannon, Esquire, for the Redevelopment Commission of Greensboro, and the Court Commission of Greensboro, and the Court finds as a fact that neither Bernice T. Hagins, nor her attorney, Wallace Harrelson, appeared before the Court, and that neither communicated with the Court, or Next Friend regarding their appearance before the Court;

And it further appearing to the Court, and the Court finding as a fact, from statements made in open court by Joseph Franks, Next Friend, and from a Supplemental Affidavit filed herein by

said Next Friend on the 7th day of April, 1967, which statements and Supplemental Affidavit found to be true.

And it further appearing to the Court, and the Court finding as a fact, that the parties to this action have agreed to waive a trial by jury and that the Court shall hear the evidence in the case;

And it further appearing to the Court that the plaintiff, through her Next Friend, has settled her claim herein against the Redevelopment Commission of Greensboro, one of the co-defendants, for the sum of $40,000.00;

And it further appearing to the Court, and the Court finding as a fact, that Joseph Franks, Jr., Next Friend of the plaintiff, has examined the property of the plaintiff now located at Champion Storage and Trucking Company, Incorporated, warehouse and that said property is not in a damaged condition as a result of the movement or storage of the property by Champion Storage and Trucking Company, Incorporated, and Aero Mayflower Transit Company, Incorporated, as alleged in the complaint, and that in relation to said examination the Next Friend has filed an Affidavit herein;

And it further appearing to the Court that the plaintiff, by and through the duly appointed Next Friend, and the defendants Champion Storage and Trucking Company, Incorporated, and Aero Mayflower Transit Company, Incorporated, and their successors and assigns, have agreed upon a compromise settlement and adjustment of all matters and things in controversy between them, by the terms of which compromise settlement agreement defendants Champion Storage and Trucking Company, Incorporated and Aero Mayflower Transit Company, Incorporated, and their successors and assigns, have agreed to accept the sum of $617.62 from the Redevelopment Commission of Greensboro, in full settlement and satisfaction for their services and the services of their successors and assigns rendered to the Redevelopment Commission of Greensboro and subsequently to the plaintiff since January 25, 1967, to thirty days after the date of this Judgment, in consideration of which the plaintiff hereby relinquishes, releases and discharges the said defendant, and their successors or assigns, from all matters and things alleged, or which might have been alleged, in the Complaint in this action;

And the Court having investigated the matter of the proposed settlement and examined the Next Friend of the plaintiff with regard thereto, the Court is of the opinion, and finds as a fact, that the proposed compromise settlement is fair and reasonable and is for the best interest of the plaintiff; and, therefore, the Court is of the opinion, and finds as a fact, that the compromise settlement should be entered into by the Next Friend of the plaintiff and that the compromise settlement should be ratified, approved and confirmed by the Court;

Now, therefore, by and with the consent of the plaintiff and the defendants, as evidenced by the signatures of the Next Friend of the plaintiff, and the attorney representing the defendants Champion Storage and Trucking Company, Incorporated, and Aero Mayflower Transit Company, Incorporated, and their successors and assigns, which signatures are hereinafter affixed to this judgment, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff shall have and recover nothing of the said defendants, or their successors and assigns, by reason of any of the matters and things alleged, or which might have been alleged, in the Complaint in this action; that the said defendants, and their successors and assigns, shall have and recover nothing further of the plaintiff by virtue of any services rendered to her with respect to her property up to and including thirty days from the date of the entry of this judgment as hereafter provided; that the plaintiff, or the plaintiff through her Next Friend, shall have thirty days from the date of this judgment to remove her property from the Champion Storage and Trucking Company, Incorporated's warehouse, and in the event that the plaintiff shall not remove her property therefrom within said thirty days, Champion Storage and Trucking Company, Incorporated, shall have the power to sell said property as by law provided and apply the proceeds of said sale to such charges as it may incur subsequent to the thirty-day period; and that the costs of this action shall be paid by the defendant Redevelopment Commission of Greensboro."

In this final judgment the facts are set out in detail and the plaintiff makes no exception to any findings of fact. Upon a careful examination of the record, we find that the evidence before the Court fully supports the findings of fact and the findings of fact support the judgment. We must accept as established the facts set forth in the Court's findings of fact. *Weddle v. Weddle,* 246 N.C. 336, 98 S.E. 2d 302; *In re Estate of Cogdill,* 246 N.C. 602, 99 S.E. 2d 785; *In re*

Hardin, 248 N.C. 66, 102 S.E. 2d 420; *Trust Company v. Buchan,* 256 N.C. 142, 123 S.E. 2d 489. The next friend is an officer of the court and a next friend, properly appointed, may negotiate, compromise and settle his ward's rights, provided his action is approved by the court. The judge found that the proposed settlement as set out in the foregoing judgment was fair and reasonable and was for the best interest of the plaintiff. Assignment of error number two is without merit and is overruled. *Oates v. Texas Company,* 203 N.C. 474, 166 S.E. 317. See also *Hagins v. Redevelopment Commission of Greensboro,* this day decided by this Court, *ante* page 40, and the cases cited therein.

Plaintiff's right to appeal from this judgment came into existence on April 14, 1967. Plaintiff took exception to the judgment but did not appeal therefrom. This judgment affected a substantial right. If she was *sui juris,* as she contends, she was required to give notice of appeal within ten days after notice of the judgment or within ten days after its rendition, and although she took exception thereto, she did not appeal. G.S. 1-279; G.S. 1-277.

Plaintiff's fourth and fifth assignments of error are to the action of the court in overruling her motion and signing the judgment in connection therewith. In view of what is said above and in view of the ruling in *Bernice T. Hagins v. Redevelopment Commission of Greensboro,* this day decided, *ante* page 40, we hold that these assignments of error are without merit and they are overruled.

The judgment of Judge Crissman, dated October 3, 1967, denying, overruling and dismissing plaintiff's motion to vacate and set aside the order dated January 26, 1967, and all judgments and orders entered in this case subsequent thereto, is affirmed.

Affirmed.

BROCK and BRITT, JJ., concur.

BERNICE T. HAGINS v. SOUTH ATLANTIC BONDED WAREHOUSE CORPORATION, ALLIED VAN LINES, INC., AND REDEVELOPMENT COMMISSION OF GREENSBORO.

(Filed 28 February, 1968.)

1. Appeal and Error § 28—

Upon exception to a judgment without exception to any findings of fact, the findings set forth by the trial court will be accepted as established.

2. Infants § 9—

The next friend is an officer of the court and may negotiate, compromise and settle the rights of his ward subject to a finding by the court that the settlement is reasonable, fair and for the best interests of his ward.

3. Appeal and Error § 14—

Where plaintiff excepts to a judgment affecting a substantial right, the remedy is to give notice of appeal within ten days after notice of the judgment or within ten days after its rendition. G.S. 1-277, G.S. 1-279.

APPEAL by plaintiff from *Crissman, J.*, October 1967 Civil Session of GUILFORD Superior Court, Greensboro Division, from a judgment denying her motion to vacate and set aside the order appointing a next friend, dated January 26, 1967, and all subsequent orders made herein including the judgment dated April 14, 1967.

This is one of the four cases growing out of a condemnation proceeding originally instituted in 1961 by the Redevelopment Commission of Greensboro against the plaintiff herein. In Superior Court this was case no. 4439, and it is no. 67SC13 in this Court.

Comer & Harrelson, attorneys for plaintiff.

Cannon, Wolfe & Coggin by J. Archie Cannon, attorneys for Redevelopment Commission of Greensboro.

Jordan, Wright, Henson & Nichols by Charles E. Nichols; and D. Newton Farnell, Jr., attorneys for defendants, South Atlantic Bonded Warehouse Corporation and Allied Van Lines, Inc.

MALLARD, C.J. This case was consolidated with the three other cases in this Court for argument. The plaintiff in this case is the plaintiff in all the other cases, and the Redevelopment Commission of Greensboro is a defendant in all four cases. The other defendants herein are not involved in the other three cases. In this Court plaintiff filed only one brief, but a separate record was filed in each case. In the record in this case, the plaintiff sets out five assignments of error. Number one relates to the appointment of the next friend, and number three relates to the order allowing compensation to the next friend. These assignments of error are identical to the exceptions to the same orders which have been discussed and ruled on in the case of *Bernice T. Hagins v. Redevelopment Commission of Greensboro,* decided this day, *ante* page 40, and each are overruled for the reasons stated therein.

The plaintiff alleges in her complaint that on May 25, 1962, the defendant, Allied Van Lines, Incorporated, and the defendant, Redevelopment Commission of Greensboro, unlawfully took posses-

sion and control of certain of plaintiff's personal property; that they removed it from her premises and delivered it to the defendant, South Atlantic Bonded Warehouse Corporation; that the defendant, South Atlantic Bonded Warehouse Corporation, received possession of plaintiff's property with full notice that it had been unlawfully taken from her, and that since the 25th day of May 1962, the defendant South Atlantic Bonded Warehouse Corporation, in concert with the defendant Allied Van Lines, Incorporated, and the defendant Redevelopment Commission of Greensboro, has exercised unlawful authority over plaintiff's property. She also alleges that because of the maltreatment by the defendants of plaintiff's property, she has been damaged in the sum of $10,000, and because of the wrongful exclusion of plaintiff from the possession, use and enjoyment, she has been damaged in the amount of $200 per month from and after the 25th day of May 1962, and that she is entitled to recover punitive damages in the amount of $12,000. Plaintiff seeks to recover judgment for these amounts.

The defendant, South Atlantic Bonded Warehouse Corporation, filed an answer denying the material allegations of plaintiff's complaint and alleged that it acted in good faith and at the request of the defendant, Redevelopment Commission of Greensboro, in moving certain personal property from a house located in the City of Greensboro and storing it in its warehouse for safekeeping, and that this defendant has carefully and reasonably kept said property since that time and issued its warehouse receipt for same. This defendant denies that the plaintiff is entitled to recover any sum from it.

The defendant, Allied Van Lines, Inc., filed an answer denying the material allegations of plaintiff's complaint and asserts that it had nothing to do with the hauling, carrying, moving, transportation, or storage of the plaintiff's property and asserts that it is not liable to the plaintiff in any sum.

The defendant, Redevelopment Commission of Greensboro, answering the complaint of the plaintiff filed herein, denies the material allegations thereof and asserts as a further defense that Judge Walter E. Crissman issued a Writ of Possession directing the Sheriff of Guilford County to place the Redevelopment Commission of Greensboro in possession of certain property and that the Sheriff of Guilford County, acting under said writ, caused to be removed some personal property of the plaintiff, and that same was removed and stored with the South Atlantic Bonded Warehouse Corporation; that the Redevelopment Commission of Greensboro did nothing except to obey the orders and the directions set forth in the judgment and the writ issued by the Superior Court. The Redevelopment Commis-

sion of Greensboro denies that the plaintiff is entitled to recover any sum whatsoever from it.

The plaintiff's second assignment of error is to the action of the Court in entering a final judgment in this case on April 14, 1967. This judgment reads as follows:

"THIS CAUSE coming on to be heard upon opening of Court at 9:30 a.m. and being heard before the undersigned Resident Judge of the Guilford County Superior Court in High Point, N. C., on the 14th day of April, 1967:

And it appearing to the Court, and the Court finding as a fact, based on the Order of the Court dated January 26, 1967, that the plaintiff is incapable of protecting her own rights or making decisions that would be to her best interest in this matter due to her apparent inability to comprehend judicial proceedings or to heed advice of counsel, and that the said Next Friend is the proper person to act herein on behalf of the plaintiff;

And it further appearing to the Court, and the Court finding as a fact, that Joseph Franks, appearing as Next Friend, notified Bernice T. Hagins by registered letter mailed April 10, 1967, and received by her on April 11, 1967, as evidenced by return receipt signed by her as addressee, a copy of which letter and the original receipt have been filed and made a part of the record of this case;

And it further appearing to the Court, and the Court finding as a fact, that said Next Friend was notified on April 10, 1967, by Wallace Harrelson, Attorney at Law of Greensboro, North Carolina, that he had been retained by Bernice T. Hagins, and whereupon Wallace Harrelson was then notified by said Next Friend that this matter would be heard before the undersigned Judge in open court at 9:30 a.m., Friday, April 14, 1967, in the Superior Court, High Point, North Carolina;

And it further appearing to the Court when this matter was called for hearing at 9:30 a.m. the following persons appeared: Joseph Franks, Jr., Next Friend, Charles E. Nichols, Esquire, for South Atlantic Bonded Warehouse Corporation, and Allied Van Lines, Incorporated; and Archie Cannon, Esquire, for the Redevelopment Commission of Greensboro, and the Court finds as a fact that neither Bernice T. Hagins, nor her attorney, Wallace Harrelson, appeared before the Court, and that neither communicated with the Court or Next Friend, regarding their appearance before the Court;

And it further appearing to the Court, and the Court finding as a fact, from statements made in open court by Joseph Franks, Jr., Next Friend, and from a Supplemental Affidavit filed herein by said Next Friend on the 7th day of April, 1967, which statements and Supplemental Affidavit found to be true.

And it further appearing to the Court, and the Court finding as a fact, that the parties to this action have agreed to waive a trial by jury and that the Court shall hear the evidence in the case;

And it further appearing to the Court that the plaintiff, through her Next Friend, has settled her claim herein against the Redevelopment Commission of Greensboro, one of the co-defendants, for the sum of $40,000.00;

And it further appearing to the Court, and the Court finding as a fact, that Joseph Franks, Jr., Next Friend of the plaintiff, has examined the property of the plaintiff now located at Rucker Moving and Storage Company, Inc., warehouse, and that said property is not in a damaged condition as a result of the movement or storage of the property by South Atlantic Bonded Warehouse Corporation and Allied Van Lines, Incorporated, as alleged in the Complaint, and that in relation to said examination the Next Friend has filed a Supplemental Affidavit herein;

And it further appearing to the Court, that the plaintiff, by and through the duly appointed Next Friend, and the defendants South Atlantic Bonded Warehouse Corporation and Allied Van Lines, Incorporated, and their successors and assigns, have agreed upon a compromise settlement and adjustment of all matters and things in controversy between them by the terms of which compromise settlement agreement defendants South Atlantic Bonded Warehouse and Allied Van Lines, Incorporated, and their successors and assigns, have agreed to accept the sum of $2,235.23 from the Redevelopment Commission of Greensboro, in full settlement and satisfaction for their services and the services of their successors and assigns rendered to the Redevelopment Commission of Greensboro and subsequently to the plaintiff since January 25, 1967, to thirty days after the date of this judgment, in consideration of which the plaintiff hereby relinquishes, releases and discharges the said defendants, and their successors or assigns, from all matters and things alleged, or which might have been alleged, in the Complaint in this action;
And it further appearing to the Court, that the defendants, South

Atlantic Bonded Warehouse Corporation and Allied Van Lines, Incorporated, have heretofore on March 28, 1967, filed exceptions and notice of appeal with regard to the judgment entered herein on March 17, 1967, and that said defendants have agreed to withdraw said exceptions and notice of appeal;

And the Court having investigated the matter of the proposed settlement and examined the Next Friend of the plaintiff with regard thereto, the Court is of the opinion, and finds as a fact, that the proposed compromise settlement is fair and reasonable and is for the best interest of the plaintiff; and, therefore, the Court is of the opinion, and finds as a fact, that the compromise settlement should be entered into by the Next Friend of the plaintiff and that the compromise settlement should be ratified, approved and confirmed by the Court;

NOW, THEREFORE, by and with the consent of the plaintiff and the defendants, as evidenced by the signatures of the Next Friend of the plaintiff, and the attorneys representing the defendants South Atlantic Bonded Warehouse Corporation and Allied Van Lines, Incorporated, and their successors and assigns, which signatures are hereinafter affixed to this judgment, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff shall have and recover nothing of the said defendants, or their successors and assigns, by reason of any of the matters and things alleged, or which might have been alleged, in the Complaint in this action; that the said defendants, and their successors and assigns, shall have and recover nothing further of the plaintiff by virtue of any services rendered to her with respect to her property up to and including thirty days from the date of the entry of this judgment as hereinafter provided; that the plaintiff, or the plaintiff through her Next Friend, shall have thirty days from the date of this judgment to remove her property from the Rucker Moving and Storage Company, Inc., warehouse, and in the event that the plaintiff shall not remove her property therefrom within said thirty days, Rucker Moving and Storage Company, Inc., shall have the power to sell said property as by law provided and apply the proceeds of said sale to such charges as it may incur subsequent to the thirty-day period; that the exceptions and notice of appeal heretofore filed on March 28, 1967, by South Atlantic Bonded Warehouse Corporation and Allied Van Lines, Incorporated, are hereby withdrawn and dismissed; and that the costs of this action shall be paid by the defendant Redevelopment Commission of Greensboro."

In this final judgment the facts are set out in detail and the plaintiff makes no exception to any finding of fact. Upon a careful examination of the record, we find that the evidence before the Court fully supports the findings of fact, and the findings of fact support the judgment. We must accept as established the facts set forth in the court's findings of fact. *Weddle v. Weddle,* 246 N.C. 336, 98 S.E. 2d 302; *In re Estate of Cogdill,* 246 N.C. 602, 99 S.E. 2d 785; *In re Hardin,* 248 N.C. 66, 102 S.E. 2d 420; *Trust Company v. Buchan,* 256 N.C. 142, 123 S.E. 2d 489.

The next friend is an officer of the court and a next friend, properly appointed, may negotiate, compromise and settle his ward's rights, provided his action is approved by the court. The judge found that the proposed settlement as set out in the foregoing judgment was fair and reasonable and was for the best interest of the plaintiff. Assignment of error number two is without merit and is overruled. *Oates v. Texas Company,* 203 N.C. 474, 166 S.E. 317. See also *Hagins v. Redevelopment Commission of Greensboro,* this day decided by this Court, *ante* page 40, and the cases cited therein.

Plaintiff's right to appeal from this judgment came into existence on April 14, 1967. Plaintiff took exception to the judgment but did not appeal therefrom. This judgment affected a substantial right. If she was *sui juris,* as she contends, she was required to give notice of appeal within ten days after notice of the judgment or within ten days after its rendition, and although she took exception thereto, she did not appeal. G.S. 1-279; G.S. 1-277.

Plaintiff's fourth and fifth assignments of error are to the action of the court in overruling her motion and signing the judgment in connection therewith. In view of what is said above and in view of the ruling in *Bernice T. Hagins v. Redevelopment Commission of Greensboro,* this day decided, *ante* page 40, we hold that these assignments of error are without merit, and they are overruled.

The order of Judge Crissman, dated October 3, 1967, denying, overruling and dismissing plaintiff's motion to vacate and set aside the order dated January 26, 1967, and all judgments and orders entered in this case subsequent thereto are affirmed.

Affirmed.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA, UPON THE RELATION OF BERNICE T. HAGINS, AND BERNICE T. HAGINS, v. E. R. PHIPPS, E. E. BALLINGER, DEPUTY SHERIFFS OF GUILFORD COUNTY IN MAY 1962, JOHN E. WALTERS, SHERIFF OF GUILFORD COUNTY IN MAY 1962, AND NATIONAL SURETY CORPORATION OF NEW YORK, A FOREIGN CORPORATION AND SURETY UPON THE OFFICIAL BOND OF SHERIFF JOHN E. WALTERS, REDEVELOPMENT COMMISSION OF GREENSBORO, A BODY CORPORATE.

(Filed 28 February, 1968.)

Infants §§ 5, 9; Judgments § 8—

The next friend appointed for the adult plaintiff in this case *is held* to have the authority of a next friend of an infant, G.S. 1-64, and consequently his consent to a judgment involving the interests of the plaintiff without the investigation and approval by the court is invalid.

APPEAL by plaintiff, Bernice T. Hagins, from *Crissman, J.*, October 1967 Civil Session, GUILFORD Superior Court, Greensboro Division, from a judgment denying plaintiff Bernice T. Hagins' motion to set aside the order dated January 26, 1967, appointing a next friend, the judgment dated March 17, 1967, and the order dated May 18, 1967, allowing compensation to the next friend.

This is one of the four cases growing out of a condemnation proceeding originally instituted in 1961 by the Redevelopment Commission of Greensboro against plaintiff herein. In Superior Court this was case no. 5045, and it is no. 67SC14 in this Court.

Comer & Harrelson, attorneys for plaintiff Bernice T. Hagins, appellant.

Cannon, Wolfe & Coggin by J. Archie Cannon, attorneys for defendant Redevelopment Commission of Greensboro.

No Counsel for defendants E. R. Phipps; E. E. Ballinger; John E. Walters, Sheriff of Guilford County; or National Surety Corporation of New York.

MALLARD, C.J. This case was consolidated with the three other cases in this Court for argument. The plaintiff, Bernice T. Hagins, in this case is the plaintiff in all the other cases, and the Redevelopment Commission of Greensboro is a defendant in all four cases. The other defendants herein are not involved in the other three cases as parties. In this Court the plaintiff filed only one brief, but a separate record was filed in each case. In the record in this case the plaintiff sets out five assignments of error. Number one relates to the appointment of the next friend, and number three relates to the order allowing compensation to the next friend. These assignments of error are identical to the exceptions to the same orders which

have been discussed and ruled on in the case of *Bernice T. Hagins v. Redevelopment Commission of Greensboro,* decided this day, *ante* page 40, and each are overruled for the reasons stated therein.

The plaintiff in her complaint alleges that E. R. Phipps and E. E. Ballinger were duly appointed Deputy Sheriffs of Guilford County in May 1962, and that John E. Walters was the duly elected and acting Sheriff of Guilford County and that the defendant, National Surety Corporation, was a surety upon the official bond of the defendant, John E. Walters, Sheriff of Guilford County. The plaintiff alleges that on the 25th day of May 1962, the defendants Phipps and Ballinger, while acting in their capacities as Deputy Sheriffs, without just cause unlawfully assaulted the plaintiff by threat of the use of arms and without authority of law forced her to permanently vacate her home at the corner of Macon and Dellinger Streets in Greensboro; that the assault above mentioned was inflicted under the color of the office of the defendant Walters, Sheriff of Guilford County, and at his direction; that said assault was ordered and commanded by the defendant Redevelopment Commission of Greensboro for its benefit; that on account of said assault the plaintiff has been damaged in the sum of $10,000 as compensatory damages which she seeks to recover, and she also seeks to recover $10,000 as punitive damages.

The defendants, Phipps, Ballinger and Walters, filed an answer denying the material allegations of plaintiff's complaint and asserting that the plaintiff is not entitled to recover anything from them or either of them.

The plaintiff's second assignment of error is to the action of the court in entering a judgment of nonsuit in this case, dated March 17, 1967. This judgment reads as follows:

> "THIS CAUSE coming on to be heard and being heard before the Honorable Walter E. Crissman, Judge Presiding over the March 6th, 1967 Civil Session of Guilford County Superior Court, upon motion of Joseph Franks, Jr., duly appointed and acting Next Friend of Bernice T. Hagins, plaintiff, for judgment as of voluntary nonsuit against the defendants, E. R. Phipps, E. E. Ballinger, Deputy Sheriffs of Guilford County in May, 1962, John E. Walters, Sheriff of Guilford County in May, 1962, and National Surety Corporation of New York, a foreign corporation and surety upon the official bond of Sheriff John E. Walters;
>
> NOW, THEREFORE, upon motion of Joseph Franks, Jr., Next Friend of Bernice T. Hagins, plaintiff, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above entitled action be, and

the same is hereby dismissed as in case of voluntary nonsuit against the defendants, E. R. Phipps, E. E. Ballinger, Deputy Sheriffs of Guilford County in May, 1962, John E. Walters, Sheriff of Guilford County in May, 1962, and National Surety Corporation of New York, a foreign corporation and surety upon the official bond of Sheriff John E. Walters."

This judgment reveals that it is a consent judgment. There is no finding or adjudication that it was investigated or approved by the court.

We hold that the next friend in this case had no more, nor less, authority than the next friend of an infant. G.S. 1-64; 44 C.J.S., Insane Persons, § 49.

"In the case of infant parties, the next friend, guardian *ad litem,* or guardian cannot consent to *a judgment or compromise* without the investigation and approval by the Court." (Emphasis added.) McIntosh, North Carolina Practice and Procedure, Second Edition, Vol. 2, page 147; *Butler v. Winston,* 223 N.C. 421, 27 S.E. 2d 124; *Trust Company v. Buchan,* 256 N.C. 142, 123 S.E. 2d 489.

The judgment of Judge Crissman, dated October 3, 1967, denying plaintiff's motion to set aside the judgment of nonsuit herein is reversed.

Reversed.

BROCK and BRITT, JJ., concur.

ROTHA MERRIT WILSON, JR., v. J. W. DUNN COMPANY
AND
CONNIE MARIE WILSON, BY HER NEXT FRIEND, ROTHA MERRIT WILSON, JR., v. J. W. DUNN COMPANY.

(Filed 28 February, 1968.)

1. Trial § 21—

On motion to nonsuit, plaintiff's evidence must be taken as true and considered in the light most favorable to him, resolving all contradictions therein in his favor and giving him the benefit of every inference which can be reasonably drawn therefrom.

2. Negligence § 26—

Nonsuit for contributory negligence is proper only when plaintiff's own evidence discloses contributory negligence so clearly that no other reasonable conclusion may be drawn therefrom.

3. Automobiles § 79— Evidence held insufficient to show contributory negligence as a matter of law in intersection accident.

Plaintiff's evidence was to the effect that she was driving in the northbound lane of a four-lane highway, that the northbound and southbound lanes were separated by a grass median, that as she approached an intersection she slowed to 30 miles per hour, that when 200 feet from the intersection she observed defendant's truck approaching the intersection from a road to her left, that defendant's truck did not stop but entered the intersection at a speed of 10 to 12 miles per hour, crossed the dual southbound lanes, slowed down as it entered the crossover in the median, then speeded up when plaintiff was 50 feet from the intersection and crossed into the right-hand northbound lane in front of plaintiff's automobile, which was still traveling at 30 miles per hour, where plaintiff collided with the right rear wheel of defendant's truck, *is held* insufficient to establish contributory negligence on the part of plaintiff barring recovery as a matter of law.

APPEAL by defendant from *Gambill, J.*, at the 9 October 1967 Civil Session of the Superior Court of DAVIDSON County.

These two civil actions were instituted in the Superior Court of Davidson County, one by Rotha Merrit Wilson, Jr., the owner of a Volkswagen automobile to recover for damages to his automobile, and the other by his daughter, Connie Marie Wilson, the driver of the Volkswagen, to recover for her bodily injuries arising out of a collision which occurred 26 August 1966, between the Volkswagen and a Ford dump truck owned by the defendant, J. W. Dunn Company, and driven by its agent. The cases were consolidated for trial and for purposes of this appeal. At the trial it was stipulated that at the time of the collision the defendant's truck was being operated by its agent in the scope of and in the course of his employment by the defendant, and that Connie Marie Wilson was operating a family-purpose automobile owned by her father, Rotha Merrit Wilson, Jr., and with his knowledge and consent.

The pleadings raised issues of negligence and contributory negligence. At the close of evidence for plaintiffs, and again at the close of all of the evidence, the defendant moved for nonsuit, which motions were denied. The jury by its verdict found the defendant negligent, the plaintiffs free from contributory negligence, and awarded $1,000.00 as damages to the plaintiff automobile owner for property damage and $1,000.00 as damages to the plaintiff driver for her bodily injuries.

From judgment in accord with the verdict, defendant appeals, assigning as error the action of the trial court in denying defendant's motions for nonsuit.

Walser, Brinkley, Walser & McGirt by Walter F. Brinkley for defendant appellant.

Jack E. Klass and Hudson, Ferrell, Petree, Stockton, Stockton & Robinson by W. F. Maready for plaintiffs appellees.

PARKER, J. Defendant in its brief and argument on this appeal has apparently conceded, and we agree, that there was sufficient evidence of negligence on the part of the driver of defendant's dump truck to take that issue to the jury. Defendant contends, however, that its motion for nonsuit should have been allowed on the grounds that the plaintiff, Connie Marie Wilson, was guilty of contributory negligence as a matter of law and this contention is the sole question presented by this appeal.

In considering a similar question in the recent case of *Anderson v. Carter,* 272 N.C. 426, 429, (1968), the North Carolina Supreme Court said: "It is elementary that upon a motion for judgment of nonsuit the evidence of the plaintiff must be taken to be true and must be considered in the light most favorable to him, resolving all contradictions therein in his favor, and giving him the benefit of every inference in his favor which can reasonably be drawn from it. Strong, N. C. Index, Trial, § 21. Obviously, the evidence of the plaintiff, so construed, is ample to support a finding of actionable negligence by the defendant. A judgment of nonsuit on the ground of the plaintiff's contributory negligence can be granted only when the plaintiff's evidence, considered in accordance with the above rule, so clearly establishes his own negligence as one of the proximate causes of his injury that no other reasonable inference or conclusion can be drawn therefrom. *Black v. Wilkinson,* 269 N.C. 689, 153 S.E. 2d 333; *Pruett v. Inman,* 252 N.C. 520, 114 S.E. 2d 360; *Bondurant v. Mastin,* 252 N.C. 190, 113 S.E. 2d 292."

Considering the evidence of the plaintiffs in the light of the foregoing rules, plaintiffs' evidence tended to show: That on the afternoon of 26 August 1966, Connie Marie Wilson, a sixteen year old girl, was driving her father's Volkswagen in a northerly direction on N. C. Highway 150 on a trip with a young girl companion from her home in Lexington to Winston-Salem. At the point where the collision occurred, N. C. Highway 150 is intersected and crossed by a rural paved road, which constitutes one continuous road but is given two numbers, RPR 3011 being the number given to designate the rural paved road as it runs into the intersection from the west and RPR 1508 being the number given to the rural paved road as it runs into the intersection from the east. At the intersection N. C. 150 is a four-lane, paved highway with two lanes of traffic for northbound

travel, two lanes of traffic for southbound travel, with the northbound and southbound lanes being separated by a grass covered median strip. The intersection is located in open rural country, and at the intersection N. C. Highway 150 is a through highway with a speed limit of 55 miles per hour. There are stop signs located at the intersection requesting all traffic on the rural paved road entering N. C. Highway 150 from either direction to stop. At a point 255 feet south of the intersection the northbound and southbound lanes of Highway 150 are each 24 feet in width and the grass covered median is 32 feet 6 inches in width. As one proceeds northward from that point on Highway 150 toward the intersection, the median gradually narrows and the northbound lane gradually widens to permit room for a lane of left-turn traffic, so that at the southern edge of the intersection the northbound lane is 33 feet in width and the median is 16 feet 10 inches in width, with the southbound lane remaining 24 feet in width. North of the intersection the northbound lane of Highway 150 is again 24 feet in width while the southbound lane is wider, to permit a left-turn lane for traffic moving south on 150 and desiring to turn left at the intersection, with the median on the north being approximately twenty feet in width at the north edge of the intersection. Farther north, at a point approximately 100 feet north of the intersection, the median again widens to 32 feet in width.

At approximately 2:15 p.m., in the afternoon of 26 August 1966, Connie Marie Wilson drove her father's Volkswagen in a northerly direction on Highway 150 toward the intersection and at a speed of approximately 40 miles per hour. There is a slight hill approximately 480 feet south of the intersection and as the Volkswagen passed this hill and continued to approach the intersection, Connie Marie Wilson took her foot off of the accelerator and slowed the Volkswagen to approximately 30 miles per hour. When she was approximately 200 feet from the intersection, she observed the defendant's dump truck on her left, on RPR 3011 at or around the stop sign. The truck did not stop but continued to move at approximately ten to twelve miles per hour as it entered into the intersection and crossed the dual lanes for southbound traffic on Highway 150. As it entered the crossover in the median, the truck slowed down even more. When the Volkswagen was approximately 50 feet from the intersection, the truck speeded up and crossed into the northbound lanes of traffic on Highway 150 directly in front of the Volkswagen. At this point, the Volkswagen was traveling approximately 30 miles per hour and Connie Marie Wilson put her foot on the brakes, but did not have time to apply them effectively to slow or stop the Volkswagen be-

fore the collision occurred. The front of the Volkswagen struck the right rear wheel of the truck, which was located approximately three feet from the rear end of the truck. The impact occurred in the right-hand, northbound lane close to the extreme right, or eastern, side of Highway 150 and at the point where RPR 1508 intersects.

On the foregoing evidence it is the contention of the defendant that the plaintiff, Connie Marie Wilson, was guilty of contributory negligence as a matter of law. We do not agree. Since the burden of proof on the issue of contributory negligence is upon the defendant, a motion for judgment of involuntary nonsuit upon that ground should be allowed only when the evidence of the plaintiffs, considered alone and taken in the light most favorable to them, together with all inferences favorable to them which may reasonably be drawn therefrom, so clearly establishes the defense that no other conclusion can reasonably be drawn. *Raper v. Byrum,* 265 N.C. 269, 144 S.E. 2d 38 (1965), and cases there cited.

Defendant contends that the intersection in question was in law but a single intersection, since at the point of intersection the median strip is less than 30 feet in width, and therefore the definition set forth in G.S. 20-38(12) which states that where a highway includes two roadways 30 feet or more apart, then each crossing of each roadway of such divided highway by an intersecting highway shall be regarded as a separate intersection, does not apply in this case. We do not find it necessary to pass upon this contention of the defendant, though we point out that at a point 255 feet south of the intersection, and again at a point 100 feet north of the intersection, the northbound and southbound roadways of Highway 150 are more than 30 feet apart, and that the median strip narrows as the intersection is approached only in order to permit more room for left-turn lanes of traffic. Therefore we think it entirely possible that this is the type of intersection which the legislature intended by G.S. 20-38(12) to be treated as two separate intersections. However, accepting for present purposes the defendant's contention to be correct that this constituted in law but a single intersection, we still cannot agree that the evidence of the plaintiffs so clearly establishes that Connie Marie Wilson was guilty of contributory negligence that no other conclusion can reasonably be drawn.

Defendant's contention is that Connie Marie Wilson first observed the truck as it was entering the intersection and at a time when she was approximately 200 feet away, and that in the exercise of such care as an ordinarily prudent person would take to avoid a collision with the truck, she had ample time to apply her brakes and to slow her Volkswagen or to change its course sufficiently

to avoid the collision. Defendant contends that this being considered as a single intersection, Connie Marie Wilson had no right to assume that the truck driver would stop in the median, but was under a duty to anticipate that he would continue across the northbound lane of traffic, and that had she exercised ordinary care she could have avoided the collision, either by applying her brakes in time, or by steering her Volkswagen to the left into that portion of the northbound lane which was not obstructed by the truck, or a combination of both. Defendant contends that the evidence establishes that Connie Marie Wilson did not apply her brakes, did not steer to the left, but on the contrary steered her Volkswagen directly into the right-hand, rear wheel of the truck.

We grant that a very cautious or a very skillful driver, when faced with the situation which Connie Marie Wilson confronted, might have successfully taken action to avoid the collision. We grant that the evidence was sufficient to take to the jury the issue of whether or not she did in fact exercise such care to avoid the collision as an ordinarily prudent person would have exercised under the circumstances. But we do not agree that the evidence so clearly establishes the fact of her negligence as to require that this be found as a matter of law. She was traveling at 30 miles per hour, well within the lawful limit. At this speed her vehicle was moving 44 feet per second. She saw the truck slow down as it entered into the median. We do not think that an ordinarily prudent person in her situation must have anticipated, or was under a positive legal duty to anticipate, that the truck would continue across in front of her line of traffic. Not until she was about five car lengths away or approximately 50 feet from the intersection did she see the truck suddenly speed up as is passed through the median and move across directly into her path in the northbound lane of Highway 150. She then had only slightly more than one second in which to apply her brakes and slow or change the course of her vehicle. We do not think that her failure to do so establishes contributory negligence as a matter of law.

That she drove into the right-hand rear wheel of the truck, instead of attempting to drive in front or behind the truck, may have under the circumstances been her safest course. She testified that she thought it was, stating in response to a question of defendant's counsel as to whether or not she more or less intended to hit the truck's right rear wheel: "Yes, it was the safest thing I could think of then because if I went either way, I would have gone under the truck and cut the top of the car off and my head." She further testified: "When I saw he went ahead and speeded up and tried to

get in front of me, I saw if I went to the right of him, I would go completely under his truck and if I went to the left, I couldn't get behind, I would go under it anyway or run in the median, so I just really guided for the wheel because I knew that would definitely stop us and probably not kill us." We cannot say as a matter of law that Connie Marie Wilson was wrong in this conclusion. We think the issue of her contributory negligence was properly submitted to the jury. The judgment below is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

JAMES HENRY JACKSON, AN INFANT BY AND THROUGH HIS NEXT FRIEND, HAROLD D. DOWNING, PLAINTIFF, v. DAVID JONES, JR. AND ABERDEEN AND ROCKFISH RAILROAD COMPANY, DEFENDANTS.

(Filed 28 February, 1968.)

1. Pleadings §§ 2, 7—

The primary function of the pleadings is to state in a plain and intelligible manner facts constituting the grounds of action or defense so that (1) each side may know the other's contentions, (2) the court may understand the controversy, and (3) there be a permanent memorial of the litigation in the record.

2. Trial § 5—

The practice in this State of reading the pleadings to the jury is not a matter of right but is to be determined by the trial court in the exercise of its discretion.

3. Same; Master and Servant § 86—

In an action by an employee against the third party tort-feasors, defendants' allegations as to the concurring negligence of the employer and as to an award received by plaintiff under the Workmen's Compensation Act are properly pleadable, but such allegations as to compensation benefits should not be read in the presence of the jury, and the rulings of the trial court in denying plaintiff's motion to strike the allegations and in suppressing the reading of such allegations to the jury are affirmed.

ON Writ of *Certiorari* to review an Order entered by *Brewer, J.*, November 13, 1967, Civil Session, CUMBERLAND Superior Court.

This action arose out of a collision between a truck and a train at about 11:00 a.m. on October 8, 1964. The truck was owned by Ideal Brick Company, employer, and was being operated in the

course of his employment by the plaintiff James Henry Jackson, employee. The defendant David Jones, Jr. was the engineer on the defendant railroad company's locomotive.

The action is by the plaintiff James Henry Jackson, employee, to recover damages for personal injuries which he alleges are the proximate result of the negligence of the defendants.

The defendants filed answer in which they denied actionable negligence on their part, and in their Second Further Answer and Defense, allege as follows:

"ONE: That on October 8, 1964, plaintiff was regularly employed as a truck driver by Ideal Brick Company, a North Carolina corporation with principal office at Slocumb, North Carolina; that on said date, Ideal Brick Company regularly employed five or more employees, and pursuant to the provisions of Chapter 97 of the General Statutes of North Carolina, entitled 'Workmen's Compensation Act,' plaintiff and Ideal Brick Company were subject to said laws of North Carolina; that on the occasion of the collision described in the complaint, plaintiff was injured by accident while in the course and scope of his employment with Ideal Brick Company."

"Two: That Ideal Brick Company, as plaintiff's employer, had purchased Workmen's Compensation Insurance with Southern Home Insurance Company, which insurance policy was in full force and effect on October 8, 1964, the date of plaintiff's injuries; that by reason of his injuries and expenses resulting from the collision described in the complaint, plaintiff was paid a monetary award by Southern Home Insurance Company, in behalf of Ideal Brick Company, pursuant to the provisions of the North Carolina Workmen's Compensation Act."

THREE: (In substance) That the Ideal Brick Company was negligent in furnishing to the plaintiff a truck with defective brakes.

FOUR: (In substance) That if the defendant was negligent in any respect, that the negligence of Ideal Brick Company combined and concurred with any negligence of the defendant in producing the injuries complained of.

"FIVE: If it should be found by the jury that the above-described negligence of Ideal Brick Company was not the sole proximate cause of the collision and of plaintiff's injuries, then it is alleged, as aforesaid, that said negligence of Ideal Brick

Company combined and concurred with any such negligence of the defendants in producing the collision and plaintiff's resulting injuries and damages, and, at the least, the said negligence of Ideal Brick Company estops and bars Ideal Brick Company and its insurance carrier, Southern Home Insurance Company, from recovering in this action the aforementioned sum of money paid to plaintiff under the provisions of the Workmen's Compensation Act of North Carolina."

The plaintiff filed a motion to strike from the answer all of the allegations contained in the defendant's Second Further Answer and Defense, and in the alternative, prayed that the Court prohibit the reading to the jury of paragraphs One and Two and the portion of paragraph Five referring to the estoppel of Ideal Brick Company and Southern Home Insurance Company from recovering in this action money previously paid to the plaintiff under The Workmen's Compensation Act.

Judge Brewer denied the motion to strike, but entered an order suppressing the reading to the jury or mention to the jury of the allegations in paragraphs One and Two and the portion of paragraph Five. The pertinent part of his order is as follows:

"IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff's Motion and Demurrer to the Second Further Answer and Defense of the defendants be, and the same is hereby overruled, but IT IS FURTHER ORDERED that paragraphs One and Two of said Second Further Answer and Defense and all that portion of paragraph Five which commences with line six (line seven as reproduced herein) after the word 'damages,' reading: 'and at the least, the said negligence of Ideal Brick Company estops and bars Ideal Brick Company and its insurance carrier, Southern Home Insurance Company, from recovering in this action the aforementioned sum of money paid to plaintiff under the provisions of the Workmen's Compensation Act of North Carolina,' shall not be read to or brought before the jury on *voir dire* in the trial of this action."

The plaintiff and the defendants excepted to the signing of the Order. The defendants petitioned this Court for Writ of *Certiorari*, and by his answer to the petition, the plaintiff joined the defendants in requesting this Court to review the Order. We allowed *certiorari*.

Rose and Thorp, and Quillin, Russ, Worth and McLeod, attorneys for defendant appellants.

Anderson, Nimocks and Broadfoot, and McCoy, Weaver, Wiggins, Cleveland and Raper, attorneys for plaintiff appellee.

BROCK, J. The defendants assign as error that the trial court erred in ordering that certain portions of defendants' Second Further Answer shall not be read to or brought before the jury on *voir dire* in the trial of this action.

The defendants argue that the trial court should have allowed the motion to strike if the pleading is improper; and that since it was not stricken as improper, defendants are entitled to read and explain the pleadings to the jury.

The primary function of the pleadings is to state in a plain and intelligible manner the facts constituting the grounds of action or defense, so that (1) each side of the controversy may know the other's contention and prepare to meet it, that (2) the court may have a clear understanding of the controversy, and that (3) it may go into the record as a permanent memorial of the litigation. McIntosh, North Carolina Practice and Procedure, Second Edition, Vol. 1, p. 522. It is true that the general practice has been for attorneys to read the pleadings in open court in the presence of the jury, after the jury has been empanelled to try the case. But there is no requirement by statute, case law, or rule of court, that the pleadings must be read to the jury. Nor is it provided by any statute, case law, or rule of court, that a party has an unqualified right to read his pleadings to the jury. *Pratt v. Bishop,* 257 N.C. 486, 499, 126 S.E. 2d 597. It might be noted that, effective July 1, 1969, "Unless otherwise ordered by the judge, pleadings *shall not* be read to the jury." (Emphasis added.) General Statutes of North Carolina, Chapter 1A, Article 3, Rule 7(d).

Our research discloses that numerous opinions of our Supreme Court have referred to a reading of the pleadings in the presence of the jury, but the only case we have found containing a pointed statement is *Privette v. Privette,* 230 N.C. 52, 51 S.E. 2d 925 (1949). In that case the Supreme Court was considering an appeal from an order of the judge affirming an order of the Clerk denying a motion to strike allegations from a motion made to the Clerk. In dismissing the appeal, the Court was pointing out the difference in the attempted appeal, and those appeals which had been allowed for the purpose of reviewing a ruling on a motion to strike from pleadings. The Court said: "The pleadings in a cause raise issues of fact to be decided by a jury, chart the course of the trial and, in large measure,

determine the competency of evidence. They are to be read to the jury. If they contain irrelevant or impertinent averments not competent to be shown in evidence, a refusal to strike might impair or imperil the rights of the adversary party. For this reason this Court has entertained appeals from orders denying motions to strike allegations in pleadings." Obviously this statement concerning the reading of pleadings to the jury was not necessary to the decision of the Court to dismiss the appeal. At most it was in explanation of why appeals from orders denying motions to strike from pleadings had been allowed by the Court. The statement was merely a recognition of the fact of the general practice in the Superior Courts of attorneys reading the pleadings in open court. According to Shepard's North Carolina Citations, *Privette* has never been cited as authority that a party has an unqualified right to read his pleadings to the jury.

We hold that whether the pleadings, or any parts thereof, are to be read in open court in the presence of the jury is a matter to be determined by the trial judge in the exercise of his discretion.

The plea of the concurring negligence of the employer of the plaintiff and the fact of an award under The Workmen's Compensation Act is a proper plea, and the trial court was correct in refusing to strike it. *Poindexter v. Motor Lines,* 235 N.C. 286, 69 S.E. 2d 495; *Essick v. Lexington,* 233 N.C. 600, 65 S.E. 2d 220. Such a plea is necessary to protect the defendants' right to have the issue of the concurring negligence of plaintiff's employer determined; and the plea is necessary for the purpose of bringing before the judge the fact of an award so that the judge can enter a proper judgment on the verdict. But it does not follow that defendants are entitled to read the allegations in question, or explain them, to the jury.

In their brief, defendants seek to distinguish *Spivey v. Wilcox,* 264 N.C. 387, 141 S.E. 2d 808, by pointing out that the statement of facts and the opinion make no mention of the case involving a plea of concurring negligence of plaintiff's employer. An examination of the record on appeal in the *Spivey* case clearly reveals that such a plea was involved. In *Spivey* the following was said with respect to the evidence admitted at trial: "In his cross-examination of plaintiff's doctor, counsel also brought out, over plaintiff's objections, that the doctor had handled plaintiff's case 'as a Workmen's Compensation matter' and that plaintiff himself was not at the present time indebted to the doctor for any services rendered. This, too, was error. The obvious purpose of these references to Workmen's Compensation benefits was to reduce the amount of the verdict in the event the case went to the jury."

To allow the defendants to read in the presence of the jury, or

explain to the jury on *voir dire,* the allegations of the paragraphs affected by Judge Brewer's Order would create as much mischief as allowing testimony before the jury of the fact of Workmen's Compensation benefits.

The defendants argue strenuously that the jury cannot understand the full import of the issue of concurring negligence unless they can have the fact of the interaction of the Workmen's Compensation benefits explained to them. This argument must fail.

The plaintiff is entitled to have assessed in his action against the third party tort-feasor, if he is entitled to recover at all, a fair compensation for his injuries without regard to any benefits available or paid under Workmen's Compensation. *Spivey v. Wilcox, supra.*

The Order of Judge Brewer is

Affirmed.

MALLARD, C.J., and BRITT, J., concur.

BOBBIE JEAN GRANT v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY.

(Filed 28 February, 1968.)

1. Insurance § 81—

The provisions of the Motor Vehicle Financial Responsibility Act of 1957 must be read into a policy issued pursuant to the Assigned Risk Plan and construed liberally to effectuate its purpose of providing financial protection to persons injured by the negligent operation of an automobile.

2. Insurance § 108—

To avoid liability to a third party beneficiary of an assigned risk automobile insurance policy, the insurer must allege and prove cancellation and termination of the policy in accordance with the applicable statutes.

3. Same; Insurance § 94—

A purported cancellation of a policy of automobile liability insurance by an assigned risk insurer upon request by a premium finance company acting under a power of attorney in a premium finance agreement, such request arising from the insured's default in making premium payments, *is held* ineffectual to prevent recovery upon the policy by a party injured in an accident with the insured two days after the purported cancellation, in the absence of a showing by the insurer that the premium finance company had given to the insured and his insurance agent ten days' written notice of such request of cancellation pursuant to G.S. 58-60.

THIS is an appeal from *McConnell, J.,* December 11, 1967, Regular Civil Session, RICHMOND County Superior Court. In this case the plaintiff seeks to recover on a judgment previously obtained by

the plaintiff in an action against Mary Ann Stubbs (Stubbs). Plaintiff was injured in an automobile accident when riding as a guest passenger in an automobile owned and operated by Stubbs. The plaintiff contends that at the time of the accident, namely, January 9, 1964, Stubbs had a valid automobile liability insurance policy with the defendant. As a result of said accident, plaintiff had recovered a judgment against Stubbs which is the judgment that the plaintiff now seeks to recover from the defendant by virtue of the automobile insurance policy.

The defendant admits that Stubbs was assigned to it as an assigned risk in September of 1963, and that a policy had been issued to her.

At the time of the issuance of the policy, Stubbs had financed the premium through Universal Acceptance Corporation of Fayetteville, North Carolina (Acceptance Corporation) and had given a Power of Attorney to Acceptance Corporation.

On January 7, 1964, the defendant received through the mails a request from Acceptance Corporation reading: "Request is hereby made that subject policy be cancelled effective as soon after this date as statutory requirements permit. As insured failed to make payment under the terms of his contract with us, PLEASE FORWARD RETURN PREMIUM TO US FOR DISBURSEMENT. Authority for this request is set forth in the attached Power of Attorney, duly executed by the insured, and notarized." Attached to this was the Power of Attorney given Acceptance Corporation by Stubbs. The defendant thereupon cancelled the policy of insurance issued to Stubbs effective 12:01 a.m., January 7, 1964, and calculated the return premium. On January 14, 1964, the defendant prepared and mailed to the North Carolina Department of Motor Vehicles "Notice of Termination", and on January 15, 1964, mailed check for the return premiums to Acceptance Corporation and sent a letter to Stubbs advising her that the policy had been cancelled pursuant to the request based upon the Power of Attorney she had given Acceptance Corporation.

Upon these facts the lower court held that the policy of insurance had not been cancelled and was in full force and effect on January 9, 1964, at the time of the accident, and that the plaintiff recover judgment from the defendant in the amount previously recovered from Stubbs.

Carpenter, Webb, and Golding by William B. Webb for defendant appellant.

Webb, Lee & Davis by Hugh A. Lee for plaintiff appellee.

CAMPBELL, J. It is conceded by all parties that under the applicable statutes as originally enacted in 1957 known as "The Vehicle Financial Responsibility Act of 1957" as contained in Article 13 of Chapter 20 of the North Carolina General Statutes, Section 20-309 through 20-319 as construed in the cases of *Daniels v. Nationwide Mutual Insurance Company*, 258 N.C. 660, 129 S.E. 2d 314 (1962), and *Griffin v. Hartford Accident and Indemnity Company*, 264 N.C. 212, 141 S.E. 2d 300 (1965), the insurance policy involved here would have been properly cancelled and would not have been in effect at the time of the accident in question.

The trial court held that the requisite notice, as provided by statute, and as provided by law, for the cancellation of an assigned risk policy, was not given by the defendant, and the policy of insurance referred to in the pleadings and in the stipulations was in full force and effect on January 9, 1964, at the time of the accident referred to in the pleadings and upon which judgment had been rendered against the defendant's insured.

Since this holding is contrary to the statute as originally enacted in 1957 and as construed in the *Daniels* and *Griffin* cases, *supra*, the question presented is whether the Legislature in the Session Laws of 1963 made such changes as will support the decision of the lower court.

"The policy in question having been issued pursuant to the Assigned Risk Plan and for the purpose of fulfilling the requirement of the Financial Responsibility Act of 1957, the provisions of that act, relative to the cancellation of such policies, must be read into this policy and construed liberally so as to effectuate the purpose of the act." *Harrelson v. Insurance Company*, 272 N.C. 603, 158 S.E. 2d 812 (1967).

In an action such as this where the third party beneficiary is bringing the action against the insurance company, "to avoid liability insurer must allege and prove cancellation and termination of the insurance policy in accordance with the applicable statute." *Daniels v. Nationwide Mutual Insurance Company, supra.*

Likewise, as stated in the *Daniels* case, *supra*, "Perhaps there are reasons why a person insured under a compulsory motor vehicle liability insurance policy should not be permitted to authorize an agent to cancel such policy, particularly in the circumstances here shown. But nothing in the statute expressly or impliedly forbids." Subsequent to the *Daniels* case, the Legislature in 1963 enacted Chapter 1118 which is entitled: "An Act to Provide for the Regulation of Insurance Premium Financing, Providing for the Licensing of Insurance Premium Finance Companies, Providing for Insurance Prem-

ium Finance Charges, Rules, Regulations, Administrative Hearings, and Penalties." This chapter is codified as Article 4 of Chapter 58 of the General Statutes of North Carolina and is Section 58-55 through Section 58-61.1.

As stated in *Allstate Insurance Company v. Hale,* 270 N.C. 195, 200, 154 S.E. 2d 79 (1967).

> "The primary purpose of the law requiring compulsory insurance is to furnish at least partial compensation to innocent victims who have suffered injury and damage as a result of the negligent operation of a motor vehicle upon the public highway. Insurance covering liability arising out of the ownership, maintenance and use of a motor vehicle on the highway in the amount required by statute is mandatory. If the policy exceeds the amount required, the policy to the extent of the excess is voluntary. Voluntary insurance is contractual and determines the rights and liabilities of the parties *inter se.* Assigned risk insurance is compulsory both as to the insurer and the insured, made so by law. Such policy must be interpreted in the light of the statutory requirement rather than the agreement or understanding of the parties. The requirements of the statute with respect to cancellation must be observed or the attempt at cancellation fails. Such policies 'are generally construed with great liberality to accomplish their purpose'."

The 1963 Act now codified as G.S. 58-60 provides:

> *"Procedure for cancellation of insurance contract upon default; return of unearned premiums; collection of cash surrender value.* — When an insurance premium finance agreement contains a power of attorney or other authority enabling the insurance premium finance company to cancel any insurance contract or contracts listed in the agreement, the insurance contract or contracts shall not be cancelled unless such cancellation is effectuated in accordance with the following provisions:
>
> (1) Not less than ten (10) days written notice be furnished the insured or insured's shown on the insurance premium finance agreement of the intent of the insurance premium finance company to cancel his or their insurance contract or contracts unless the defaulted installment payment is received. A notice thereof shall also be mailed to the insurance agent.
>
> (2) After expiration of such period, the insurance premium finance company shall mail the insurer a request for can-

cellation, including a copy of the power of attorney, and shall mail a copy of the request for cancellation to the insured at his last known address as shown on the insurance premium finance agreement.

(3) Upon receipt of a copy of such request for cancellation notice by the insurer or insurers, the insurance contract shall be cancelled with the same force and effect as if the aforesaid request for cancellation had been submitted by the insured himself, without requiring the return of the insurance contract or contracts. * * *"

In the instant case, there is no evidence at all that this statute was complied with. In fact, the request for cancellation submitted by the Acceptance Corporation should have alerted the defendant that something had not been complied with because the request stated: "Request is hereby made that subject policy be cancelled *effective as soon after this date as statutory requirements permit.*" (emphasis added.)

At any rate, and we so hold, the burden is upon the insurance company to show that all statutory requirements have been complied with, including the ten days written notice by the premium finance company to the insured together with said notice to the insurance agent, prior to the premium finance company requesting cancellation of the policy. We do not think this unduly burdens the insurance company, for that the insurance company has received and has on hand the full premium and before making cancellation and returning any portion of the unearned premium, the insurance company can require the premium finance company to satisfy fully the insurance company that all statutory notices have been given, otherwise, the insurance company will not return any of the premium. With this ability on the part of the insurance company to use a "money talks" approach, we think the primary purpose of the law will be more fully complied with and innocent victims more adequately protected. *cf. Cannon v. Merchants Mutual Insurance Co.*, 35 Misc. 2d 625, 230 N.Y.S. 2d 282 (1962); *White v. Edwards*, ... Mass. ....., 227 N.E. 2d 354 (1967). Furthermore, if the premium finance company misleads the insurance company wrongfully by requesting cancellation of the policy, the insurance company can seek redress from the premium finance company. *Johnson v. General Mutual Insurance Company,* 271 N.Y.S. 2d 428 (1966).

Since in the instant case the defendant does not show that this provision of the law had been complied with prior to cancellation of the policy, we find that the court below was correct in its holding

that the policy in question was in full force and effect at the time of the accident and that it had not been theretofore cancelled.

Affirmed.

MORRIS and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. T. F. EVERS.

(Filed 28 February, 1968.)

1. Criminal Law § 118—

A mere disparity in the length of time devoted by the trial court in stating the contentions of the parties is not prejudicial error where the charge as a whole fairly presents the contentions of the defendant.

2. Criminal Law § 163—

An exception to the charge in its entirety is a broadside exception and cannot be sustained.

APPEAL by defendant from *Burgwyn, E.J.*, October 1967 Session, BLADEN Superior Court.

The defendant was charged in a valid bill of indictment with the felony of breaking and entering with intent to commit the crime of larceny, in violation of G.S. 14-54. Trial was by jury on the bill of indictment, and the jury returned a verdict of guilty of the felony as charged in the first count.

From a judgment of imprisonment the defendant appeals to the Court of Appeals.

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

Worth H. Hester for the defendant.

MALLARD, C.J. Defendant, an indigent person, was represented at the trial in the Superior Court, and in this Court, by Worth H. Hester, his court-appointed attorney. Judge Edward B. Clark, Resident Judge of the Thirteenth Judicial District ordered Bladen County to supply a copy of the transcript of the trial as provided by law, and directed Worth H. Hester, his court-appointed attorney, to represent the defendant and prosecute his appeal, and ordered that the record on appeal and briefs be reproduced pursuant to the Rules of the Court of Appeals and the costs thereof to be paid as provided by law.

The defendant asserts as error that the trial judge did not give equal emphasis to the contentions of the defendant and to the State, and also assigns as error the entire charge of the court.

From a reading of the charge as a whole, it appears that the trial judge fairly reviewed the contentions of the defendant. We find the argument of the defendant that the trial judge did not give equal stress to his contentions is without merit and is overruled. Our Supreme Court has held many times that a mere disparity in the length of time devoted by a judge in stating contentions of parties does not constitute prejudicial error. *State v. Sparrow,* 244 N.C. 81, 92 S.E. 2d 448; *State v. Maynard,* 247 N.C. 462, 101 S.E. 2d 340.

We have reviewed the entire charge, and when considered as a whole, we find it to be free from prejudicial error.

The exception to the charge in its entirety is a broadside exception and cannot be sustained. *State v. Biggerstaff,* 226 N.C. 603, 39 S.E. 2d 619; *State v. Anderson,* 228 N.C. 720, 47 S.E. 2d 1; *State v. Dillard,* 223 N.C. 446, 27 S.E. 2d 85.

After a careful review of the entire record, we find that the defendant has had a fair trial, free from prejudicial error.

No error.

BROCK and BRITT, JJ., concur.

PRESTIGE REALTY COMPANY, PETITIONER, v. STATE HIGHWAY COMMISSION, RESPONDENT.

(Filed 20 March 1968.)

1. Highways § 5; Eminent Domain § 1—

Upon a finding that the use of a direct access from adjoining property onto a highway is an obstruction to the free flow of traffic thereon or a hazard to the safety of travelers, the State Highway Commission has authority to prohibit further use of the direct access; if the denial of access involves a taking of property, the owner is entitled to compensation for its taking, the remedy being by proceedings under Chapter 136 of the General Statutes.

2. Same— Denial of direct access to a highway held to constitute a taking and to justify compensation.

The agreement between petitioner's predecessor in title and the Highway Commission for the conveyance of a right of way provided that the owner or his assigns should have no right of access to the highway con-

structed on the right of way except at a designated survey station. The Highway Commission subsequently denied direct access at the designated survey station, but constructed a service road along the right of way adjacent to petitioner's property and parallel to the highway, which connected the streets terminating at the southern end of petitioner's property but which did not connect to any other street or highway. *Held:* The agreement for access contemplated an easement for direct access to the highway at the designated survey station and not access to a service road constructed six years after the agreement, and the denial of such direct access is a taking of a property right, entitling petitioner to just compensation.

3. Appeal and Error § 28—

An exception to the findings on the ground that they are based on incompetent evidence cannot be sustained when appellant fails to point out what part of the evidence is incompetent.

APPEAL by respondent from *Ervin, J.*, October 16, 1967 Regular Civil Session IREDELL Superior Court.

This proceeding was instituted by petitioner, Prestige Realty Company, pursuant to the provisions of G.S. 136-19 and Article 2 of Chapter 40 of the General Statutes of North Carolina on August 6, 1962, to recover damages alleged to have been suffered by reason of the appropriation of certain property rights of petitioner by the State Highway Commission, the respondent.

Petitioner is, and was as of June 23, 1960, the owner of certain real property abutting the northern margin of the right of way of Interstate Highway 40 (formerly U. S. Highway 64 Bypass). The property is located near the northern city limits of the City of Statesville, Iredell County, North Carolina.

Petitioner's predecessors in title by right of way agreement dated March 11, 1953, conveyed to respondent an easement 260 feet in width. The right of way acquired was for construction of a controlled access highway, U. S. Highway 64 Bypass, but petitioner's predecessors in title reserved to themselves, their heirs and assigns, a direct access to the highway to be constructed upon said right of way by virtue of the following language appearing in the right of way agreement:

> "It is further understood and agreed that the undersigned and their heirs and assigns shall have no right of access to the highway constructed on said right of way except at the following survey station: 101+00."

Petitioner subsequently acquired the subject property, and subdivided a portion thereof for residential purposes. Petitioner caused streets to be laid out and paved in the subdivision.

Respondent utilized the right of way agreement to construct Highway 64 Bypass, a controlled access highway. The highway, as constructed, consisted of a dual-lane, nondivided facility, with one lane for traffic moving in an easterly direction and one lane for traffic moving in a westerly direction. Petitioner had access to said highway via an access road extending from the southern border of petitioner's property and joining the northern edge of said highway at survey station 101+00.

During the year of 1959 the respondent undertook a project to upgrade Highway 64 Bypass to Interstate standards. Pursuant to this project, respondent denied access to all abutting property, including the property of petitioner. Petitioner's access road at survey station 101+00 was closed.

Respondent constructed a service road on its right of way south of petitioner's property and parallel to the northernmost lane of travel of the controlled access facility. Petitioner was allowed full access to the service road but no access to the main lanes of travel. The service road did not junction with the main lanes of travel, but connected with the subdivision streets. Respondent constructed a paved road from U. S. Highway 21, which is west of petitioner's property, to connect with the northwestern corner of the subdivision. Petitioner's direct access point to the controlled access highway was not discontinued until the alternate access route was completed.

Petitioner, by this proceeding, seeks just compensation for the taking of said access point and for damages to the remainder of its property by reason of the taking. Respondent denies that petitioner is entitled to recover for denial of direct access to the main lanes of the controlled access highway, alleging that said denial was an exercise of the police power of the State.

Respondent objected to the appointment of commissioners, and petitioner and respondent both objected and excepted to the report of commissioners and order confirming report of the commissioners, and gave notice of appeal to the Superior Court.

Upon hearing in the Superior Court, on motion of the Highway Commission to determine all issues except the issue of damages, the Superior Court found, as a matter of law, that petitioner sustained a compensable taking of its property right by reason of the closing and elimination of the access point at survey station 101+00. Respondent Highway Commission appealed.

Attorney General T. Wade Bruton, Deputy Attorney General Harrison Lewis and Assistant Attorney General Henry T. Rosser for respondent appellant.

Walser, Brinkley, Walser and McGirt by Gaither S. Walser; Sowers, Avery and Crosswhite by Neil S. Sowers and Kenneth D. Thomas for petitioner appellee.

BROCK, J. Interstate Highway 40 (formerly U. S. Highway 64 Bypass around the City of Statesville) at the location in question on this appeal is a controlled access highway (G.S. 136-89.49(2)); and is so treated by both parties in this controversy. The petitioner does not question the authority of the State Highway Commission to close its access road to U. S. Highway 64 Bypass (now Interstate 40). There can be no doubt of the authority of the State Highway Commission upon its finding that the use of a direct access from adjoining property onto such highway is an obstruction to the free flow of traffic thereon, or a hazard to the safety of travelers upon the highway, to prohibit further use of the direct access. Article 6D of Chapter 136 of the General Statutes of North Carolina; *Petroleum Marketers v. Highway Commission,* 269 N.C. 411, 152 S.E. 2d 508. In such event, the remedy of the property owner is by a proceeding under Chapter 136 of the General Statutes, and this is the remedy sought by the plaintiff in this action.

In support of its position that the action of the Highway Commission in closing the access from petitioner's land to U. S. Highway 64 (Interstate 40) did not constitute an appropriation of any property or property right of the petitioner, and therefore was not a compensable taking, the Highway Commission cites G.S. 136-89.48, G.S. 136-89.50, G.S. 136-89.51, and G.S. 136-89.53. If these General Statutes would otherwise allow such a taking without compensation, they are not controlling in this case because they were not enacted until 1957, which was four years after the right of way agreement between the Commission and the petitioner's predecessors in title. *Petroleum Marketers v. Highway Commission, supra.*

Except for the designation of the survey station, the language used in the right of way agreement between the Highway Commission and the petitioner's predecessors in title is identical to the language used in the right of way agreements involved in *Williams v. Highway Commission,* 252 N.C. 772, 114 S.E. 2d 782, and in *Petroleum Marketers v. Highway Commission,* 269 N.C. 411, 152 S.E. 2d 508. The language in the right of way agreement between the Highway Commission and the petitioner's predecessor in title is as follows:

> "It is further understood and agreed that the undersigned and their heirs and assigns shall have no right of access to the high-

way constructed on said right-of-way except at the following survey station: 101 + 00."

In the *Williams* case, it was said:

"The agreement provided the owners $2500 cash, a highway constructed across their land, and a right of access at survey station 761 + 00 right. This right of access was an easement, a property right, and as such was subject to condemnation. Defendant's refusal to allow plaintiffs to enter upon the highway at the point of the easement constituted a taking or appropriation of private property. For such taking or appropriation, an adequate statutory remedy in the nature of a special proceeding is provided."

In the *Petroleum Marketers* case, in ruling that the plaintiff was entitled to compensation, this was said:

"We think the plain meaning of the agreement between the Commission and Mrs. Shelton is that she surrendered whatever claim she, and her successor in interest, might otherwise have to a direct access to Highway 29-70 at other points along the southern boundary of this tract in exchange for a cash consideration and a reservation or grant of a right of direct access 'to the highway constructed on said right of way' at the designated point. The amount of the cash consideration paid to Mrs. Shelton was unquestionably affected by the insertion of this provision in the agreement."

Unquestionably, the agreement to subject the land to the right of way for highway purposes was more easily negotiated by the Highway Commission with petitioner's predecessors in title because of the agreed reservation of direct access from the remaining land to the highway at survey station 101 + 00. Nor can it be seriously questioned that the price paid by the Highway Commission for the right of way was tempered by the agreed reservation of direct access. Also, it is reasonable to assume that the right of direct access enhanced the value of the property in the purchase thereof by the petitioner.

The petitioner, by virtue of the agreement between the Highway Commission and its predecessors in title, had an easement for direct access to the highway at the designated point. If the Commission has destroyed this property right, the petitioner is entitled to just compensation for any damage it may have suffered.

The Highway Commission and the petitioner have stipulated that on June 23, 1960, a sign was erected at the access point at station 101 + 00 advising that access to the main lane of travel of U. S. High-

way 64 (now Interstate 40) would no longer be allowed and that such access is not now allowed. However, the Highway Commission urges that it has satisfied the terms of the original right of way agreement by the construction of a paved eighteen-foot service road along the Commission's right of way parallel to Highway 64 and between Highway 64 and the petitioner's property, to which service road the petitioner has access from all points along its property. Also, the Highway Commission urges that it has opened a previously dedicated road extending Eastview Drive from the petitioner's property in a westerly direction to Highway 21, and that Highway 21 crosses and interchanges with Interstate 40.

The eighteen-foot paved service road lies within the highway right of way and along the southern edge of the petitioner's property. The streets laid out on petitioner's property, which has been subdivided, have access to the service road, and there is further access to the service road from all points along the southern edge of petitioner's property. The service road extends from approximately the eastern border of the petitioner's property to approximately the western border of the petitioner's property, and does not connect with any other streets or highways; it therefore serves only as a connection between the streets in the petitioner's property at their southern terminus. The extension of Eastview Drive to Highway 21 extends from approximately the northwestern corner of petitioner's property in a westerly direction to Highway 21.

The Highway Commission urges that the service road is a highway constructed on the right of way and that permitting access to it at survey station 101 + 00, and at other points, is in compliance with the right of way agreement and that therefore the petitioner has not been deprived of any property right.

The right of way agreement between the Highway Commission and petitioner's predecessors in title is dated March 12, 1953, and is made in connection with Project 6374. The right of way agreement itself refers to plans for said project in the office of the State Highway Commission in Raleigh, and it must be assumed that it was this project that the parties described at the time of entering into the agreement. It would strain the imagination to suggest that at the time of signing the right of way agreement in March of 1953 referring to Project 6374 that the parties had in mind and were describing Projects 8.16377 and 8.16415, which were commenced in September of 1959.

Access to a service road which was constructed under a 1959 project could not reasonably have been the intent of the parties on March 11, 1953. In fact, neither party treated the agreement as describing access to a service road; a 30-foot access at survey station 101 + 00 was ac-

tually connected to U. S. Highway 64 and served the plaintiff's property for several years. We must place a reasonable construction upon the agreement between the Highway Commission and the petitioner's predecessors in title, and we hold that the agreement described a right of way for a direct access to the main traveled portion of Highway 64 at survey station 101 + 00.

The Highway Commission further urges that Judge Ervin's findings of fact are not supported by competent evidence, and that his findings of fact do not support his conclusions of law. In the record on appeal, the Commission states that this cause was heard by Ervin, J., upon the pleadings, the stipulations, and evidence introduced by the Commission. From the findings of fact in the judgment it would appear that the evidence introduced by the Commission was the testimony of certain officers or employees of the Commission; nevertheless, the Commission did not include such evidence in the record on appeal. The bulk of the findings of fact by Ervin, J. were from the admissions in the pleadings and the stipulations of the parties. The Commission does not point out what part of its additional evidence was incompetent, therefore we assume that all the findings of fact were based upon competent evidence. The findings of fact adequately support the conclusions of law.

According to the stipulations and the findings of the Superior Court, the direct access to the main traveled portion of Highway 64 (now Interstate 40) has been closed and destroyed by the Highway Commission. This the Commission was authorized to do in the public interest, but for such taking of its property, the petitioner is entitled to just compensation. *Petroleum Marketers v. Highway Commission, supra.*

Moses v. Highway Commission, 261 N.C. 316, 134 S.E. 2d 664; and *Barnes v. Highway Commission,* 257 N.C. 507, 126 S.E. 2d 732, cited by the Highway Commission, are factually distinguishable because in neither case was there an agreement reserving direct access. *Abdalla v. Highway Commission,* 261 N.C. 114, 134 S.E. 2d 81, also cited by the Highway Commission, is factually distinguishable; in that case the agreement reserved access only to service roads and ramps.

Upon this appeal, the Highway Commission brings forward 7 assignments of error. Assignments of error numbers 3, 4 and 5, which constitute the main thrust of this appeal, have been disposed of by the foregoing; those assignments of error are overruled.

Assignments of error 1 and 2 relate to exceptions taken by the Highway Commission to the failure of the Court (1) to determine the question of petitioner's right to compensation for circuity of

route, and (2) to determine the question whether the ingress, egress and access to and from petitioner's property as provided by the Highway Commission was a reasonable and adequate substitute for the direct access to Highway 64. The Superior Court was not required to answer this first question at the hearing from which this appeal was taken. The second question was answered by the Superior Court in its determination that the closing of the access to the highway at survey station 101 + 00 was a compensable taking. Assignments of error numbers 1 and 2 are overruled.

Assignments of error numbers 6 and 7 are to the refusal of the Superior Court to enter the judgment tendered by the Highway Commission and to the signing and entry of the judgment of record. These assignments of error are overruled.

The order of Ervin, J., is affirmed, and this cause is remanded to the Superior Court of Iredell County for determination by a jury of just compensation for damages, if any, that petitioner may have suffered by reason of the taking of its easement of direct access to the highway at survey station 101 + 00.

Affirmed.

MALLARD, C.J., and BRITT, J., concur.

MONNIE WILLIAMS, WIDOW, AND NEXT FRIEND OF MELISSA WILLIAMS AND AMELIA LYNN WILLIAMS, MINOR DAUGHTERS OF WILLIAM NORMAN WILLIAMS, DECEASED, EMPLOYEE PLAINTIFF, v. BRUNSWICK COUNTY BOARD OF EDUCATION, SELF-INSURER, EMPLOYER DEFENDANT.

(Filed 20 March 1968.)

1. Master and Servant § 93—

When supported by competent evidence, findings of fact by the Industrial Commission on a claim properly constituted under the Workmen's Compensation Act are conclusive on appeal.

2. Master and Servant § 60—

An injury suffered by an employee while going to or from his work arises out of and in the course of employment when the employee, under the terms of the employment and as an incident to the contract of employment, is paid an allowance to cover the cost of such transportation.

3. Same—

Findings that the deceased employee, a superintendent of county schools, was paid a monthy travel allowance to cover his automobile expenses to

and from work, that his occupation required him to be on call at all times and that he frequently worked after regular school hours, and that the employee met his death in an automobile accident while returning home from late-night work on school forms that were needed the following day, *are held* sufficient to show the death arose out of and in the course of employment.

4. Master and Servant § 54—

Where any reasonable relationship to employment exists, or employment is a contributing cause, the court is justified in upholding an award under the Compensation Act arising out of the employment.

APPEAL by defendant from Industrial Commission, J. W. Beam, Chairman.

This is a proceeding under the Workmen's Compensation Act (G.S. Ch. 97, Art. I) by the widow and minor children of William Norman Williams, deceased, to recover compensation for the accidental death of the employee resulting from an automobile accident.

In addition to the jurisdictional determinations, the essential findings of fact, upon which the judgment for plaintiffs is based, are as follows:

"1. The deceased employee, William Norman Williams, was a white married male, age thirty-three, and was on November 19, 1965, and prior thereto employed with the defendant employer as County Superintendent of Schools in Brunswick County, North Carolina.

2. On November 18, 1965, at about five p.m., the deceased employee called from Southport, North Carolina, to Mr. Stanley, publisher of the Brunswick Beacon of Shallotte, North Carolina. The call was in reference to a certain form to record the attendance of the pupils in the Brunswick County School System. The form was to be made up and distributed to the principals of Brunswick County. The form was to be made up on instructions from the County Board of Education, and it was the duty of the deceased employee to see that the form was properly prepared. As a result of the phone call the deceased employee drove from Southport to Shallotte and met with Mr. Stanley in his office.

3. Mr. Stanley and the deceased employee worked on the form from about five-thirty p.m. to seven p.m. The form was not completed at that time. The deceased employee and Mr. Stanley then left the publisher's office in Shallotte. The deceased employee drove to his home at Sunset Beach and from there drove

to Somerset Landing to attend a Lion's Club meeting and fish fry. Mr. Stanley and deceased employee did not go together, but met at the fish fry. After the Lion's Club meeting and fish fry was over, the deceased employee and Mr. Stanley drove Mr. Stanley's car to the home of the deceased at Sunset Beach. The deceased employee left his car at Somerset Landing which is about two miles from his home.

4. When reaching the deceased employee's home the subject of the forms previously mentioned was discussed and it was decided that the deceased employee and Mr. Stanley would return to Mr. Stanley's office in Shallotte and complete the work on the form. This was done and work was completed around one-thirty a.m. on November 19, 1965. Mr. Stanley then took the deceased employee in his car and drove to Somerset Landing where the deceased left his car previously. The deceased employee got into his car and proceeded from Somerset Landing towards his home at Sunset Beach. En route to his home the deceased employee was in an automobile accident and received injuries resulting in his death. The deceased employee at the time was on the most direct route from the publisher's office in Shallotte to his home when the accident occurred. The accident occurred around two o'clock a.m. on November 19, 1965. *It was not unusual for the deceased employee and other school officials to work long and hard hours after school and as a matter of fact they often worked late hours. In the instant case the form referred to had to be out the following day, and it was necessary to work at a late hour to get the form in a position to be printed. The deceased employee's duty as a County Superintendent of the Schools required him to be on duty call at all times.*

5. The deceased employee was paid a travel allowance of $75.00 per month by the Brunswick County Board of Education, and this money was used to buy oil, gas, etc., in the operation of his vehicle. *The travel allowance was used by the deceased to pay the expenses to and from his work. The allowance was made under the terms of the employment and as an incident to the contract of employment.*

6. Deceased employee sustained an injury by accident arising out of and in the course of his employment with the defendant employer on November 19, 1965, said injury resulting in his death."

The foregoing findings of fact were made by the Deputy Hearing Commissioner and adopted by the full Commission. The full Commission overruled all of defendant's exceptions to the findings of fact, conclusions of law, and award of compensation made to plaintiffs by the Deputy Hearing Commissioner.

Defendant assigns as error the italicized portions of finding of fact No. 4, the italicized portion of finding of fact No. 5, and finding of fact No. 6, for that they are not supported by competent evidence in the record. Defendant further assigns as error the conclusion that the deceased employee sustained an injury by accident arising out of and in the course of his employment.

Frink and Gore for plaintiff appellee.

T. W. Bruton, Attorney General, by Mrs. Christine Y. Denson, Staff Attorney, for employer, appellant.

MORRIS, J. When supported by competent evidence, the findings of fact by the Industrial Commission on a claim properly constituted under the Workmen's Compensation Act are conclusive on appeal. *Hinkle v. Lexington,* 239 N.C. 105, 79 S.E. 2d 220 (1953). From an examination of the evidence presented, we conclude that the defendant's assignments of error directed to finding of fact No. 4 and No. 5 cannot be sustained. We think there was sufficient competent evidence to support the findings, and we are bound by them.

The only question remaining is the application of legal principles to those facts. If the Commission correctly applied the legal principles, the award should be affirmed. If the injury was not, under North Carolina law, one "arising out of and in the course of" employment, the award should be reversed.

Ordinarily, an injury suffered by an employee while going to or from his work is not an injury arising out of and in the course of his employment. *Humphrey v. Laundry,* 251 N.C. 47, 110 S.E. 2d 467 (1959), and cases there cited. As is the case with most all general rules, there are exceptions, and North Carolina has recognized some of the exceptions recognized by other jurisdictions.

Where an employee sustains injury going to or from his place of work on employer's premises or premises controlled by employer, the injury is compensable, provided no unreasonable delay is chargeable to employee. *Bass v. Mecklenburg County,* 258 N.C. 226, 128 S.E. 2d 570 (1962).

North Carolina has also allowed compensation where the injury occurred on the highway close to employer's premises and the employee was using the only means of ingress and egress to and from

the work he was to perform, saying that the hazards of that route become the hazards of the employment. *Hardy v. Small,* 246 N.C. 581, 99 S.E. 2d 862 (1957).

Where a cemetery caretaker employed by the city who had no telephone, regularly and daily made rounds of the funeral homes at night to determine what graves needed to be dug the next day, the Court held as compensable injury sustained by him when he was hit by an automobile while engaged in making these rounds. The employer was said to have consented to the making of the trip because of the established custom of the caretaker. *Hinkle v. Lexington, supra.*

North Carolina has long held as compensable injuries sustained by employees while on the way to or returning from work where the employer provides the means of transportation. *Dependents of Phifer v. Dairy,* 200 N.C. 65, 156 S.E. 147 (1930); *Edwards v. Loving Co.,* 203 N.C. 189, 165 S.E. 356 (1932); *Massey v. Board of Education,* 204 N.C. 193, 167 S.E. 695 (1933); *Smith v. Gastonia,* 216 N.C. 517, 5 S.E. 2d 540 (1939).

The question of whether the principle should be extended to the case where the employer, under the terms of the employment, paid the employee an allowance to cover the cost of transportation to and from work was first before the Supreme Court in *Puett v. Bahnson Co.,* 231 N.C. 711, 58 S.E. 2d 633 (1950). There the employees were working some 15 or 20 miles from their homes, it was not convenient for them to procure living quarters at the place of their work, and they commuted daily alternating in the use of their automobiles. They were involved in an automobile collision on their way to work and received injuries. Each was paid $20.80 per week, in addition to his regular salary, to cover his living expenses and expense of traveling to and from work. The Court said, in affirming the award, "The Industrial Commission has consistently followed the majority view, and we are inclined to approve, where, as here, the cost of transporting the employees to and from their work is made an incident to the contract of employment." The principle was again applied in *Kiger v. Service Co.,* 260 N.C. 760, 133 S.E. 2d 702 (1963).

In the case before us, the Commission found as a fact, and there is competent evidence to support it, that the deceased employee was paid $75.00 per month travel allowance to pay the expenses to and from his work. The Commission further found, based on competent evidence, that the deceased and other school officials frequently worked long and hard hours after the school day, often worked late hours; that the form on which the deceased had been working had

to be out the following day; that it was necessary to work at a late hour to get the form ready for the printer; and that the deceased's duties as County Superintendent of Schools required him to be on duty call at all times.

Unquestionably the fatal accident is traceable to the employment as a contributing cause. The deceased was being paid an allowance by the employer to pay his travel expenses. "Where any reasonable relationship to employment exists, or employment is a contributing cause, the court is justified in upholding the award as 'arising out of employment'." *Kiger v. Service Co., supra.*

The conclusions of the Industrial Commission and the award based thereon are

Affirmed.

CAMPBELL and PARKER, JJ., concur.

JOHN J. TEW, III, AND DONALD RAY TEW, BY AND THROUGH THEIR DULY APPOINTED NEXT FRIEND, ALENE S. McLAMB, PLAINTIFFS, v. DURHAM LIFE INSURANCE COMPANY, AND JOHN J. TEW, JR., SUBSTITUTED DEFENDANT.

(Filed 20 March 1968.)

1. Appeal and Error § 26—

An exception to the judgment or to the signing of the judgment presents the face of the record proper for review, but 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.

2. Insurance § 35—

A finding that the named beneficiary of a life insurance policy issued in the name of his wife was tried for the murder of the wife and found not guilty by reason of insanity *is held* insufficient to support the trial court's conclusions that the beneficiary is not a slayer within the purview of G.S. Chapter 31A and is entitled to the proceeds of the policy.

3. Appeal and Error § 10; Guardian and Ward § 2—

Oral motion in the Court of Appeals that a guardian *ad litem* be appointed for the defendant does not comply with Rule of Practice in the Court of Appeals No. 36, and in the absence of any findings or evidence in the record to rebut the presumption that the defendant is *sui juris*, the motion will be denied.

APPEAL from *Braswell, J.*, October 16, 1967, Civil Session, HARNETT Superior Court.

This action was instituted by the plaintiffs, contingent beneficiaries, against Durham Life Insurance Company to recover the proceeds of a contract of life insurance in which the life of Dora Inez Tew was insured. Plaintiffs, the children of Dora Inez Tew, alleged, as grounds for their right to recover, that John J. Tew, Jr., their father and primary beneficiary, wrongfully and unlawfully slew his wife, Dora Inez Tew, on July 17, 1965.

Durham Life Insurance Company admitted liability on its policy No. 366965 and paid the proceeds thereof to the Clerk of Superior Court of Harnett County; and upon its motion, John J. Tew, Jr. was substituted as a party defendant. John J. Tew, Jr. filed answer in which he alleged that he was tried in August, 1965, upon a charge of murdering his wife, and that the jury found him not guilty by reason of insanity, and that he was therefore entitled to recover as primary beneficiary.

When this case was called for trial on October 16, 1967, Judge Braswell found facts upon the pleadings and certain stipulations, and ruled as a matter of law that: (one) John J. Tew, Jr. was not a slayer as defined in G.S. 31A-3(3), and (two) was entitled to the proceeds of the policy.

Plaintiffs appealed.

Gerald Arnold, Attorney for plaintiff appellants.

Bryan, Bryan and Johnson by Robert C. Bryan, Attorneys for defendant appellee.

BROCK, J. The plaintiffs' only exception is to the signing and entry of the judgment.

An exception to the judgment or to the signing of the judgment presents the face of the record proper for review; and 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. Strong, North Carolina Index 2d, Vol. 1, Appeal and Error, Sec. 26.

There are no formal stipulations of the parties entered in the record before us, but the trial judge found that counsel had entered into certain stipulations in open court, therefore these findings are conclusive on this appeal. An exception to the judgment does not present for review the findings of fact.

The final judgment from which this appeal is taken is as follows:

> "THIS CAUSE coming on to be heard and being heard before the undersigned Judge holding the Courts of the Eleventh Ju-

dicial District, and this case having been regularly calendared for trial and called for trial on October 16, 1967; and it appearing to the Court from readings (*sic*) the pleadings, and from stipulations made in open Court by attorneys for plaintiff (*sic*) and defendants (*sic*) that John J. Tew, Jr. was a named beneficiary on a life insurance policy issued on the life of Dora Inez Tew, wife of John J. Tew, Jr.; and

"IT FURTHER APPEARING TO THE COURT that John J. Tew, Jr. did kill his wife on July 17, 1965, and that the parties have stipulated that the said John J. Tew, Jr. was tried for murder in the Superior Court of Harnett County for said killing, and was found not guilty by reason of insanity.

"AND THE COURT further holds the matter of law that by virtue of said stipulations, John J. Tew, Jr. is not a slayer as defined in Chapter 31A of the General Statutes of North Carolina, and is therefore entitled to the proceeds of said insurance policy as a beneficiary in said policy; and

"IT FURTHER APPEARING TO THE COURT that the Clerk of the Superior Court of Harnett County has the amount of $10,000.00 from said policy in her custody, waiting orders from this Court as to the distribution thereof.

"IT IS, THEREUPON, CONSIDERED, ORDERED AND ADJUDGED that the plaintiff's (*sic*) action be dismissed, and that the costs be taxed to the plaintiff (*sic*).

"IT IS FURTHER ORDERED that the Clerk of the Superior Court of Harnett County surrender to John J. Tew, Jr., or his lawful representative, all funds which she has in her custody which have been paid into (*sic*) her by Durham Life Insurance Company, being life insurance on the life of Inez Suggs Tew, as set out in the complaint."

The trial judge made only four findings of fact:

1. ". . . that John J. Tew, Jr. was a named beneficiary on a life insurance policy issued on the life of Dora Inez Tew, wife, of John J. Tew, Jr. . . ."

2. ". . . that John J. Tew, Jr. did kill his wife on July 17, 1965, . . ."

3. ". . . that the said John J. Tew, Jr. was tried for murder in the Superior Court of Harnett County for said killing, and was found not guilty by reason of insanity."

4. ". . . that the Clerk of Superior Court of Harnett County has the amount of $10,000.00 from said policy in her custody, waiting orders from this Court as to the distribution thereof."

The pleadings supply no additional admissions except formal ones relating to the identity and residence of the parties.

Based upon the four findings of fact the trial judge concluded as a matter of law:

". . . that John J. Tew, Jr. is not a slayer as defined in Chapter 31A of the General Statutes of North Carolina, and is therefore entitled to the proceeds of said insurance policy as a beneficiary in said policy . . ."

We note that findings of fact No. 1 and No. 4 do not identify any insurance policy. The Complaint alleges a $5,000 policy and the Answer admits a $5,000 policy, but neither the Complaint nor the Answer identifies the policy as sufficiently as seems desirable. The trial judge finds that the Clerk has $10,000 "from said policy." The identity of the policy was not stipulated and the policy was not offered in evidence. There is no finding of a direct relationship between the policy referred to in the pleadings and the money on deposit with the Clerk. Much is left to conjecture, and we trust this matter will be clarified upon retrial.

The pivotal finding of fact is finding No. 3: ". . . that said John J. Tew, Jr. was tried for murder in the Superior Court of Harnett County for said killing, and was found not guilty by reason of insanity." Obviously this is not a finding of fact by the trial judge that John J. Tew, Jr. was insane when he killed his wife on July 17, 1965. At most, this is only a finding that in another trial, between different parties, the defendant "satisfied" the jury (not beyond a reasonable doubt nor even by the greater weight of the evidence, but merely "satisfied") that he was mentally incapable of knowing the nature and quality of his act, or incapable of distinguishing between right and wrong in relation to such act. This finding of fact No. 3 does not support the trial judge's conclusion in this action that John J. Tew, Jr. is entitled to the proceeds of the insurance upon his wife's life. The conclusion and judgment get no support from G.S. 31A-13. This section of the General Statutes refers specifically to judicial determinations under G.S. 31A-3, which has no application to a verdict of *not guilty,* for whatever reason it is rendered.

The conclusion of law, not being supported by the findings of fact, does not support the judgment. The final judgment was improvidently entered.

After the record on appeal in this case was docketed, the defendant's mother, on February 26, 1968, filed a petition with the Clerk of Superior Court of Harnett County for the appointment of a guardian *ad litem* for the defendant; and on February 26, 1968, the Clerk entered an Order appointing defendant's mother, Mrs. John J. Tew, Sr., guardian *ad litem nunc pro tunc* to November 4, 1965, the date of service of process in this action on John J. Tew, Jr. Thereafter, upon the hearing of plaintiffs' appeal, defendant's counsel made an oral motion to this Court to appoint Mrs. John J. Tew, Sr. guardian *ad litem* for the defendant, and has filed a proposed Order for this Court to issue. Also the defendant filed with this Court a copy of Mrs. Tew's February 26, 1968, petition, and a copy of the Clerk's February 26, 1968, Order.

According to the Record there was nothing before the Clerk of Court of Harnett County to justify the appointment, except Mrs. Tew's allegation. There was no finding in the Order by said Clerk to justify the appointment. There is nothing before us to justify an Order from this Court appointing a guardian *ad litem;* and the defendant has not complied with the rules. Rule 36, Rules of Practice in the Court of Appeals. The defendant verified his answer on December 30, 1965, before a Notary Public, and his present attorney also signed the Answer. Nothing has been shown that would rebut the presumption that the defendant was *sui juris.* If it is felt that the defendant is not now *sui juris,* a new petition, setting out the grounds and supported by appropriate affidavits, should be submitted for consideration by the Superior Court.

In view of the foregoing, we decline to issue the Order tendered by the defendant in this Court, and his oral motion is denied; also, it is ordered that the Order of the Clerk of Superior Court, dated February 26, 1968, be vacated.

Reversed.

MALLARD, C.J. and BRITT, J., concur.

STATE v. WILLIAM RONALD HAMILTON.

— AND —

STATE v. BOBBY BEASLEY.

(Filed 20 March 1968.)

1. Criminal Law § 106—

An extra-judicial confession is insufficient to support a criminal conviction without independent proof of the *corpus delicti.*

2. Homicide § 1—

The *corpus delicti* in a criminal homicide consists of the fact of death and the existence of a criminal agency as its cause.

3. Criminal Law § 106—

In ruling upon the State's evidence *aliunde* the confession, the evidence must be considered in the light most favorable to the State, giving it the benefit of every reasonable inference fairly deducible therefrom.

4. Homicide § 21—

To make a *prima facie* showing of a homicide *corpus delicti,* the State need not eliminate all inferences tending to show a noncriminal cause of death, but must introduce evidence sufficient to create a reasonable inference that the death could have been caused by a criminal agency.

5. Criminal Law § 106—

A confession may be corroborated by circumstantial evidence, and to support a conviction the corroborative evidence need not be sufficient, independent of the confession, to establish the commission of the crime.

6. Same—

If there is any evidence tending to prove the fact of guilt or which reasonably conduces to this conclusion as a fairly logical deduction and not merely such as raises a suspicion or conjecture of guilt, the case should be submitted to the jury.

7. Homicide § 21—

Evidence of the State tending to show that the deceased's nude body was discovered in a creek, that bruises were found on the body, that the cause of death was drowning, and that deceased was seen riding in an automobile with defendants on the night of his disappearance makes a *prima facie* showing of a homicide *corpus delicti,* and such evidence, together with defendants' confessions that after one of them had beaten the deceased, they together undressed the deceased and threw him into the creek, *is held* sufficient to sustain defendants' convictions of voluntary manslaughter.

8. Homicide § 6—

Involuntary manslaughter is the unintentional killing of a human being resulting from the performance of an unlawful act not amounting to a felony or not naturally dangerous to human life, or from the performance of a lawful act in a culpably negligent way, or from the culpably negligent omission to perform a legal duty.

9. Homicide § 26—

In this homicide prosecution the failure to charge the jury with reference to involuntary manslaughter was not error, since there was no evidence to support such instruction.

THESE two cases were tried together before *Braswell, J.*, December 1967 Criminal Session, JOHNSTON County Superior Court. Two separate records were filed in this Court and each case was docketed as a separate appeal but will be considered and treated as one case, the same as in the trial court.

Each of the defendants was tried under an indictment charging first degree murder. At the time of the trial the solicitor on behalf of the State put each defendant on trial for the crime of murder in the second degree, or manslaughter, as the facts might reveal. Each defendant entered a plea of not guilty and from a verdict of guilty of manslaughter and the imposition of sentence thereon, each defendant took an appeal. The defendant Beasley was sentenced to nine years imprisonment and the defendant Hamilton to ten years.

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

Tyson Y. Dobson, Jr., for defendant William Ronald Hamilton.

C. C. Canaday, Jr., for defendant Bobby Beasley.

CAMPBELL, J. Each defendant makes the same assignments of error. The facts sufficiently appear in the opinion.

Neither defendant offered any evidence and each contends that the case should have been dismissed at the close of the State's evidence.

Each defendant concedes that a voluntary confession was made by each under such circumstances that none of the constitutional rights of either was violated. Each defendant, however, contends that it was error to admit the confession since the State failed to prove the commission of any crime *aliunde* the confession and that such failure on the part of the State necessitated the dismissal of the criminal charges, and that a judgment of nonsuit should have been entered.

North Carolina follows the rule succinctly applied in *State v. Bass*, 253 N.C. 318, 116 S.E. 2d 772 (1960), that an extra judicial confession, standing alone, cannot be used to prove the commission of a crime. There must be independent proof of the *corpus delicti*. *State v. Crawford*, 260 N.C. 548, 133 S.E. 2d 232 (1963).

"The *corpus delicti* in criminal homicide involves two elements: (1) The fact of the death. (2) The existence of the criminal agency

of another as the cause of death." 41 C.J.S., Homicide, section 312. Citing *State v. Johnson*, 193 N.C. 701, 138 S.E. 19 (1927).

In order to determine whether there was evidence on behalf of the State, *aliunde* the confessions of the defendants, the evidence must be considered in the light most favorable to the State and we must give to such evidence the benefit of every reasonable inference fairly deducible therefrom. Strong, 2 N. C. Index, 2d Ed., Criminal Law, Section 106. Citing cases.

The State offered evidence to the effect that the nude body of MacDaniel McCoy (a Negro man) was found September 1, 1967, in Middle Creek in Johnston County about 500 yards from a bridge across said creek. The body at the time was caught on a snag in a curve near the bank of the creek and the water in the creek was running swiftly. On the side of the road some 85 to 90 feet from the bridge across the creek, there was found a metal button with the words, "Payday" on it and attached to it was a pink thread. It was shown that this button came from the overalls that the deceased had been wearing on Friday, August 25, 1967, which was the last day the deceased had been seen alive by his relatives. Witnesses testified to seeing the deceased riding in the automobile with the defendant Hamilton about midnight Friday, August 25, 1967.

About 1:30 or 2:00 a.m., in the morning of August 26, 1967, James Johnson, the operator of a service station, testified to seeing both defendants and a colored man whom he did not know at his service station where they bought gas and cigars. At that time the defendant Hamilton told the witness Johnson that he was going to whip the Negro but did not say when he was going to do it.

On September 5, 1967, each of the defendants was picked up by the officers and at that time a belt belonging to the deceased was found in the back of the defendant Hamilton's automobile.

The deceased was around 49 or 50 years old, weighed about 130 to 135 pounds and was five feet four inches in height. He was last seen by members of his family about midnight Friday, August 25, 1967.

At the time his body was found floating in Middle Creek on September 1, 1967, considerable putrefaction had taken place.

An autopsy was performed and the pathologist testified that he found areas of bruising on the body but no fractured bones. The pathologist testified that in his opinion the deceased came to his death from drowning and acute alcoholism, but that in his opinion there was not sufficient alcohol of itself to cause death.

We think the evidence introduced by the State *aliunde* the confessions of each defendant was sufficient to make out a *prima facie*

showing of *corpus delicti*. "To meet the foundational test the prosecution need not eliminate all inferences tending to show a non-criminal cause of death. Rather, a foundation may be laid by the introduction of evidence which creates a reasonable inference that the death could have been caused by a criminal agency * * * even in the presence of an equally plausible non-criminal explanation of the event." *People v. Jacobson,* 46 Cal. Rptr. 515, 405 P. 2d 555 (1965). See also the cases of *Kozlowski v. State,* 248 Ala. 304, 27 So. 2d 818 (1946) and *State v. Thomas,* 222 S.C. 484, 73 S.E. 2d 722 (1952).

As stated by Britt, J. of this Court in the case of *State of North Carolina v. William Francis Burgess* filed this day: "The corroboration of the confession necessary to support its introduction into evidence can be shown by circumstances. * * * A confession will be sufficient if there be such extrinsic corroborative circumstances, as will, when taken in connection with the confession, establish the prisoner's guilt in the minds of the jury beyond a reasonable doubt. * * * The rule does not require that the independent evidence of *corpus delicti* shall be so full and complete as to establish unaided the commission of a crime. It is sufficient if the extrinsic circumstances, taken in connection with the defendant's admission, satisfies the jury of the defendant's guilt beyond a reasonable doubt."

Having held that the inculpatory statements were properly admitted, what do they indicate?

Each defendant freely and voluntarily made a statement to Robert D. Emerson, a special agent with the North Carolina State Bureau of Investigation. These statements were to the effect that on Friday night, August 25, 1967, the two defendants and the deceased, MacDaniel McCoy rode around Johnston County in the Ford automobile of the defendant Hamilton. The three were drinking white liquor. Hamilton stated that he was doing the driving and that Beasley and the deceased had an argument and that Beasley struck the deceased several blows and wanted to throw him over the bridge railing; that he, Hamilton, assisted Beasley in undressing the deceased and helped to throw the deceased over the railing.

Beasley, on the other hand, stated that he was asked to drive and did drive and that Hamilton claimed the deceased owed him some money and threatened to kill the deceased if he did not pay. They argued over the money and Hamilton began to hit the deceased and the deceased got quiet and Hamilton said: "Let's throw him in the creek." Beasley further stated that he stopped the car and the deceased was dead or knocked out and that Hamilton had undressed

him and that he helped Hamilton throw the deceased over the rail into the water and that the deceased was unconscious.

Both defendants said this occurred about 2:00 a.m. August 26, 1967, and that later they went back to the place and did not see the deceased.

We are of the opinion and so hold that there was sufficient evidence of the guilt of each of the defendants to require the case be submitted to the jury. "If there is any evidence tending to prove the fact of guilt or which reasonably conduces to this conclusion as a fairly logical and legitimate deduction, and not such as merely raises a suspicion or conjecture of guilt, it is for the jury to say whether they are convinced beyond a reasonable doubt of the fact of guilt." Strong, 2 N. C. Index 2d, Criminal Law, Section 106, and cases cited therein.

Each defendant contends that the trial court committed error in the charge in failing to include the crime of involuntary manslaughter as one of the possible verdicts.

In the case of *State v. Satterfield,* 198 N.C. 682, 684, 153 S.E. 155 (1930), Adams, J. said: "This offense (involuntary manslaughter) consists in the unintentional killing of one person by another without malice (1) by doing some unlawful act not amounting to a felony or *naturally dangerous to human life;* or (2) by negligently doing some act which in itself is lawful; or (3) by negligently failing or omitting to perform a duty imposed by law. These elements are embraced in the offense as defined at common law. Wharton, Homicide, 7; 1 Crim. Law (11 Ed.) 622; 1 McClain on Crim. Law, 303, sec. 335; Clark's Crim. Law 204. The definition includes unintentional homicide resulting from the performance of an unlawful act, from the performance of a lawful act done in a culpably negligent way, and from the negligent omission to perform a legal duty." (emphasis added.)

This definition is quoted with approval in *State v. Honeycutt,* 250 N.C. 229, 108 S.E. 2d 485 (1959).

The acts of the defendants, in the instant case, were without the scope of involuntary manslaughter and, therefore, there was no necessity for the court to include this as a possible verdict.

The cases cited by the defendants are readily distinguishable and the instant case is not unlike the factual situation presented in *State v. Rich,* 231 N.C. 696, 58 S.E. 2d 717 (1950) where Winborne, J. (later C.J.) stated:

"III. 'Did the court err in its charge to the jury in not submitting that there might be a finding of guilty of involuntary manslaughter?' As to this contention, the court instructed the jury that

one of three verdicts might be returned, guilty of murder in the second degree, guilty of manslaughter, or not guilty. In the light of the evidence offered by the State it does not appear that the failure of the trial judge to charge on involuntary manslaughter was error."

In the instant case the trial judge, after a fair and accurate exposition of the law and application thereof to the facts in the case, submitted the same three possible verdicts as to each defendant.

Hence, after careful consideration of all questions presented, we find in the judgment below

No error.

MORRIS and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIAM FRANCIS BURGESS.

(Filed 20 March 1968.)

1. Burglary and Unlawful Breakings § 2—

The breaking of a store window with the intent to commit a felony completes the offense defined in G.S. 14-54, even though the building is not actually entered.

2. Burglary and Unlawful Breakings § 5—

Evidence of the State tending to show that a pharmacy window had been broken sometime after the store had closed for the night, that defendant was discovered in some bushes near the broken window with gloves on and holding a pry bar, that defendant admitted to officers that he broke the window with the intent of blowing the pharmacy's safe to get drugs and that he and an accomplice had nitroglycerin in an automobile for that purpose, *is held* sufficient to be submitted to the jury as to defendant's guilt of breaking and entering with intent to commit the felony of larceny.

3. Criminal Law § 106—

The corroborative evidence of *corpus delicti* necessary to support an extra-judicial confession may be circumstantial and need not be sufficient, independent of the confession, to establish the commission of the crime.

4. Criminal Law § 102—

Control of the argument of the solicitor and counsel rests largely in the trial court's discretion, and only in extreme cases of abuse where the court fails to intervene or correct an impropriety will a new trial be awarded on appeal.

5. Criminal Law § 170—

Impropriety of the solicitor's remarks to the jury to the effect that questions asked by the defendant's attorney indicated that defendant had knowledge of the crime *held* cured by the court's instruction that no question asked by defendant's attorney should be considered as evidence against defendant.

APPEAL by defendant from *Bickett, J.*, First Regular October 1967 Criminal Session of WAKE County Superior Court.

By an indictment proper in form, defendant was charged with the offense of breaking and entering the Brentwood Pharmacy, with the intent to commit the felony of larceny.

The evidence for the State, consisting primarily of the testimony of Don Carter, owner and operator of Brentwood Pharmacy, and Deputy Sheriff Branch, tended to show the following:

Mr. Carter closed the pharmacy on 27 August 1967 at 7:00 p.m., locked the doors and fastened the windows. There was no broken window at the time. In the building, he had drugs, cosmetics, and other merchandise of the value of some $28,000.00.

The building faces north and is located in a shopping center near the northern edge of the city of Raleigh. To the rear and south of the building, on top of a hill, is a Holiday Inn and between the back of the pharmacy and the Holiday Inn is an empty lot with trees and undergrowth on it.

In the back wall of the building, there was a fold-down type window containing lower and upper panes of glass with a screen on the outside.

On said date, Deputy Branch had occasion to be in the vicinity of the pharmacy at about 11:30 p.m. answering a "prowler call" placed by a resident of the area. Thereafter, at about 12:15 a.m., he went to Brentwood Pharmacy and on investigation found a pane of glass in the window broken and the screen pushed in from the outside.

Upon investigation of the area back of the building, Deputy Branch saw some bushes moving and with the aid of his flashlight found the defendant concealed in some bushes a short distance back of the Brentwood Pharmacy.

The defendant was wearing a pair of black gloves and had a craftsman punch and pry bar in his hand. Deputy Branch saw another person in the area but was not able to catch him.

After being warned of his constitutional rights by Deputy Branch, the defendant stated in substance that he knew all about his rights since he had served time in San Quentin Prison and that he was wanted by the State of Maine for parole violation. He further stated

that he had driven a car that another person had stolen in the State of Ohio; he also possessed a stolen Esso credit card.

Defendant further told Deputy Branch that he had broken the window and that he was planning to blow the safe in Brentwood Pharmacy in order to steal some drugs; to accomplish this and to blow another safe in the vicinity, he and his accomplice had eight ounces of nitroglycerin in a 1959 Chevrolet automobile.

The witness Carter testified that he returned to his pharmacy on 28 August 1967 around 1:00 p.m. and found broken glass in the back window; he further testified that there was no merchandise missing from the store.

The defendant offered no evidence. The jury returned a verdict of guilty as charged and from judgment pronounced upon the verdict, defendant appealed.

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

Boyce, Lake & Burns by G. Eugene Boyce, Attorneys for defendant appellant.

BRITT, J. Among his assignments of error, defendant contends that the trial court erred in failing to grant his motion for judgment as of nonsuit.

The pertinent language of G.S. 14-54 is, "If any person, with intent to commit a felony or other infamous crime therein, shall break *or* enter . . . any storehouse, shop . . . or other building where any merchandise . . . or other personal property shall be . . . he shall be guilty of a felony. . . ." (Emphasis added.) The breaking of the store window, with the requisite intent to commit a felony therein, completes the offense even though the defendant is interrupted or otherwise abandons his purpose without actually entering the building. *State v. Jones,* 272 N.C. 108 (1967), 157 S.E. 2d 610, and cases cited therein.

Defendant's motion for judgment as of nonsuit was properly overruled. The circumstances in this case make it a question for the jury. *State v. Johnson,* 1 N.C. App. 15 (1968), and cases cited therein.

Defendant contends that "the trial court erred in allowing the State's witness, Mr. Branch, to testify about an alleged verbal confession made by defendant, for that the State had failed theretofore to prove the *corpus delicti.*"

The corroboration of the confession necessary to support its introduction into evidence can be shown by circumstances. *State v.*

Whittemore, 255 N.C. 583, 589, 122 S.E. 2d 396; *State v. Thomas,* 241 N.C. 337, 85 S.E. 2d 300 (1954); *State v. Cope,* 240 N.C. 244, 247, 81 S.E. 2d 773; 23 C.J.S., Criminal Law 185. A confession will be sufficient if there be such extrinsic corroborative circumstances, as will, when taken in connection with the confession, establish the prisoner's guilt in the minds of the jury beyond a reasonable doubt. *State v. Whittemore, supra.* The rule does not require that the independent evidence of *corpus delicti* shall be so full and complete as to establish unaided the commission of a crime. It is sufficient if the extrinsic circumstances, taken in connection with the defendant's admission, satisfies the jury of the defendant's guilt beyond a reasonable doubt. *Jordan v. United States* (4th Cir.), 60 F. 2d 4, 5 (1932), and cases cited therein.

The State showed by testimony of Mr. Carter that the pharmacy window was not broken at 7:00 p.m. Some five hours later, at around 12:15 a.m., Deputy Branch found it broken, with the outside screen pushed in, and found the defendant with gloves on and a pry bar in his hand concealed in some bushes a short distance from the broken window. He later admitted to officers that he broke the window, that he intended to blow the safe with nitroglycerin to get drugs, and that there were others with him in an automobile which had nitroglycerin in a sling in the back seat. There was sufficient evidence *aliunde* the confession to corroborate its use and admit it to the jury.

Defendant assigns as error comments by the solicitor in his argument to the jury to the effect that questions asked by the defendant's attorney indicated some knowledge of the crime by the defendant. The record discloses that upon objection by defendant's counsel, the trial judge adequately instructed the jury not to consider any question by the attorney as evidence against the defendant.

The control of the argument of the solicitor and counsel must be left largely to the discretion of the trial court, and it is only in extreme cases of abuse and when the trial court does not intervene or correct an impropriety that a new trial may be allowed on appeal. *State v. Barefoot,* 241 N.C. 650, 657, 86 S.E. 2d 424; *State v. Bowen,* 230 N.C. 710, 711, 55 S.E. 2d 466; *State v. Horner,* 139 N.C. 603, 52 S.E. 136.

We hold that the impropriety of the argument by the solicitor was cured by the instruction of the trial judge.

We have carefully reviewed the other exceptions and assignments of error cited by defendant but find them without merit.

The record indicates that defendant's court-appointed attorney

represented him well in the trial below and in his appeal to this Court. The defendant had a fair trial, free from prejudicial error.

No error.

MALLARD, C.J., and BROCK, J., concur.

IN THE MATTER OF ISAAC HOLT, III.

(Filed 20 March 1968.)

1. Divorce and Alimony § 1—

The general county court of Alamance County has jurisdiction to try and determine divorce actions, G.S. 7-279, and such jurisdiction continues until the establishment of a district court pursuant to G.S. 7A-131(2). G.S. 50-13.5(h).

2. Divorce and Alimony § 22; Habeas Corpus § 8—

Where final judgment for absolute divorce has been rendered in one court and there has been no determination of custody or support of the children of the marriage, the issue of custody and support may be determined in an independent action, instituted after October 1, 1967, in another court. G.S. 50-13.5(f).

APPEAL by Edna W. Holt, applicant, from an Order by *Bailey, J.*, entered 2 January 1968, in ALAMANCE Superior Court, dismissing her *habeas corpus* proceeding.

Edna W. Holt and Isaac Holt, Jr., were married October 21, 1939. Three children were born of the marriage, two of whom are now emancipated, and the third, Isaac Holt, III, age 14, resides with Edna W. Holt.

Isaac Holt, Jr., instituted an action for absolute divorce against Edna W. Holt on May 25, 1965, in the General County Court of Alamance County. Summons therein was personally served on Edna W. Holt and she filed no answer or other pleading. On June 29, 1965, a judgment of absolute divorce against Edna W. Holt was entered in the General County Court of Alamance County. No appeal was noted.

On August 8, 1967, Edna W. Holt filed a motion in the cause in the General County Court of Alamance County requesting support payments from Isaac Holt, Jr., for Isaac Holt, III. Also, on August 8, 1967, Edna W. Holt filed a motion in the same Court praying that the cause be transferred to the Superior Court of Alamance County.

On November 16, 1967, a hearing was held upon the motion to transfer, and an Order was entered denying the motion and retaining the cause in the General County Court of Alamance County. No exception or appeal was noted.

On December 15, 1967, Edna W. Holt made a motion before the Clerk of the General County Court of Alamance County that her motion for support filed in the cause in that court be withdrawn. This motion was allowed on December 15, 1967.

Upon an application to the Superior Court of Alamance County for a writ of *habeas corpus* requesting support payments from Isaac Holt, Jr., for the benefit of Isaac Holt, III, Carr, J., Resident Judge of Superior Court, on December 16, 1967, signed a Show Cause Order directed to Isaac Holt, Jr. This Order was served on Isaac Holt, Jr., on December 18, 1967.

A "Demurrer and Motion to Dismiss" was filed by the respondent on January 2, 1968, and the matter was heard by Bailey, J., on January 9, 1968, resulting in an Order dismissing the *habeas corpus* proceeding.

Applicant, Edna W. Holt, appealed.

Dalton and Long, Attorneys for Edna W. Holt, applicant appellant.

T. Paul Messick, and Ross, Wood and Dodge, Attorneys for Isaac Holt, Jr., respondent appellee.

BROCK, J. The applicant appellant's first assignment of error contends that the trial judge erred in finding and concluding that the General County Court of Alamance County has jurisdiction to try divorce actions.

Jurisdiction to try and determine divorce actions was conferred upon the General County Court of Alamance County by statute. G.S. 7-279; *McLean v. McLean,* 233 N.C. 139, 63 S.E. 2d 138. And by the express provisions of G.S. 50-13.5(h), effective from and after October 1, 1967, the General County Court of Alamance County retains such jurisdiction until a district court is established in Alamance County on the first Monday in December, 1968. G.S. 7A-131(2). Appellant's first assignment of error is overruled.

Applicant appellant's second assignment of error contends that the trial judge erred in concluding that the General County Court of Alamance County has jurisdiction of the parties and of all matters concerning the maintenance and support of Issac Holt, III, and that applicant's remedy is properly before the General County Court of Alamance County.

The complaint in the action for absolute divorce filed on May 24, 1965, in the General County Court of Alamance County by Isaac Holt, Jr., the respondent herein, alleges separation between the parties for two consecutive years as grounds for divorce; there was no prayer for custody or support of any of the children born of the marriage. Edna W. Holt was personally served with summons and complaint in the divorce action on May 25, 1965; she filed no answer or cross-action. Final judgment was entered in the divorce action on June 29, 1965, dissolving the bonds of matrimony; no provision or mention was made in the judgment respecting custody or support of any of the children born of the marriage. No exception or appeal was noted.

On August 8, 1967, Edna W. Holt filed a motion in the cause in the General County Court of Alamance County requesting support payments for Isaac Holt, III. Under the statutes and case law, this was the proper forum on August 8, 1967. G.S. 50-13; *In Re Blake,* 184 N.C. 278, 114 S.E. 294; *In Re Custody of Sauls,* 270 N.C. 180, 154 S.E. 2d 327. On the same day, August 8, 1967, Edna W. Holt filed in the same court a motion to remove the case to the Superior Court of Alamance County for hearing on the motion in the cause for support payments. Following several procedural steps not pertinent to a decision in this case, the motion to remove was argued and an order was entered by the judge of the General County Court of Alamance County on November 16, 1967, denying the motion to remove. Isaac Holt, Jr. did not file response, answer, or counter motion to Edna W. Holt's motion in the cause for support payments. On December 15, 1967, upon the request of Edna W. Holt, an order was entered in the General County Court of Alamance County withdrawing and nonsuiting her motion in the cause for support payments. No exception or appeal was noted by either party.

The motion in the cause for support payments having been ordered withdrawn and nonsuited, and no exception or appeal having been noted, the records of the General County Court of Alamance County are restored to their June 29, 1965, status; *viz.,* a final judgment of absolute divorce with no provision for or mention of custody or support of the children of the marriage.

On December 16, 1967, this proceeding in *Habeas Corpus* was commenced by Edna W. Holt in the Superior Court of Alamance County requesting support payments for Isaac Holt, III.

The record on appeal supplies us with no explanation of the procedure followed by Edna W. Holt, but, regardless of the reasoning by which her erratic steps were guided, we are faced with this question: *Does the court in which the divorce action is tried obtain and retain exclusive jurisdiction of custody and support of children of*

the marriage where no custody or support questions are raised prior to, or determined in, the final judgment in the divorce action? Before October 1, 1967, according to the statutes and decisions of our Supreme Court, we would be compelled to answer this question in the affirmative, with the one exception created by *Blakenship v. Blakenship,* 256 N.C. 638, 124 S.E. 2d 857. See: G.S. 50-13. *In Re Blake, supra; In Re Custody of Sauls, supra.* However, since the present proceeding was commenced on December 16, 1967, we must look to the provisions of Chapter 1153, Session Laws, 1967, entitled, "An Act To Rewrite The Statutes Relating To Custody And Support Of Minor Children," which is effective from and after October 1, 1967. G.S. 50-13.1, *et seq.*

Section 1. of Chapter 1153, Session Laws, 1967, repeals G.S. 17-39 (*habeas corpus* to determine custody), G.S. 17-39.1 (*habeas corpus* to determine custody), G.S. 17-40 (appeal in *habeas corpus* proceedings), G.S. 50-13 (custody of children in action for divorce); and G.S. 50-16 (custody of children in action for alimony without divorce). Section 2. of the Chapter extensively provides for parties, types of actions, procedures, and venue in actions for custody and support of minor children. Sections 3. and 4. of the Chapter amend G.S. 1-440.2 and G.S. 1-410(5). By the enactment of this Chapter the Legislature has sought to eliminate the conflicting and inconsistent statutes, which have caused pitfalls for litigants, and to bring all of the statutes relating to child custody and support together into one act. Section 2. of Chapter 1153 has been codified as G.S. 50-13.1, *et seq.*

Subsection (b) of G.S. 50-13.5 provides for the types of actions which may be maintained to obtain custody or support, and subdivision (2) of the subsection provides for writ of *habeas corpus.*

Subsection (f) of G.S. 50-13.5 provides for the proper venue for the actions allowed under subsection (b). Subsection (f) provides: "An action or proceeding in the courts of this State for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides, except as hereinafter provided." Then there follows two provisos. The first proviso reads: "If an action for annulment, for divorce, either absolute or from bed and board, or for alimony without divorce has been previously instituted in this State, *until there has been a final judgment in such case,* any action or proceeding for custody and support of the minor children of the marriage *shall* be joined with such action or be by motion in the cause in such action." (Emphasis added.) The second proviso is not pertinent to this case.

The foregoing proviso, when read in conjunction with the first sentence of this subsection (f) and in conjunction with subsection (b), makes it clear that after final judgment in a previously instituted action between the parents, where custody and support has not been brought to issue or determined, the custody and support issue may be determined in an independent action in another court. *Habeas Corpus* is an independent action. Of course, if the custody and support has been brought to issue or determined in the previously instituted action between the parents, there could be no final judgment in that case, because the issue of custody and support remains *in fieri* until the children have become emancipated. 27B C.J.S. 423; 27B C.J.S. 678.

Conceding *arguendo*, that the primary purpose of the new statute is to relieve the parties of having to go back to the court granting the divorce, when they may have subsequently moved to other counties or districts before an issue of custody and support arise; nevertheless, the authority for the writ of *habeas corpus* issued at the instance of Mrs. Holt is clear. It should not be a matter of concern that the procedure followed in this case was one of moving from one court to another in the same county. When the process of unifying the court system in this State finally completes the formation of District Courts for each county by January 1, 1971, there can be no moving from one court to another in the same county. G.S. 50-13.5(h). Any attempt at such would result in an Order consolidating both actions in the same court. Chapter 7A, Article 21, General Statutes of North Carolina.

The Order of Bailey, J., dismissing the *habeas corpus* proceeding in the Superior Court is reversed, and this cause is remanded to the Superior Court of Alamance County for determination of a proper support order, if any, to be entered.

Reversed and remanded.

MALLARD, C.J., and BRITT, J., concur.

STATE OF NORTH CAROLINA v. JASPER SWAIN.

(Filed 20 March 1968.)

1. Criminal Law § 106—

If there is evidence, circumstantial, direct, or a combination of both, amounting to substantial evidence of each element of the offense charged, motion to nonsuit should be denied, it being in the province of the jury

to determine whether the circumstantial evidence excludes every reasonable hypothesis of innocence.

2. Burglary and Unlawful Breakings § 5—

Evidence of the State tending to show that the defendant and another person were observed at 2:00 a.m. walking from the front of a store building to an adjacent alley, that defendant and three others who were huddled together in the alley ran when officers approached, and that a glass in the store's front door had been broken, *is held* insufficient to be submitted to the jury on the issue of defendant's guilt of attempted breaking and entering.

3. Criminal Law § 46—

While flight of an accused person is a circumstance to be considered with other facts and circumstances upon the question of an implied admission of guilt, it is insufficient, standing alone, to warrant the submission of the issue of guilt to the jury.

APPEAL by defendant from *Carr, J.*, at the October 1967 Criminal Session of ALAMANCE County Superior Court. The defendant was tried on a warrant for attempted breaking and entering of "Trucker's Rest at 584 South Beaumont Avenue, Burlington, N. C." in the Burlington Municipal Court. He was found guilty and given a sentence of eighteen months. He took an appeal to the Superior Court, and upon the call of the case for trial upon motion of the solicitor, the warrant was amended to charge the defendant with an attempt to break and enter the building of Selma Harrell known as "Trucker's Rest" and located at 584 South Beaumont Avenue, Burlington, North Carolina. To the charge, the defendant entered a plea of not guilty. The case was consolidated with three other cases charging the same offense to three other defendants.

At the close of the State's evidence, the defendant made a motion for judgment as of nonsuit. This motion was denied and the defendant offered no evidence and renewed his motion for judgment as of nonsuit, and from a denial of this motion, the defendant assigns error in the trial below. The jury found the defendant guilty and he was sentenced to imprisonment for a term of twelve months to be assigned to work under the supervision of the State Correctional Department.

From the judgment, the defendant appealed assigning as error the denial of his motion for judgment as of nonsuit.

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

W. R. Dalton, Jr., for defendant appellant.

CAMPBELL, J. As stated by Lake, J. in *State v. Hill*, 272 N.C. 439, 444, 158 S.E. 2d 329 (1967):

> "The test of the sufficiency of the State's evidence to withstand a motion for judgment of nonsuit in a criminal action is the same whether the evidence is circumstantial, direct, or a combination of both. * * * To survive the motion for nonsuit, it is not necessary that the court be of the opinion that the evidence is sufficient to establish each element of the offense beyond a reasonable doubt. It is enough that there is substantial evidence of each element of the offense. If so, the issue must be submitted to the jury, and it is a question for the jury whether the evidence establishes each element of the crime beyond a reasonable doubt. * * * When the evidence relied upon to establish an element of the offense charged is circumstantial, the court must charge the jury that it must return a verdict of not guilty unless the evidence points unerringly to the defendant's guilt and excludes every other reasonable hypothesis. * * * It is not necessary however that the judge must so appraise the evidence in order to overrule the motion for judgment of nonsuit."

The State's evidence in its strongest light shows that on Friday, 15 September 1967, Selma Harrell owned and operated a place of business known as "Trucker's Rest" located on South Beaumont Avenue in Burlington, North Carolina. This business was a retail grocery store, and among other items, beer was sold.

About 9:30 p.m. the store was closed and all of the doors were locked. There was a front door which had glass panels in it which extended from the top about half way down. There was also a back door and a side door. In addition to the latch, the front door had a padlock on the inside with a screen above it. On one side of the store, there was a driveway and it was on this driveway that the side door opened. On the other side of the store, there was an alley but there was no door on the alley side of the building.

Braddy, a witness for the State, testified that he lived across the street on Beaumont Avenue and about 50 to 75 yards away from the store. He could see the store and the entrance to the alley from his home. About 2:00 a.m. on 16 September 1967 he was on the front porch of his home smoking, and he noticed two people walking in front of the store. He observed them go into the alley. He called the police and they arrived in about ten minutes. During this time he continued to watch the mouth of the alley and saw no one come out. When the police arrived, he saw the police officers place some people

in the police car and two of the persons put into the car were dressed like the two he had first seen walking in front of the store. The defendant had on a light jacket similar to the jacket the witness had seen on one of the two people in front of the store before he called the police. This witness saw no one break a glass in the door of the store.

The police officers testified that when they arrived they stopped the police patrol car in such way that the lights shined down the alley. Four men were observed huddled together in the alley and when the lights shined on them they ran towards the back of the alley. Upon command of the police officers, they stopped and were placed under arrest. All four had the odor of alcohol upon their breath but were not under the influence of alcohol. No weapons or burglary tools were found, either on the defendant or any of his companions. The defendant told the arresting officers that he had been drinking beer in the home of one of his companions and that he left to go telephone a taxi cab in order to go home. The other three companions came out of the house with him and one of them had a pint of whiskey and they had gone down the alley to take a drink. The defendant and his companions denied breaking any glass in the door of the store.

The State's evidence further shows that the glass panel in the front door was broken near the bottom just above the door handle and above where the padlock was on the inside. A hole some four inches wide by five to six inches high had been made in the glass, and glass was found knocked back into the store for a distance of about fifteen feet.

The police officers were unable to find a whiskey bottle in the alley or the adjacent field but did find a pair of work gloves and four socks in a rack for placing empty bottle cartons in the alley back of Jim's Curb Market which was a store across the alley from Trucker's Rest.

"This just is not enough evidence to convict the defendant of the charge." *State v. Batts,* 269 N.C. 694, 153 S.E. 2d 379 (1967).

"While the flight of an accused person may be admitted as a circumstance tending to show guilt, it does not create a presumption of guilt, nor is it sufficient standing alone, but it may be considered in connection with other facts in determining whether the combined circumstances amount to an admission." *State v. Gaines,* 260 N.C. 228, 231, 132 S.E. 2d 485 (1963).

"Evidence which raises no more than a surmise or conjecture of guilt is insufficient to overrule nonsuit, and there must be legal evidence of each fact necessary to support conviction." Strong, 2 N. C.

Index 2d, Criminal Law, Section 106, and cases cited in Footnotes 8 and 9.

The evidence here can only "raise a surmise or conjecture" of the defendant's guilt. It is not sufficient to withstand a motion to nonsuit.

Reversed.

MORRIS and PARKER, JJ., concur.

EDNA T. DUNN, ADMINISTRATRIX OF THE ESTATE OF ARNOLD LEWIS DUNN, DECEASED, v. NORTH CAROLINA STATE HIGHWAY COMMISSION.

(Filed 20 March 1968.)

1. Appeal and Error § 14—

G.S. 1-279 requiring that an appeal from a judgment rendered in term be taken within ten days after its rendition unless appeal is taken at the trial, and G.S. 1-280 which requires that appellant shall cause his appeal to be entered by the clerk on the judgment docket and notice thereof to be given the adverse party, are jurisdictional, and when not complied with, the Court of Appeals acquires no jurisdiction of the appeal and must dismiss it.

2. Same; Notice § 1—

The fact that plaintiff's attorney did not receive actual notice of a judgment entered in term until more than ten days after the rendition of the judgment does not remove plaintiff's responsibility to comply with G.S. 1-279, since plaintiff was charged with notice of all proceedings in the cause during the session.

3. Master and Servant § 93—

The 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 to support findings to the contrary.

PURPORTED appeal by plaintiff from *Brewer, J.*, from judgment entered at the September 1967 Session of the Superior Court of HARNETT County; and purported appeal by plaintiff from judgment of Brewer, J., entered in Chambers on 18 December 1967.

The record discloses that on 1 December 1965, at approximately 7:45 p.m., plaintiff's intestate was traveling east on rural-paved road 1799 in Harnett County when his car ran off the road and he was fatally injured.

Plaintiff filed a claim with the Industrial Commission against

defendant, State Highway Commission, alleging negligence on the part of Highway Commission employees, in that they left holes in said road and allowed dirt to be piled up on the shoulder and on the edge of the pavement on said road. Defendant filed answer denying plaintiff's allegations of negligence and alleging contributory negligence on the part of plaintiff's intestate.

The Hearing Commissioner rendered a decision denying plaintiff's claim for damages after finding no negligence on the part of defendant's employees and that decedent's death resulted from the operation of his automobile at a high and excessive rate of speed.

Plaintiff appealed to the full Commission which, with one commissioner dissenting, adopted as its own the findings of fact, conclusions of law, and award rendered by the Hearing Commissioner.

Plaintiff appealed to the Superior Court of Harnett County where the matter came on for hearing on 10 September 1967 during the September 1967 Civil Session. During said session, on 19 September 1967, Judge Brewer entered judgment in which he confirmed and sustained the findings of fact, conclusions of law, and award of the Industrial Commission.

On 17 October 1967, plaintiff's attorney gave notice of appeal to this Court from the aforesaid judgment. Thereafter, defendant filed a motion in the Superior Court of Harnett County asking that said appeal be dismissed for that notice of appeal was not given within ten days after entering of judgment as required by G.S. 1-279 and G.S. 1-280.

The motion to dismiss was heard by consent before Judge Brewer on 18 December 1967. On said date, Judge Brewer entered judgment finding, *inter alia*, that the cause came on for trial at the September 1967 Session of the Superior Court of Harnett County, that judgment was rendered during said term in favor of the defendant and against the plaintiff, that plaintiff's attorney received a copy of said judgment through the mail from the clerk of said court at his office in Smithfield, N. C., on 9 October 1967, and that plaintiff gave notice of appeal to the Court of Appeals on 17 October 1967. Said judgment further found that plaintiff failed to give notice of appeal in apt time as required by law and ordered that the action be dismissed.

Plaintiff excepted to the signing of said judgment and gave notice of appeal therefrom in open court.

Joseph H. Levinson, Attorney for plaintiff appellant.

Thomas Wade Bruton, Attorney General, and Fred P. Parker, III, Staff Attorney, for defendant appellee.

BRITT, J. It is provided by statute, G.S. 1-279, that the appeal from a judgment rendered *in term* must be taken within ten days after its rendition, unless the record shows an appeal taken at the trial, which is sufficient. And, it is provided by statute, G.S. 1-280, that within the time prescribed in G.S. 1-279, the appellant shall cause his appeal to be entered by the clerk on the judgment docket and notice thereof to be given to the adverse party unless the record shows an appeal taken or prayed at the trial, which is sufficient.

Interpreting these two statutes, the Supreme Court of North Carolina has held that these provisions are jurisdictional, and unless complied with, the Supreme Court acquires no jurisdiction of the appeal and must dismiss it. *Aycock v. Richards,* 247 N.C. 233, 100 S.E. 2d 379 (1957). See also *Mason v. Commissioners of Moore,* 229 N.C. 626, 51 S.E. 2d 6, and cases cited. The Court of Appeals is bound by the same principle of law.

Judge Brewer's findings indicate that plaintiff's attorney did not receive actual notice of the judgment entered at the September 1967 Session until 9 October 1967. This finding does not alleviate plaintiff's predicament. When a civil action is regularly calendared for hearing at a session of court, all parties are bound to take notice of all motions made and proceedings had in the action in open court during the session. *Speas v. Ford,* 253 N.C. 770, 117 S.E. 2d 784 (1960); *Collins v. Highway Comm.,* 237 N.C. 277, 74 S.E. 2d 709. Therefore, plaintiff was charged with the responsibility of giving notice of appeal within ten days after 19 September 1967. Judge Brewer's order dated 18 December 1967, which had the effect of dismissing plaintiff's purported appeal, was proper. *Teague v. Teague,* 266 N.C. 320, 146 S.E. 2d 87.

Nevertheless, in this case, this Court has carefully reviewed the record on appeal and finds no prejudicial error.

It is well settled that the Industrial Commission's findings of fact are conclusive on appeal when supported by competent evidence, except for jurisdictional findings. This is true even though there is evidence which would support findings to the contrary. *Bailey v. Dept. of Mental Health,* 272 N.C. 680, 159 S.E. 2d 28 (1968); *Mica Co. v. Bd. of Ed.,* 246 N.C. 714, 100 S.E. 2d 72.

There was sufficient competent evidence before the Hearing Commissioner to support his decision and order.

The judgment of Judge Brewer dismissing the action is

Affirmed.

MALLARD, C.J., and BROCK, J., concur.

LAWRENCE H. WILSON v. WALTER YATES LEE AND PAULINE ANDERSON SHIFLETT.

(Filed 20 March 1968.)

1. Trial § 21—

On motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff.

2. Negligence § 24a—

Negligence is not presumed from the mere fact of injury.

3. Automobiles § 10—

A mere temporary or momentary stoppage on the highway without intent to break the continuity of travel is not parking or standing within the purview of G.S. 20-161.

4. Automobiles § 55—

Evidence that plaintiff was driving within the speed limit on a dual lane highway in the early morning and that as he emerged from a patch of fog he saw defendant's car straddling his lane of travel 50 to 75 feet ahead, and that a collision resulted, *is held* insufficient to be submitted to the jury on the issue of defendant's negligence in the absence of evidence showing the circumstances under which defendant's car got in that position or how long it had been there.

THIS is an appeal by the plaintiff from *Braswell, J.*, at the Regular October 1967 Civil Session, JOHNSTON Superior Court.

The plaintiff sued for damages for personal injuries sustained by him and damages to his automobile growing out of a collision between plaintiff's 1963 Pontiac automobile, driven by the plaintiff, and a 1964 Ford automobile owned by the defendant Shiflett and driven by the defendant Lee.

At the close of the plaintiff's evidence, the defendant made a motion for judgment of involuntary nonsuit and same was allowed.

George R. Kornegay, Jr., for plaintiff appellant.
Spence and Mast by George B. Mast for defendant appellees.

CAMPBELL, J. The wreck occurred about 5:15 o'clock a.m. on August 4, 1965, on U. S. Highway #701 Bypass near its intersection with U. S. Highway #701 approximately one mile north of the city limits of Whiteville, Columbus County.

State Highway Patrolman, F. D. McLean, testified on behalf of the plaintiff as to what he had observed when called to the scene for investigation. He testified that he found debris on the highway in the right-hand lane as one proceeded north. "Upon arriving at the scene I found Walter Yates Lee (the defendant) and he told me he

was driving the 1964 Ford north on U. S. Highway #701 Bypass before the accident. Lee told me he did not know what happened. I did not see Lawrence H. Wilson (the plaintiff) at the scene of the accident. * * * It was foggy on the morning of the wreck, but I cannot describe the fog. The speed limit along U. S. Highway #701 Bypass is 55 miles per hour. The best I can remember, the 1964 Ford was damaged right bad all the way down the right side and the front of the 1963 Pontiac was damaged right bad. Mr. Lee said that he did not know what happened, that the car hit him from the rear. When I talked to Lawrence Wilson at the hospital, he told me he was going north and he was involved in a wreck with Mr. Lee. I could not find out from Walter Yates Lee or Lawrence Wilson what happened. There was no damage to the front of the 1964 Ford."

The only other evidence introduced by the plaintiff as to the automobile collision itself was the testimony of the plaintiff who testified:

"I was traveling north on U. S. Highway #701 Bypass at a speed of 45 to 50 to 55 miles per hour. I did not have my lights on and visibility was good for three, four or five hundred feet. It was foggy, but it was in sheets, not just a blanket fog. When I was approximately 100 feet from where the wreck occurred, I saw a patch of fog. When I saw the fog, I took my foot off of the accelerator and slowed down. The fog was just a blanket-like cloud and I could not see through the fog. I was in the fog just momentarily. When I came out of the fog, I could see the defendant's 1964 Ford in front of me about 50 feet or 75 feet at the most, crossways the road in my lane of travel. I attempted to put on my brakes but the impact occurred before I did. The 1964 Ford was in the right lane going north. The right front of my car struck the right side of the 1964 Ford. I would say my right headlight hit the post of the 1964 Ford which was four-door car. The post would be about the middle of the right side of the car. The wreck occurred between 5:15 and 5:30 o'clock in the morning. The defendant's car was in the right-hand lane going north. The next thing I remembered was being in the hospital in Columbus County."

Based upon this testimony the plaintiff relies upon a violation of G.S. 20-161 claiming that this evidence establishes a violation of that particular statute and that the evidence establishes that the 1964 Ford was "parked" or "left standing" on the highway.

The evidence must be considered in the light most favorable to the plaintiff in passing upon a motion to nonsuit. *Lassiter v. Williams*, 272 N.C. 473, 476, 158 S.E. 2d 593 (1967).

"Negligence is not presumed from the mere fact of injury." *Hubbard v. Oil Co.*, 268 N.C. 489, 151 S.E. 2d 71 (1966).

> "It is also true that negligence need not be established by direct and positive evidence, but may be established by circumstantial evidence, either alone or in combination with direct evidence. * * * 'A basic requirement of circumstantial evidence is a reasonable inference from established facts. Inference may not be based on inference. Every inference must stand upon some clear and direct evidence, and not upon some other inference or presumption.' * * * The plaintiff, to carry her case to the jury against defendant on the ground of actionable negligence, must offer evidence sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts. * * * The doctrine of *res ipsa loquitur* is not applicable upon a mere showing of the wreck of an automobile on the highway." *Crisp v. Medlin*, 264 N.C. 314, 317, 141 S.E. 2d 609 (1965). *cf. Clark v. Scheld*, 253 N.C. 732, 117 S.E. 2d 838 (1960).

The evidence in the instant case fails to show under what circumstances the defendant's 1964 Ford got "crossways across the road" in the plaintiff's lane of travel or how long it had been in that location. A mere temporary or momentary stoppage on the highway when there is no intent to break the continuity of the travel is not "parking" or "leave standing" as used in the statute. *Faison v. Trucking Co.*, 266 N.C. 383, 390, 146 S.E. 2d 450 (1965).

As stated by Brogden, J., in *Grimes v. Coach Co.*, 203 N.C. 605, 609, 166 S.E. 599 (1932): "In the present case, deductions, inferences, theories and hypotheses rise and run with the shifting turns of interpretation, but proof of negligence must rest upon a more solid foundation than bare conjecture."

Therefore, the Court is of the opinion that the ruling of the trial judge was correct.

Affirmed.

MORRIS and PARKER, JJ., concur.

HENRY ROBERTSON v. BANKERS AND TELEPHONE EMPLOYERS INSURANCE COMPANY AND NATIONWIDE MUTUAL INSURANCE COMPANY.

(Filed 20 March 1968.)

Pleadings § 18—

A complaint seeking recovery against two insurance companies upon policies of automobile liability insurance separately issued by each company to plaintiff's two tortfeasors is demurrable for misjoinder of both parties and causes, G.S. 1-123, even though plaintiff's injury resulted from the joint and concurrent negligence of the two tortfeasors, since the liability of each insurer is predicated solely upon its own policy.

APPEAL by plaintiff from *Braswell, J.*, at the November 1967 Term of the Superior Court of JOHNSTON County.

On 2 May 1966 plaintiff brought suit in the Superior Court of Johnston County against Alex Lee McArthur and Murrice McLamb to recover for personal injuries resulting from a collision on 15 September 1963 between a car owned and operated by McLamb and a car owned and operated by McArthur, in which latter car plaintiff was riding as a guest. Plaintiff alleged joint and concurrent negligence on the part of the two defendants. Summons was served in that action on 22 May 1966. Neither defendant answered or otherwise pleaded, and on 3 August 1966 judgment by default and inquiry was entered. At the December 1966 Civil Term of the Johnston Superior Court the case was submitted to a jury on the issue of damages and the jury answered that issue in the amount of $10,000.00. On 12 December 1966 judgment was entered on the verdict against McArthur and McLamb that plaintiff recover of those defendants jointly and severally the sum of $10,000.00.

Plaintiff's judgment against McArthur and McLamb not having been paid, on 10 April 1967 plaintiff instituted the present action against the two insurance companies. Plaintiff alleged that Bankers and Telephone Employers Insurance Company had issued its owners policy of liability insurance insuring McArthur against liability resulting from the operation of his motor vehicle within the State of North Carolina and that Nationwide Mutual Insurance Company had issued a similar policy to McLamb.

Defendant Nationwide Mutual Insurance Company demurred to the complaint for misjoinder of parties and causes. From judgment sustaining the demurrer and dismissing the action as to Nationwide Mutual Insurance Company, plaintiff appeals.

J. R. Barefoot for plaintiff appellant.

Dupree, Weaver, Horton, Cockman & Alvis for defendant appellee, Nationwide Mutual Insurance Company.

PARKER, J. While not separately stated, plaintiff's complaint

has alleged two causes of action, one against the defendant Bankers and Telephone Employers Insurance Company on its policy of liability insurance issued to Alex Lee McArthur and the other against the defendant Nationwide Mutual Insurance Company on its policy of liability insurance issued to Murrice McLamb. While both causes of action are on contract, each is grounded on an entirely separate contract entered into between different parties. The defendant Nationwide Mutual Insurance Company is not a party to nor is it in any way interested in the policy of insurance between Bankers and Telephone Employers Insurance Company and McArthur. On the other hand, Bankers and Telephone Employers Insurance Company is not a party to nor in any way interested in the policy of insurance between Nationwide Mutual Insurance Company and McLamb. The fact that McArthur and McLamb may have become jointly liable to plaintiff by reason of their joint and concurrent negligence in causing plaintiff's injuries, does not make the liability of the two insurance companies joint. Each is liable, if at all, under its own separate policy in which the other is in no way involved.

The case of *Pretzfelder v. Merchants Insurance Company,* 116 N.C. 491, 21 S.E. 302 (1895), cited by the plaintiff, is not controlling in the case before us. In that case the plaintiff's stock of goods had been damaged by fire, and plaintiff brought action against several fire insurance companies whose policies he held. The fire insurance contract with each company contained the provision that the plaintiff's right of recovery against each was limited to the proportion of the loss which the amount named in the policy of each company should bear to the whole amount insured. The court, speaking through Clark, J., later Chief Justice, said:

> "By their stipulation to apportion the loss the companies have, to that extent at least, made the five policies one contract, the amount of damages accruing upon which should be assessed and apportioned in one joint action. Adams' Eq. 200; 1 Pomeroy Eq. Jur., section 245, 274; *Black v. Shreeve,* 3 Hals, ch. 440, 456. The verdict necessarily 'affects all parties to the action.' The joinder is therefore within the purview of The Code, sec. 267."

In the case before us plaintiff has not alleged that there is any clause in the liability policy issued by either of the defendant insurance companies calling for any apportionment of liability. He has alleged simply that one of the defendant insurance companies has issued its liability policy to one of the joint tort-feasors and the other defendant insurance company has issued its separate liability policy to the other. The two policies are separate contracts between sep-

arate parties and no clause in either policy so relates it to the other as to make the two policies one contract.

Plaintiff contends and it may well be that our procedure should permit the type of joinder of parties and causes attempted here. The legislature apparently felt so when adopting the new Rules of Civil Procedure, Chapter 954, Session Laws 1967. (See particularly Rules 18, 19, 20 and 21.) This would seem all the more true in view of the provisions of Section 1B-1(e) of the Uniform Contribution Among Tortfeasors Act, adopted as Article 1 of Chapter 1B of the General Statutes by Chapter 847 of the 1967 Session Laws. But the new Rules of Civil Procedure do not become effective until 1 July 1969, and the Uniform Contribution Among Tortfeasors Act is not applicable to litigation pending on 1 January 1968. In the present case we must deal with the law as it is now.

Under our present Code of Civil Procedure, while plaintiff may unite in the same complaint several causes of action arising out of contract, each of the causes of action so united must affect all the parties to the action. G.S. 1-123. Here this requirement was not met and the demurrer was properly sustained. *Orkin Exterminating Company v. O'Hanlon*, 243 N.C. 457, 91 S.E. 2d 222 (1956). The judgment below is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

J. D. SERCY, MILTON S. HUDSON, J. K. ADCOX, SR., JEAN LEWIS AND REVEREND SAMUEL HARDISON, OFFICERS AND MEMBERS OF THE TRUE CONGREGATION OF LONG BRANCH PENTECOSTAL FREE WILL BAPTIST CHURCH AND THE MEMBERS OF SAID CHURCH UNITED IN INTEREST WITH SAID NAMED PLAINTIFFS, AND CONSTITUTING THE TRUE CONGREGATION OF LONG BRANCH PENTECOSTAL FREE WILL BAPTIST CHURCH, PLAINTIFFS, v. EDWARD M. WALKER, JESSE ALPHIN, RAYMOND ALTMAN, CHARLES POPE AND HAROLD BEASLEY, PURPORTED DEACONS OF LONG BRANCH NON-DENOMINATIONAL CHURCH; MRS. HAROLD BEASLEY, PURPORTED TREASURER OF SAID CHURCH, AND ALL PERSONS UNITED IN INTEREST WITH THEM AND PURPORTING TO BE THE CONGREGATION OF LONG BRANCH NON-DENOMINATIONAL CHURCH, DEFENDANTS.

(Filed 20 March 1968.)

1. Pleadings § 30—

Judgment on the pleadings is improper where the pleadings raise an issue of fact on any single material proposition.

2. Same—

Plaintiff's motion for judgment on the pleadings is in effect a demurrer to the answer and admits for the purpose of the motion the truth of all

facts well pleaded in the answer and the untruth of plaintiff's allegations which are controverted in the answer.

3. Same—

On plaintiff's motion for judgment on the pleadings, defendant's answer will be liberally construed and the motion denied if the facts alleged in the answer constitute a defense or if the answer is good in any respect or to any extent.

4. Religious Societies and Corporations § 3—

In an action to determine the true congregation of a church and to restrain defendants from using the church properties, plaintiffs' motion for judgment on the pleadings *is held* improvidently granted, there being material issues of fact raised by the pleadings which require the consideration of evidence.

APPEAL by defendants from *Braswell, J.*, October, 1967, Session, HARNETT Superior Court.

This is a civil action instituted by the plaintiffs against the defendants to determine the true congregation of the Long Branch Pentecostal Free Will Baptist Church, and to restrain the defendants from using said church properties and facilities. Upon the call of the case for trial, the plaintiffs made a motion for judgment on the pleadings, which motion was allowed. The Court entered judgment concluding that the defendants' answer to the complaint raised no issuable fact for jury determination in that in their answer they admit the substantive and determinative allegations of the complaint, and that as a matter of law the plaintiffs' motion for judgment on the pleadings should be allowed.

Defendants appealed.

Boyce, Lake and Burns, by Eugene Boyce, and Bryan, Bryan and Johnson by Robert C. Bryan, Attorneys for defendant appellants.

W. A. Johnson, Attorney for plaintiff appellees.

BROCK, J. The defendants assign as error the granting of the plaintiffs' motion for judgment on the pleadings, and the signing of the judgment.

The pleadings are voluminous and often argumentative, and a detailed discussion or even partial reproduction here would serve no useful purpose.

The law does not authorize the entry of a judgment on the pleadings in any case where the pleadings raise an issue of fact on any single material proposition. *Erickson v. Starling*, 235 N.C. 643, 71 S.E. 2d 384; *Motley v. Thompson*, 259 N.C. 612, 131 S.E. 2d 447.

Plaintiffs' motion for a judgment on the pleadings is in effect, or in the nature of, a demurrer to the answer, and admits for the

purpose of their motion: one, the truth of all well-pleaded facts in the answer, and, two, the untruth of the plaintiffs' own allegations insofar as they are controverted in the answer. The answer of the appealing defendant must be construed liberally, which means that every reasonable intendment must be taken in favor of him, and if the answer contains well-pleaded facts sufficient to constitute a defense, or if it is good in any respect or to any extent, it will not be overthrown by a motion for judgment on the pleadings. *Sale v. Johnson, Commissioner of Revenue,* 258 N.C. 749, 129 S.E. 2d 465.

The plaintiffs allege, generally, that the conduct of the defendants is in violation of the *Discipline* of the church. The defendants, generally, deny this. However, since the contents and provisions of the *Discipline* are not before the Court by way of the pleadings, no determination can be made as to whether defendants have violated the *Discipline* in any respect, and, if so, what effect it would have.

The plaintiffs allege that the defendants have formed a non-denominational church. The defendants deny this.

The plaintiffs allege that the defendants do not now support the usages, customs, doctrines and practices recognized and accepted by both factions of the congregation before this dissension arose. The defendants deny this.

The plaintiffs allege, and the defendants admit, that the defendants are not now members of the fellowship of the Pentecostal Free Will Baptist Church, Inc., a Conference of Free Will Baptist Churches.

The crucial finding of fact in the judgment appealed from is as follows:

> "7. That the named defendants and those united in interest with them have diverted the property of Long Branch Pentecostal Free Will Baptist Church to the support of usages, customs, doctrines and practices radically and fundamentally opposed to the characteristic usages, customs, doctrines and practices recognized and accepted by both factions of the congregation before the dissension between them arose and that the plaintiffs and those united in interest with them have remained true to said usages, customs, doctrines and practices."

After a careful and thorough examination of the record, we hold that it does not justify findings upon the pleadings sufficient to render final judgment thereon. There are material issues of fact raised by the pleadings, the resolution of which require the consideration of evidence.

Judgment on the pleadings in this case was improvidently entered.

This disposition of the appeal reinstates the Temporary Injunction entered by Braswell, J., on 9 October 1967, and requires that a new Order be issued to the defendants to show cause, if any they have, why the injunction should not be continued in effect until the final hearing in this cause.

Reversed.

MALLARD, C.J. and BRITT, J., concur.

STATE OF NORTH CAROLINA v. JOHNNY THOMAS WILLIAMS.

(Filed 27 March 1968.)

1. Criminal Law § 162—

Exceptions to the admission of evidence are deemed waived if not taken in apt time during the trial, and a motion to strike testimony to which no objection was aptly made is addressed to the discretion of the trial court and its ruling thereon is not reviewable in the absence of an abuse of discretion.

2. Same—

G.S. 1-206(3) provides that no exception need be taken to any ruling upon an objection to the admission of evidence, but the statute does not do away with the necessity of making an objection to the ruling of the court.

3. Same—

A motion to strike the testimony of a State's witness without directing the trial court's attention to any specific evidence deemed incompetent or prejudicial is ineffectual.

4. Same—

Failure of defendant to object on trial to testimony concerning defendant's identification at a police line-up is assumed to be trial strategy on the part of defendant's counsel, since every competent trial lawyer in this State knows that the failure to object to evidence is ordinarily a waiver.

5. Criminal Law § 66; Constitutional Law § 32—

Evidence in this case *held* sufficient to show that defendant freely, understandingly and voluntarily waived his right to counsel at a police identification line-up.

6. Criminal Law § 104—

On motion to nonsuit, the evidence must be considered in the light most favorable to the State.

7. Robbery § 4—

Evidence in this case *held* sufficient to be submitted to the jury on the issue of defendant's guilt of armed robbery in violation of G.S. 14-87.

8. Criminal Law § 114—

A remark of the court to the jury, "You may retire now, that was just a legal technicality I forgot to tell you about," while not approved, is deemed not to constitute an expression of opinion by the trial court.

9. Criminal Law § 167—

A new trial will not be granted for mere technical error which could not have affected the result, but only for prejudicial error amounting to the denial of a substantial right.

APPEAL by defendant from *Bickett, J.*, October 1967 Second Regular Criminal Session of the Superior Court of WAKE County.

Criminal prosecution upon a bill of indictment charging the defendant with armed robbery in violation of G.S. 14-87.

The bill charges that on 18 August 1967 the defendant with the use and threatened use of a pistol endangered and threatened the life of Allen Bruce Wood and robbed him of $126.

Defendant, an indigent person, was represented at his trial in the Superior Court and in this Court by Ralph McDonald, his court-appointed attorney.

Trial was by jury upon his plea of not guilty. The jury returned a verdict of guilty of armed robbery as charged in the bill of indictment.

From a judgment of imprisonment in the State's prison for a term of not less than fifteen years nor more than twenty years, the defendant appeals to the Court of Appeals.

Attorney General T. W. Bruton and Deputy Attorneys General Harry W. McGalliard and James F. Bullock for the State.

Ralph McDonald for the defendant.

MALLARD, C.J. Defendant asserts three assignments of error. First, that the trial court committed error by refusing to strike the testimony of the State's witness, Allen Bruce Wood. Second, that the trial court committed error in denying defendant's motion for judgment as of nonsuit made at the close of all the testimony. Third, that the court committed error in its charge to the jury.

In order to understand the first two assignments of error, it is necessary to view the evidence.

Allen Bruce Wood testified on direct examination that: On 18 August 1967 he worked at Shorty Pearce's Shell Station and saw the defendant come into this place of business at about 10:30 p.m. and purchase a bottled drink. The defendant remained there until the other customers left the building, and then the defendant put a 22-

caliber pistol against the ribs of the witness Wood and told him that he wanted everything in the cash register. The defendant told the witness Wood that if he tried anything that he, the defendant, would fill him full of holes. The defendant got $126 out of the cash register and then made the witness Wood go into the men's rest room and instructed him not to stick his head out for five or ten minutes. At that time the defendant had been in the place of business for fifteen or twenty minutes. After about five minutes, the witness Wood came out of the rest room, called the police, and the next time he saw the defendant was on 3 September in the jail part of Central Prison in Raleigh in a line-up with about seven other people. After completing the direct examination of the witness Wood, the solicitor turned him over to the defendant for cross-examination. There had been no objection to any question asked the witness Wood by the solicitor. At that time and before cross-examination, the defendant made a motion to strike the testimony of the witness without stating any reasons. The court denied the motion and the defendant excepted.

M. L. Stephenson, a State's witness, testified that he was a detective with the Raleigh Police Department and that he arrested the defendant in this case on 2 September 1967. He further testified that he placed the defendant in a line-up of six people in the Wake County Jail on 3 September and requested the witness, Allen Bruce Wood, to view the men in the line-up; that Allen Bruce Wood identified the defendant as the man who had robbed him. He further testified that prior to the time of placing the defendant in the line-up, he had advised the defendant of his constitutional rights to have a lawyer, before and during the line-up. That the defendant stated that he did not want any counsel, that he had not committed any crime and did not mind standing in a line-up.

The defendant did not object to any of this testimony relating to the line-up given by the witness Stephenson on direct examination, did not object to any question asked the witness Stephenson on direct examination, and did not move to strike it or any portion thereof at any time.

Kenneth Dunn, a witness for the defendant, testified that he is a brother-in-law of the defendant, and that on the night of 18 August 1967 he and the defendant were together from about 9:00 p.m. until about 3:00 a.m. the next morning, when they left to go to the beach together. The witness Dunn testified that during that time he and the defendant were at places other than Shorty's Shell Station.

Marjorie Williams, wife of the defendant, testified that her husband was with her on the night of 18 August at her mother's house and at her house from about 9:40 p.m. until they left to go to the

beach early the next morning, except when her husband and brother, Kenneth Dunn, left her mother's house for about ten or fifteen minutes around 10:00 p.m.

The defendant testified that he and his brother-in-law were together on the night of 18 August 1967; that he and his brother-in-law were at his house and at his mother-in-law's house that night, except on one occasion. They rode around the block, drank a beer, and then took his wife to her mother's home. Afterwards, he and his brother-in-law "parked the car and went to walking the block." They left to go to the beach at about 3:00 a.m. the next morning. The defendant testified on cross-examination that he had never seen the State's witness, Allen Bruce Wood, until the night in jail when the witness Wood identified him; that he stood in a line-up, but the prosecuting witness did not look at anybody else but him and walked straight to him.

There was no objection to the questions asked the defendant with respect to the line-up. There was no motion to strike the answers to the questions concerning the matter of the prosecuting witness identifying the defendant in jail. There is nothing in the record to indicate that the defendant made any objection in the trial or motion to strike the evidence on the grounds that he did not have a lawyer at the time he was identified by the prosecuting witness in jail. This question is raised for the first time in the defendant's brief.

"The general rule in criminal and civil cases is that exceptions to the evidence must be taken in apt time during the trial; if not, they are waived. (citing cases.) It is too late after the trial to make exceptions to the evidence. (citing cases.) These cases were decided prior to 1949. Ch. 150, S.L. 1949, now codified as G.S. 1-206(3), is clear and plain. This statute provides that no exception need be taken to any ruling *upon an objection* to the admission of evidence, but it does not do away *with the necessity of making an objection* to the ruling of the court. (citing cases.)" *State v. Howell*, 239 N.C. 78, 79 S.E. 2d 235. See also, *State v. Ayscue*, 240 N.C. 196, 81 S.E. 2d 403.

In *State v. Jenkins*, 234 N.C. 112, 66 S.E. 2d 819, Chief Justice Stacy stated: "Nor can the defendant's challenge to the validity of the search warrant be sustained. In the first place, it may be doubted whether the defendant properly presents his challenge. The evidence in respect to the validity of the warrant seems to have been offered without objection. The only exception is to the refusal to strike it out. This was a matter addressed to the sound discretion of the trial court." In *State v. Hunt*, 223 N.C. 173, 25 S.E. 2d 598, the Supreme Court said:

> "An objection to testimony not taken in apt time is waived. *S. v. Merrick,* 172 N.C. 870, 90 S.E. 257. Afterward, a motion to strike out the testimony, to which no objection was aptly made, is addressed to the discretion of the trial judge, and his ruling in the exercise of such discretion, unless abuse of that discretion appears, is not subject to review on appeal."

There is no contention in this case that there was an abuse of discretion on the part of the trial judge.

In this case there was no objection to the admission of evidence as to the identification of the defendant by the prosecuting witness. This was testified to three different times by three different witnesses, including the defendant, and the only time there was a motion to strike was after the prosecuting witness testified. There was no objection to and no motion to strike the testimony as to the identification of the defendant by the prosecuting witness when the officer testified to it. There was no objection to and no motion to strike the testimony as to the identification of the defendant by the prosecuting witness when the defendant testified to it on cross-examination. It is a well-established rule in North Carolina even when evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is lost. Stansbury, N. C. Evidence, § 30, at 56-57 (2 ed. 1963).

The evidence of the prosecuting witness would indicate that he first identified the defendant when he was being robbed and that he identified him in jail and in court the second and third times.

The defendant's defense was one of alibi, and the evidence is that the defendant told the officer after being warned of his rights that he did not mind being in a line-up. There is no contention made that he did not freely and voluntarily stand in the line-up. This record indicates that the second and third identifications of the defendant were the direct result of the identification made by the prosecuting witness at the time the crime was committed.

It is logical to conclude that the failure of the defendant to object to the questions concerning the line-up identification was trial strategy on the part of counsel for the defendant. In *Wilson v. Bailey,* 375 F. 2d 663, we find these words:

> "We may judicially notice that every competent trial lawyer in North Carolina knows that the contemporaneous objection rule obtains in this State, *i.e.,* that failure to object to evidence is ordinarily a waiver. See Stansbury, North Carolina Evidence, § 27, at 59-52 (2 ed. 1963).
>
> "Unlike the situation in *Henry v. State of Mississippi,* 379 U.S.

443, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965), there was here no motion for directed verdict on the ground of an illegally obtained incriminating statement which can be said to have notified the trial judge of the possibility of an unconstitutional trial. At no time during the entire trial was the judge's attention directed or invited to the question of whether unlawfully obtained evidence had been received."

In this case, while there was a motion to strike all of the testimony of the witness Wood, there appears nothing in the record that the judge's attention was directed or invited to the question of whether any specific evidence had been unlawfully obtained or that the defendant was in any way prejudiced by what occurred at the line-up.

We think that entirely aside from the failure to object, the record indicates that the defendant freely, understandingly and voluntarily waived his right to counsel at the so-called line-up.

We, therefore, hold that the trial court properly refused to strike the testimony of the State's witness, Allen Bruce Wood.

The defendant's second assignment of error, that the trial court committed error in denying his motion for judgment as of nonsuit, is without merit and is overruled. There was ample evidence of the identity of the defendant as being the man who robbed the prosecuting witness. He was positively identified by the State's witness in court. On motion to nonsuit, the evidence must be considered in the light most favorable to the State. 2 N. C. Index 2d, Criminal Law, § 104.

We have carefully reviewed the charge, and when it is considered as a whole, no prejudicial error appears from the one sentence complained of by the defendant and to which the defendant excepts. Although the phraseology is not approved, the jury could not have been misled; and the sentence, "You may retire now, that was just a legal technicality I forgot to tell you about," which the defendant complains of, does not in any way express an opinion or in any way prejudice the defendant, and we hold that the defendant's assignment of error to the charge of the court should be overruled and denied. A new trial will not be granted for mere technical error which could not have affected the result, but only for error which is prejudicial, amounting to the denial of a substantial right. 1 N. C. Index 2d, Appeal and Error, §§ 47 and 50.

In the trial we find

No error.

BROCK and BRITT, JJ., concur.

IN RE ASSESSMENT OF FRANCHISE TAXES.

IN THE MATTER OF: THE PETITION OF CAROLINA TELEPHONE AND TELEGRAPH COMPANY FOR ADMINISTRATIVE REVIEW OF DECISION OF COMMISSIONER OF REVENUE CONCERNING AN ASSESSMENT OF ADDITIONAL FRANCHISE TAXES FOR THE QUARTERS ENDED JUNE 30, 1958, THROUGH MARCH 31, 1961.

PETITION OF THE COMMISSIONER OF REVENUE FOR THE STATE OF NORTH CAROLINA FOR JUDICIAL REVIEW OF THE TAX REVIEW BOARD'S ADMINISTRATIVE DECISION NUMBER 71.

(Filed 27 March 1968.)

1. Telephone and Telegraph Companies § 1—

A telephone or telegraph company is an instrument of commerce, and its business constitutes commerce.

2. Taxation § 26—

Compensation received by the respondent telephone company for the operation of its facilities located wholly within this State under an arrangement with another telephone company to provide a "joint private line service" for transmitting communications of its subscribers outside the State, collection for this service being made by the other telephone company, *is held* to be revenue received by respondent for the actual transmission through its territory of communications in interstate commerce and not a rental of respondent's facilities by the other telephone company, and therefore such compensation is exempt from the franchise tax imposed by G.S. 105-120(b). G.S. 105-120(e).

3. Taxation § 23—

Tax statutes are to be strictly construed against the State and in favor of the taxpayer.

APPEAL by Commissioner of Revenue from *Martin, J.*, October 1967 Civil Session of WAKE Superior Court.

Carolina Telephone & Telegraph Company, hereinafter referred to as the respondent, is a public utility corporation organized and existing under the laws of North Carolina. All of its physical equipment and lines used in the transmission of intelligence are located wholly within this State. Some of its lines are inter-connected with the lines of other telephone companies, some of which are engaged in business both within and without North Carolina.

The Commissioner of Revenue, hereinafter referred to as petitioner, proposed an assessment of an additional franchise tax against respondent for the period, 30 June 1958 to 31 March 1961, pursuant to G.S. 105-120 and 105-241.1.

The original proposed assessment was based upon receipts of respondent which fall into three categories. Two were resolved in favor of respondent before the proceeding came on for hearing in the Superior Court.

At the time this proceeding was instituted, W. A. Johnson was

Commissioner of Revenue. By appropriate order, I. L. Clayton, the present Commissioner, has been substituted as a party.

In the Superior Court, the controversy was submitted on written stipulations, the pertinent portions of same being summarized as follows:

(1) This controversy involves the question of whether certain revenues received by respondent derived from transmission of intelligence are subject to franchise taxes by the State of North Carolina under G.S. 105-120(b). For the purposes of this action, "transmission of intelligence" means: ". . . Creating changes of intensity in a continuous current of electricity exactly corresponding to the changes of density in the air caused by the vibrations which accompany vocal or other sounds, and of using that electrical condition thus created for sending and receiving articulate speech." (or other intelligence data). (Quoted from *Telephone Cases,* 126 U.S. 1, 31 L. Ed. 863 at 989 [1887].

(2) For the purpose of this action, this transmission of intelligence is made from one point to another point over channels provided by wires or microwave and includes voice telephone communications, teletypewriter service communications, telephoto communications services, data transmission communications services, television communications services and other signaling devices.

(3) The only matter under consideration in this action is the taxability of respondent's revenue derived from operations known as "joint private line service." For the purposes of this action, "joint private line services" means services rendered to a subscriber by respondent wherein the subscriber has access to "telephone services" for the transmission of intelligence to points outside of the State of North Carolina, *i.e.,* across State lines, and for the rendition of such services by respondent, it is essential that respondent interconnect its facilities with the facilities of other telephone companies in other states. Further, such "telephone services" within the purview of this action, either originate or terminate within North Carolina but none of said services both originate and terminate within North Carolina.

(4) Either the local channel or the interchange channel may be provided by means of wire or microwave. On any one pair of wires or microwave facility, there may be two or more interchange channels carrying the private line transmissions to or from North Carolina to or from other states, at the same time.

(5) In order for the "joint private line service" to operate at all, the respondent not only provides for facilities in its area to be joined with facilities of other telephone companies in other states, but it also provides a continuous servicing of its own facilities. This

servicing includes maintenance of equipment, maintenance of the transmission channels whether wire or microwave, supplying of booster stations or repeaters at frequent intervals, supplying the original continuous current of electricity, and continuous availability to the subscriber for service to correct any defect in the service occurring in the respondent's territory.

(6) All of the collecting from subscribers to this service was made by Southern Bell Telephone & Telegraph Company (hereinafter referred to as Southern Bell) with whom respondent had a working arrangement to provide the service.

(7) All of the revenues attempted to be taxed by petitioner in this action were derived from transmission of intelligence across State lines by the use of "joint private line service" and the services are rendered to the subscriber at a cost provided under tariffs filed with the Federal Communications Commission.

(8) Both petitioner and respondent agree that if the said matters, things and services for which respondent received revenues described above constitute intrastate commerce, and come within the terms of G.S. 105-120, the stipends received by respondent are subject to the tax levied thereunder; and that if the matters, things and services for which respondent received revenues described above constitute interstate commerce, said stipends are not subject to the aforesaid tax.

At the trial in the Superior Court, Judge Martin concluded that the revenue of respondent under consideration was for services rendered in the interstate transmission of intelligence. From judgment entered in favor of respondent, petitioner appealed.

Thomas Wade Bruton, Attorney General, and Robert L. Gunn, Assistant Attorney General, for petitioner appellant.

Taylor, Brinson & Aycock by Herbert H. Taylor, Jr., and Joyner & Howison by W. T. Joyner for respondent appellee.

BRITT, J. The statutory provisions pertinent to this appeal are as follows:

> G.S. 105-120. "Franchise or privilege tax on telephone companies. — (a) Every person, firm, or corporation, domestic or foreign, owning and/or operating a telephone business for the transmission of messages and/or conversations to, from, through, in or across this State, shall, within thirty days after the first day of January, April, July and October of each year, make and deliver to the Commissioner of Revenue a quarterly return,

verified by the affirmation of the officer or authorized agent making such return, showing the total amount of gross receipts of such telephone company for the three months ending the last day of the month immediately preceding such return, and pay, at the time of making such return, the franchise, license or privilege tax herein imposed.

"(b) An annual franchise or privilege tax of six per cent (6%), payable quarterly, on the gross receipts of such telephone company, is herein imposed for the privilege of engaging in such business within this State. Such gross receipts shall include all rentals, other similar charges, and all tolls received from business which both originates and terminates in the State of North Carolina, whether such business in the course of transmission goes outside of this State or not: * * *

* * *

"(e) Nothing in this section shall be construed to authorize the imposition of any tax upon interstate commerce."

Petitioner contends that the revenue received from Southern Bell for "joint private line service" was for the rental of respondent's facilities, all of which were located in this State, and that said revenue comes within the taxability purview of the foregoing statute.

Respondent contends that its arrangement with Southern Bell was not a rental but a service rendered by respondent. Respondent contends that in the transmission of what was unquestionably interstate intelligence, respondent actually carried (transmitted physically) each message in its course in the respondent's territory; that between the point of origin and the point of exchange in North Carolina with the Bell System, respondent rendered every service necessary to transmit physically the message.

Thus, the question presented by this appeal: Did respondent actually transmit, in and through its territory, the interstate communications involved in this action; or did respondent merely rent its property to Southern Bell for transmission by Southern Bell in respondent's territory?

We hold that respondent actually transmitted the communications through its territory and said service was interstate commerce.

A telephone or telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. *Telegraph Co. v. Texas,* 105 U.S. 460, 26 L. Ed. 1067 (1882).

Although all of respondent's facilities are located in North Carolina, in performing the service involved in this proceeding, said facilities connected with those of another company to transmit intelligence between this State and other states and the intelligence transmitted was interstate from its origin to its termination. *U. S. A. v. Cab Co.*, 332 U.S. 218, 91 L. Ed. 2010, 67 S. Ct. 1560 (1947); *Telegraph Co. v. Texas, supra; Ward v. Tel. Co.*, 300 F. 2d 816, (U. S. Ct. of App., 6th Cir. 1962).

It is stipulated that respondent, in its cooperation with Southern Bell in providing joint private line service, not only provided facilities and equipment in its area but also provided a continuous servicing of its facilities and equipment. The facts clearly show that the relationship between respondent and Southern Bell was not that of lessor and lessee. Tax statutes are to be strictly construed against the State and in favor of the taxpayer. *Watson Industries v. Commr. of Rev.*, 235 N.C. 203, 69 S.E. 2d 505 (1952).

Petitioner relies very heavily on the decision of our Supreme Court in *Tel. Co. v. Clayton*, 266 N.C. 687, 147 S.E. 2d 195 (1966). The facts and principles of law in that case are clearly distinguishable from those of the case at bar.

We have carefully considered each of petitioner's assignments of error but find that neither has merit. Each of them is overruled.

The judgment of the Superior Court is

Affirmed.

MALLARD, C.J., and BROCK, J., concur.

STATE OF NORTH CAROLINA v. NORMAN FLOYD JILES.

(Filed 27 March 1968.)

1. Criminal Law § 104—

On motion to nonsuit, the evidence must be considered in the light most favorable to the State and only the evidence favorable to the State will be considered, and defendant's evidence relating to matters of defense will be disregarded.

2. Criminal Law § 2—

Where a specific intent is not an element of the crime charged, proof of the commission of the unlawful act is sufficient to support a verdict.

3. Intoxicating Liquor §§ 15, 16—

Evidence that officers observed defendant operating an automobile in which were found eleven one-half gallon plastic jugs containing nontax-

paid intoxicating liquor makes out a *prima facie* case of defendant's guilt of illegal possession and illegal transportation of intoxicating liquor, and the case is properly submitted to the jury, and the defendant's contention that the State's evidence failed to show guilty knowledge is without merit.

4. Intoxicating Liquor § 19—

Where, in a prosecution for unlawful possession and transportation of intoxicating liquor, the State's evidence makes out a *prima facie* case of the defendant's guilt, the intent of defendant is presumed from the unlawful acts, and where defendant's evidence relates solely to his defense of alibi, the trial court is not required to instruct the jury that defendant would not be guilty in the absence of knowledge that the liquor was in his automobile.

5. Criminal Law § 163—

Exceptions and assignments of error to the charge are improperly presented in the Court of Appeals when the appellant includes the charge in the stenographic transcript of the evidence rather than in the record on appeal. Rule of Practice in the Court of Appeals No. 19(a).

APPEAL by defendant from *Canaday, J.*, Second November 1967 Criminal Session of the Superior Court of WAKE County.

This criminal prosecution is based upon three warrants, all of which were issued on the 15th day of October, 1967. In these three warrants the defendant is charged with (1) illegal possession of intoxicating liquor, (2) illegal possession of intoxicating liquor for the purpose of sale, and (3) illegal transportation of intoxicating liquor. By consent, the three charges against the defendant were consolidated for the purpose of trial. The trial was upon a plea of not guilty, and a verdict of guilty as charged upon each of the three charges was rendered.

From a judgment of imprisonment in the Wake County Jail, the defendant appeals to the Court of Appeals.

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

Nassif and Churchill by Carl Churchill, Jr., for the defendant.

MALLARD, C.J. Defendant assigns as error the court's denial of his motion of compulsory nonsuit at the close of the State's evidence and at the close of all the evidence.

C. J. Williams, a witness for the State, testified that he is a detective sergeant with the Raleigh Police Department and was on duty as such on 15 October 1967. That at about 9:00 p.m., while he and another officer were patrolling on Hoke Street, he observed a

blue and white 1958 Buick automobile traveling west on Hoke Street turn right onto Mark Street, and after traveling about 1,000 feet on Mark Street, park in a yard in the 1,000 block of Mark Street. Officer Sparkman, who was driving the police car in which Officer Williams was riding, drove the police car up beside the Buick automobile, and the defendant, Norman Floyd Jiles, got out of the Buick automobile on the driver's side. The witness Williams recognized and spoke to the defendant. The defendant then walked around in front of the Buick which had its headlights on and then to his right along the side of a house. While the witness Williams was standing beside the Buick waiting for the defendant to return, a person by the name of Evelyn Jean Todd, who was a passenger in the Buick, opened the door, and a one-half gallon plastic jug fell out. Officer Sparkman picked it up, opened it, and found that it contained whiskey, and that there were no Federal or State tax stamps on the jug. Williams and Sparkman then arrested Evelyn Jean Todd for illegal possession of whiskey. Upon a search of the automobile in which Evelyn Jean Todd was sitting, ten one-half gallon plastic jugs of whiskey, on which were no Federal or State tax stamps, were found in the trunk. The officers obtained warrants for the arrest of the defendant Jiles, and at about 10:00 p.m. took the warrants to 528 East Hargett Street where the defendant lived. The defendant came to the front door, and the witness Williams told the defendant they had warrants for his arrest, whereupon the defendant said, "Let me see your warrant." Williams then started reading one of the warrants to the defendant Jiles, and the defendant Jiles said, "You don't have to read them, let's go." The witness Williams also testified that he had known Norman Floyd Jiles for about one year prior to 15 October 1967.

W. A. Sparkman, a witness for the State, testified that he is a Wake County ABC officer and on 15 October 1967 he was with Officer Williams. He has known Norman Floyd Jiles for about a year and recognized him on the night in question. Sparkman testified in substance to the same events that Officer Williams testified to, and his evidence tends to corroborate that of Officer Williams.

Annabelle Mitchell, a witness for the defendant, testified that she lived at 548 East Martin Street, that she has known Norman Floyd Jiles since 1959 and that she went to his home on 15 October 1967 at about 6:30 p.m. and that she remained there until the police came and arrested Norman at about 10:00 p.m. She further testified that at all times during this period, the defendant was also there and that she was positive he never left until he was carried away by the police. From the time that she arrived there until the

officers came and arrested him, they were looking at television and playing cards and that other people came during that time.

Lucy Mae Sanders, a witness for the defendant, testified that she went to the defendant's home on 15 October 1967 with Annabelle Mitchell. She and Annabelle arrived at about 6:30 p.m. and stayed there until the police arrived at about 10:00 p.m. Norman Jiles was there with them during the entire time and that he never left the house until the police took him away at about 10:00 p.m.

Rudolph Whitaker, a witness for the defendant, testified that he has known the defendant a long time. That he was at the defendant's home on 15 October 1967 from around 7:45 p.m. and was there continuously until the officers came and arrested the defendant around 10:00 p.m. The defendant did not leave the house from the time he arrived at about 7:45 p.m. until the officers came.

Walter Johnson, another witness for the defendant, testified that he has been knowing the defendant for about two years and that on 15 October 1967 at about 6:45 p.m. he went to the defendant's home and that the defendant was there and that he, the witness Johnson, stayed there with the defendant until the police came and arrested the defendant around 10:00 p.m. That the defendant did not leave the premises at any time.

The defendant did not testify.

On motion for nonsuit, the evidence must be considered in the light most favorable to the State. *State v. Overman,* 269 N.C. 453, 152 S.E. 2d 44. Only the evidence favorable to the State will be considered. *State v. Gay,* 251 N.C. 78, 110 S.E. 2d 458. Defendant's evidence relating to matters of defense will not be considered on a motion to nonsuit. *State v. Moseley,* 251 N.C. 285, 111 S.E. 2d 308. Applying these rules to the facts of this case, it is clear a question for the jury was raised, therefore, the court was correct in denying the motion for nonsuit.

The defendant argues, in support of this exception and assignment of error, that an essential element of the crime charged is not present in the evidence as it stood at the close of the State's testimony. He asserts that there is no evidence that the defendant had any knowledge of the fact that the liquor was in the automobile, and that guilty knowledge is an essential element of the crimes herein charged.

This contention is unavailing under the facts of this case. Where, as in violation of the State's liquor laws, a specific intent is not an element of the crime, proof of the commission of the unlawful act is sufficient to support a verdict. *State v. Elliott,* 232 N.C. 377, 378, 61 S.E. 2d 93; 48 C.J.S. Intoxicating Liquors § 222(b), 354. It follows

that the State made out a *prima facie* case when it offered evidence tending to show that there were eleven one-half gallon plastic jugs containing intoxicating liquor in the Buick automobile, that the jugs did not contain federal or state tax stamps, and that the Buick was then in the possession of and being operated by the defendant. *State v. Elliott, supra.* The defendant's assignment of error to the denial of his motion of nonsuit is without merit and is overruled.

The defendant next assigns as error the failure of the judge to charge the jury to the effect that knowledge is an essential element of the crime in each of the offenses with which the defendant is charged. The State made out a *prima facie* case against the defendant when it offered evidence tending to show that the Buick was in the possession of and being operated by the defendant, and that it had eleven one-half gallon jugs of illegal liquor in it. *State v. Elliott, supra.* A *prima facie* case having been made out by the State, the law presumes a person to intend the natural consequences of his act, and there was no evidence in this case to the contrary from which the jury could have found that the defendant had no knowledge of the presence of the intoxicating liquor in the automobile. The defendant's entire defense was an alibi, and therefore, according to this contention, the issue of knowledge of the presence of the intoxicating liquor was irrelevant. *A fortiori,* an instruction such as is now contended for by the defendant, would likely have been prejudicial to his defense of alibi. This assignment of error is overruled.

The defendant's third assignment of error is to the court's charge relating to the law of possession. This assignment of error is, however, predicated upon the proposition that the court was under the duty to charge the jury on guilty knowledge by the defendant. He asserts in support of this contention that the court should have charged the jury so as to require guilty knowledge by the defendant as a prerequisite to being guilty of the illegal possession and transportation of liquor. In view of our disposition of defendant's previous assignments of error relating to the question of the defendant's knowledge, this assignment of error is overruled.

However, it should also be noted that the defendant's exceptions and assignments of error to the charge of the court are not properly presented because he has failed to comply with the rules in that he includes the charge of the court in the stenographic transcript of the evidence instead of including it in the record on appeal. See Rule 19(a), Rules of Practice in the Court of Appeals of North Carolina.

The defendant has brought forward two additional assignments of error, one of which relates to the charge. However, after careful

consideration of each of these, we hold that they are without merit, require no discussion, and are overruled.

No error.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. WALLACE BURGESS.

(Filed 27 March 1968.)

1. Burglary and Unlawful Breakings § 8; Constitutional Law § 36—

Sentence of imprisonment of 10 years, imposed upon defendant's plea of guilty to the charge of felonious breaking and entering, is within the statutory maximum provided by G.S. 14-54, and does not constitute cruel and unusual punishment in the constitutional sense nor show abuse of the trial court's discretion.

2. Larceny § 10; Constitutional Law § 36—

Sentence of imprisonment for five to ten years, imposed upon defendant's plea of guilty to the charge of felonious larceny, is within the statutory maximum provided by G.S. 14-72, and does not constitute cruel and unusual punishment in the constitutional sense nor show abuse of the trial court's discretion.

3. Burglary and Unlawful Breakings § 3; Indictment and Warrant § 9—

An indictment charging that the defendant did feloniously break and enter a certain storehouse, shop, warehouse, dwellinghouse, bankinghouse, etc., occupied by a named person is not fatally defective in failing to identify the premises with more particularity, although the better practice would seem to require that prosecuting officers identify the subject premises by some clear description and designation to set the premises apart from like and other structures described in G.S. Chapter 14, Art. 14.

4. Larceny § 4—

An indictment alleging the taking of a television set and radio of a value of $250 from a named person adequately charges felonious larceny. G.S. 14-72.

APPEAL by defendant from *Bailey, J.*, 11 December 1967 Criminal Session of DURHAM Superior Court.

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 of personal property, to wit, one Delmonico television set and a Westinghouse clock

radio of the value of $250 of the goods, chattels and moneys of Dreame A. Glover.

In the statement of the case on appeal it is asserted that this is a criminal action in which the defendant, Wallace Burgess, is charged with unlawfully, wilfully and feloniously, with force and arms, breaking into a dwelling house occupied by one Dreame A. Glover with intent to steal and take away chattels and other valuables of the said Dreame A. Glover, and with feloniously stealing and taking away goods and merchandise of the said Dreame A. Glover as set forth in the bill of indictment.

Defendant, through his counsel, tendered a plea of guilty to the felonies of housebreaking and larceny as set forth in the bills of indictment. Before accepting the pleas, the court conducted an oral and written inquiry and found and adjudged that the pleas were freely, understandingly and voluntarily made.

On the breaking and entering count, the defendant was sentenced to a term of ten years in the custody of the North Carolina Department of Corrections. On the larceny count, he was sentenced to a term of not less than five years nor more than ten years, this sentence to commence at the expiration of the sentence imposed in the breaking and entering count.

Defendant, an indigent, through his court-appointed counsel, appeals to the Court of Appeals.

Attorney General T. W. Bruton and Assistant Attorney General George A. Goodwin for the State.

Haywood, Denny & Miller by James H. Johnson, III, for defendant.

MALLARD, C.J. The only assignment of error asserted by the defendant is that the sentences imposed by the court were excessive. He contends that they constitute cruel and unusual punishment contrary to his constitutional rights, and that the court abused its discretion in imposing said sentences.

The first count in the bill of indictment charges the felony of breaking or entering in violation of G.S. 14-54, and the second count charges the felony of larceny of personal property of the value of over $200. The defendant freely, understandingly and voluntarily pleaded guilty to both counts.

No abuse of discretion is shown. The prison sentences imposed do not exceed the maximum provided by G.S. 14-54 and 14-72. The Supreme Court said in *State v. Bruce*, 268 N.C. 174, 150 S.E. 2d 216, "We have held in case after case that when the punishment does not

exceed the limits fixed by the statute, it cannot be considered cruel and unusual punishment in a constitutional sense." See also *State v. Greer,* 270 N.C. 143, 153 S.E. 2d 849.

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.

The second count in the bill of indictment adequately charges the defendant with the felony of larceny of the television set and clock radio and alleges that they were property of Dreame A. Glover and had a value of $250. The larceny of property of the value of over $200 is a felony. G.S. 14-72; *State v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91.

The defendant's motion in arrest of the judgment on the second count is without merit.

No error appears on the face of the record.

Affirmed.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. LARRY DENNIS BROWN.

(Filed 17 April 1968.)

1. Criminal Law § 105—

Where defendant introduces evidence, only the correctness of the denial of the motion to nonsuit made at the close of all the evidence is presented on appeal.

2. Larceny § 7—

Evidence in this case *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of felonious larceny.

3. Criminal Law § 106—

If there is more than a scintilla of competent evidence to support the allegations in the warrant or bill of indictment, nonsuit is properly denied.

4. Criminal Law § 162—

Exception to the admission of evidence is waived by permitting evidence of like import to be introduced thereafter without objection.

5. Criminal Law § 97—

The trial court has discretionary power to permit the State to introduce additional evidence after both sides have argued to the jury.

6. Criminal Law § 85—

Where a defendant takes the stand as a witness he may be cross-examined with respect to prior criminal convictions and prior indictments returned against him for similar or like offenses.

7. Same—

Defendant is not prejudiced by cross-examination as to his juvenile record where he admits numerous convictions which occurred after he reached the age of sixteen.

APPEAL by defendant from *McLean, J.*, at September Special Criminal Session, 1967, of WAKE.

Defendant was tried upon a valid bill of indictment charging him with the larceny of $515.69, the property of the Forest Drive-In Theater, and with receiving said $515.69 knowing it to have been feloniously stolen or taken in violation of G.S. 14-71. From a verdict of guilty as charged and a judgment of the Court that the defendant be confined in the common jail of Wake County for a period of not less than nine years nor more than ten years to be assigned to work under the supervision of the State Department of Correction as provided by law, the defendant appeals. The facts sufficiently appear in the opinion.

Attorney General T. W. Bruton and Staff Attorney Andrew A. Vanore, Jr., for the State.

Vaughan S. Winborne for defendant appellant.

MORRIS, J. Defendant assigns as error the failure to allow his motion for judgment of compulsory nonsuit made at the close of the State's evidence and renewed at the close of all the evidence.

Since the defendant introduced evidence in his own behalf, his assignment of error must be directed to the Court's refusal to grant his motion for compulsory nonsuit at the close of all the evidence. *State v. Howell,* 261 N.C. 657, 135 S.E. 2d 625; *State v. Weaver,* 228 N.C. 39, 44 S.E. 2d 360; 2 Strong, N. C. Index 2d, Criminal Law, § 105, p. 653.

J. A. Woodham testified: That on 22 June 1967, he was employed as the manager of the Forest Drive-In Theater. On that day he received a payroll check in the amount of $515.69 for the Forest Drive-In Theater. He took this check to the Wachovia Bank located on U. S. No. 1 North at the intersection of Hodges Street and U. S. No. 1, Raleigh, North Carolina. This was approximately 4:00 o'clock in the afternoon. While at the bank he cashed the check and "received the money and placed it in the bank bag and zipped it back up." He then took the bank bag containing the money he had just received out to his car and placed it under the front seat on the driver's side and drove directly to his home, which is approximately three and one-half miles from the bank.

Upon arriving home, he got out of his car, walked around to the back of his garage, which is located at the side of his house, and went inside. While inside the garage, he went over to his work bench for just a few minutes and then turned around and headed back to the family room. He looked out a window from which he could see his driveway and his car and saw a colored man come up the driveway and proceed toward his car. While watching through the window, he saw the colored man reach under the front seat of his car and remove the bank bag which contained the money. He then ran out of the house and tried to apprehend the colored man. He chased the colored man for about a block, but at the end of the block the colored man entered a Chrysler automobile, about a 1962 model, driven by another person. As the car was driven off, he was able to take down the license number of the Chrysler.

Mr. Woodham positively identified the defendant as the man who stole the bank bag containing the money. He stated: "I observed the person who took my money . . . I see the person who I have testified took the money from my car on the 22nd day of June, 1967, in the courtroom. That is him definitely. I am pointing to this colored fellow, the defendant, Larry Dennis Brown."

After both parties had rested and had argued to the jury, the trial judge, in his discretion, allowed the State to reopen the case.

Mr. Woodham was again called to the stand. He stated that after having endorsed the theater's check, he gave it to the bank teller to cash. The bank teller counted out the money and placed it in a bank bag. Mr. Woodham testified that, of his own knowledge, "there was more than ten 20 dollar bills in that bag at least".

Horace Moore, a detective sergeant with the Raleigh Police Department, testified on behalf of the State. He stated that during the latter part of May, 1967, he saw the defendant in a parking lot located in the city of Raleigh. The defendant had been "under observation for some time". When Detective Sergeant Moore saw the defendant, he was sitting on the right hand seat of a light colored 1961 two-toned Chrysler automobile. Another colored man was sitting in the driver's seat at that time.

The evidence of the State, when considered in the light most favorable to the State as we must do, *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44, would permit but not compel the jury to find the following facts:

That J. A. Woodham was the manager of the Forest Drive-In Theater located on U.S. No. 1 North on 22 June 1967. On this date, a sum of money in excess of $200.00 was unlawfully and feloniously stolen from his automobile while it was parked in the driveway of his home. That this money was stolen by a colored man identified as the defendant, Larry Dennis Brown. That the colored man identified as the defendant, Larry Dennis Brown, was chased for about a block. That he entered a Chrysler automobile driven by another. That one month before this time the defendant was seen riding in a similar Chrysler automobile.

The defendant, Larry Dennis Brown, a witness forr himself, testified: That on 22 June 1967, the date of the alleged robbery, he was attending a birthday party behind Washington High School in Raleigh, North Carolina, for a woman named Mallibug. He stated that the party began at 2:30 o'clock in the afternoon and he did not leave until about 7:00 o'clock that evening; that he did not know anything about the robbery; that he did not know Mr. Woodham; that he had never been to the Forest Drive-In Theater; that he had never been to the Wachovia Bank at Farmer's Market; that he had never been convicted of anything but slipping in a wrestling match one night.

The defense then offered the testimony of Delores Fields, Remonya Jacquelyn Perry, John Scipio and Carolyn Lee Hill tending to substantiate the alibi of Larry Dennis Brown. All four testified that they attended the party given for Mallibug and that Larry Dennis

Brown was there from approximately 2:30 o'clock to 7:00 o'clock that evening. Neither the hostess nor the honoree testified.

Defendant's evidence would permit but not compel the jury to find that: Defendant was attending a party behind Washington High School in Raleigh, North Carolina, on 22 June 1967. Defendant was present at the party from 2:30 o'clock in the afternoon until 7:00 o'clock that evening. Defendant had never been to the Forest Drive-In Theater and defendant did not know Mr. J. A. Woodham. Defendant did not go to Mr. J. A. Woodham's home on 22 June 1967, and did not take a money bag from his automobile, and that defendant was not guilty of the crime with which he was charged.

Defendant's motion for judgment as of nonsuit was properly overruled. The circumstances of this case and the attendant facts make it a question for the jury. *State v. Mabry,* 269 N.C. 293, 152 S.E. 2d 112; *State v. Tillman,* 269 N.C. 276, 152 S.E. 2d 159.

If there is more than a scintilla of competent evidence to support the allegations of the warrant or bill of indictment, motion of nonsuit is properly denied. *State v. Kelly,* 243 N.C. 177, 90 S.E. 2d 241.

Defendant's assignment of error No. 7 is taken to the action of the trial judge in allowing Mr. Woodham to testify relating to the amount of money that was contained in the bank bag.

The record shows that Mr. Woodham testified on direct examination that he did not recall how many twenty dollar bills he saw. He was then asked whether there were more than ten or less than ten twenty dollar bills. He answered that there were more than ten. The defendant then objected and was overruled. Mr. Woodham then testified that there were more than ten twenty dollar bills in the bank bag. On cross examination, Mr. Woodham testified that he did not know of his own knowledge how much money was in the bank bag. On redirect, Mr. Woodham stated, "I know of my own knowledge there was more than ten 20 dollar bills in that bag at least". The defendant entered no objection at this point.

> "It is thoroughly established in this State that if incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been given in other parts of the examination without objection, the benefit of the exception is ordinarily lost." *Shelton v. R. R.,* 193 N.C. 670, 674, 139 S.E. 232.

Assuming, for the point of argument only, that the testimony of Mr. Woodham as to the number of twenty dollar bills in the bank bag was incompetent, the fact that this same testimony was again

elicited on redirect examination without objection from the defendant acted as an effective waiver of his exception. This assignment of error is overruled.

Defendant's assignment of error No. 6 is taken to the action of the trial judge in allowing the State to reopen its case after both parties had concluded their arguments to the jury.

Defendant contends that the discretionary action of the Court in so doing amounted to and was a comment on the evidence and prejudicial to this defendant.

The general rule followed in the majority of jurisdictions is stated in 53 Am. Jur., Trial, § 128, p. 112, as follows:

> "The trial judge possesses wide discretionary powers relative to the reopening of a criminal case for the introduction of further evidence after the parties have rested. In his discretion, a criminal case may be reopened for the reception of additional evidence after the case has been submitted to the jury and before their retirement to deliberate on their verdict, and according to the weight of authority, it lies within the sound discretion of the trial court to reopen a criminal case for the reception of additional evidence even after the jury has retired to deliberate on their verdict."

The North Carolina Supreme Court adheres to this rule and has stated that the trial court has discretionary power to permit the introduction of additional evidence after a party has rested, *State v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736, and even after the argument has begun. *State v. Jackson,* 265 N.C. 558, 144 S.E. 2d 584. As stated in *State v. Jackson, supra,* "The trial court had discretionary power to permit the introduction of additional evidence after both parties had rested and arguments had been made to the jury."

We have carefully examined the defendant's exception and assignment of error and find that the trial judge acted well within the limits of his discretion.

Defendant assigns as error the admission, over objection, by the trial judge of certain evidence pertaining to the defendant's criminal record.

The record discloses that the defendant was cross examined by the solicitor as to his juvenile record relating back to 1958 when he was tried and convicted in the Domestic Relations Court of Wake County.

> "When a defendant takes the stand as a witness in his own behalf, he 'may be cross-examined with respect to previous convictions of crime, but his answers are conclusive, and the record

of his convictions cannot be introduced to contradict him'. Stansbury, *North Carolina Evidence,* 2d, § 112, *State v. Cureton,* 215 N.C. 778, 3 S.E. 2d 343; *State v. Howie,* 213 N.C. 782, 197 S.E. 611; *State v. Maslin,* 195 N.C. 537, 143 S.E. 2. Likewise, he may be cross-examined with respect to indictments returned against him for similar or like offenses." *State v. Brown,* 266 N.C. 55, 145 S.E. 2d 297.

Here the defendant was questioned concerning his convictions while he was a juvenile. The record discloses that the defendant had a long and varied list of convictions extending from 1958 (when he was about 10 years of age), the majority of which were after he was 16 years of age.

Conceding *arguendo* that there may be cases in which the defendant might be seriously prejudiced by the admissibility into evidence of juvenile convictions, we are unable to see wherein this defendant was so prejudiced nor does it appear that the admission of this evidence could have affected the result of the trial.

All other assignments of error have been carefully considered and are overruled. We deem it unnecessary to discuss them all. In the trial below, we find

No error.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. MONROE CALLOWAY.

(Filed 17 April 1968.)

1. Homicide § 14—

When the intentional killing of a human being with a deadly weapon is admitted or is established by the evidence, the burden is on the defendant to prove to the satisfaction of the jury the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or the legal justification that will excuse it altogether upon the ground of self-defense, and this burden may be carried by evidence offered by the defendant, or by the State, or both, it being for the court to determine whether there is sufficient evidence for consideration by the jury and for the jury to determine what intensity of proof satisfies it.

2. Homicide § 24—

An instruction that the burden is on defendant to prove self-defense to the satisfaction of the jury and that such degree of proof exceeds proof

by the greater weight of the evidence, *is held* prejudicial, since proof by a bare preponderance of the evidence, or by the greater weight of the evidence, may be sufficient to satisfy the jury.

3. Same; Criminal Law § 172—

An erroneous instruction upon the intensity of proof required to satisfy the jury of matters in mitigation or justification of homicide is not cured by defendant's conviction of manslaughter, since defendant's defense of self-defense, if established to the jury's satisfaction, would entitle him to an acquittal.

APPEAL by the defendant from *Falls, J.*, November, 1967, Session, YANCEY Superior Court.

The defendant was charged in a bill of indictment with the murder of Louis Banks on 24 August 1967. He was arraigned upon the charge of murder in the second degree, pleaded not guilty, and relied upon the defense of self-defense. The jury returned a verdict of guilty of manslaughter, and from judgment of imprisonment the defendant appealed.

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

Bill Atkins and Fouts and Watson by Dover R. Fouts, for defendant appellant.

BROCK, J. The defendant assigns as error the instruction to the jury by the Court defining the intensity of proof required of the defendant to establish his plea of self-defense. Regarding that the trial judge instructed the jury as follows:

"When an intentional killing is admitted or established, the law presumes malice from the use of a deadly weapon. And the defendant is guilty of murder in the second degree unless he can satisfy the jury of the truth of facts which justify his act or mitigate it to manslaughter.

"The burden is on the defendant to establish such facts to the satisfaction of the jury, unless they arise out of the evidence against him. However, to meet the burden the defendant is not required to prove beyond a reasonable doubt the facts he relies on in mitigation, justification or excuse. Proof beyond a reasonable doubt calls for the highest intensity of proof known to our law.

"To satisfy a jury beyond a reasonable doubt means that they must be fully satisfied, or entirely convinced, or satisfied to a moral certainty of the truth of the charge. *But the defend-*

ant does not meet the requirement of the law when he satisfies the jury merely by the greater weight of the evidence of the truth of the facts he relies on in mitigation, justification or excuse. (Emphasis added.)

"By the greater weight of the evidence, that is more convincing, or evidence that carries greater weight, greater assurance than that which is offered in opposition thereto. *(sic)*

"By the phrase 'to the satisfaction of the jury' is considered to bear a stronger intensity of proof than that by the greater weight or preponderance of the evidence.

"So, to prove a fact or facts to the satisfaction of the jury requires a higher degree of proof, and signifies something more than a belief founded on the greater weight of the evidence, but does not require as high a degree or as strong an intensity of proof as proof beyond a reasonable doubt." (Emphasis added.)

The foregoing instruction clearly places upon the defendant a burden of proof of more intensity than "by the greater weight of the evidence." An instruction containing almost the exact words as the last paragraph of the foregoing instruction was disapproved in a *per curiam* opinion by our Supreme Court in *State v. Matthews,* 263 N.C. 95, 138 S.E. 2d 819.

Nevertheless, the Attorney General strenuously urges that a consideration of the entire portion of the instructions as set out above leads to the conclusion that it follows the law as laid down in *State v. Carland,* 90 N.C. 664.

In 1845, The Supreme Judicial Court of Massachusetts, in the landmark case of *Commonwealth v. York,* 9 Metc. 93, laid down the rule that justification for a homicide must be established by "preponderating proof." In 1855, The Supreme Court of North Carolina, in the case of *State v. Johnson,* 48 N.C. 266, adopted the rule that justification for a homicide must be established "beyond a reasonable doubt." In 1864, The Supreme Court of North Carolina, in the case of *State v. Ellick,* 60 N.C. 450, without mentioning either *Commonwealth v. York,* or *State v. Johnson,* announced the rule to be that justification for a homicide must be established "to the satisfaction of the jury." Then, in 1868, in the case of *State v. Willis,* 63 N.C. 26, The Supreme Court of North Carolina approved the rule of *State v. Ellick* (*to the satisfaction of the jury*) and specifically rejected the rule of *Commonwealth v. York* (*preponderating proof*), and the rule of *State v. Johnson* (*beyond a reasonable doubt*). In *State v. Willis,* the Court said this:

"We prefer to stand *super antiquas vias,* and to adhere to

the rules laid down in *State v. Ellick,* 60 N.C. 450. In that case the erroneous statement which we had inadvertently made in *State v. Johnson,* 48 N.C. 266, that it was incumbent on the prisoner to establish the matters of excuse or extenuation beyond a reasonable doubt, is corrected. In it is also corrected what we consider as erroneous in the decision of the Court in *Commonwealth v. York,* that the matter of excuse or extenuation which the prisoner is to prove must be decided according to the preponderance of evidence. It is more correct to say, as we think, that they must be proved to the satisfaction of the jury."

In *State v. Carland, supra,* relied upon by the Attorney General, the Supreme Court was considering an instruction to the jury as follows:

"When the prisoner comes to show his matters of excuse or mitigation, he is not required to prove these matters beyond a reasonable doubt, but he is required to prove them to the satisfaction of the jury; but the degree of proof is not so far relaxed that he may establish his matters of excuse or mitigation by a *bare preponderance* of proof, but must do so to the satisfaction of the jury."

In overruling the exception to the quoted portion of the instructions, the Court said:

"We are unable to see in what respect the charge of his Honor is obnoxious to the prisoner's exception. The plain meaning of the instruction is, that a *bare* preponderance of proof will not do to show matters of mitigation or excuse, unless it produces satisfaction of their truth in the minds of the jury. We can well conceive of cases where there may be a bare or slight preponderance of proof on one side, which yet fails to produce satisfaction, and still leaves the mind in an uncertain and dubious state. His meaning evidently is, and so we think any one would take it, that the jury must be *satisfied;* and if not satisfied, a bare preponderance of evidence will not do."

In its decision the Court recognized that *State v. Ellick, supra,* and *State v. Willis, supra,* had rejected the rule of *Commonwealth v. York, supra,* (preponderating proof), and had rejected the rule of *State v. Johnson, supra* (beyond a reasonable doubt). Clearly in this case the Court was approving the rule of *State v. Ellick* and *State v. Willis* (proof to the satisfaction of the jury). In the above quoted portion of the opinion in the *Carland* case, the Court did not require

more than a bare preponderance of the evidence. On the contrary, it specifically recognized that matters in mitigation or excuse established by a bare preponderance of the evidence would suffice, if it produces satisfaction of their truth in the minds of the jury.

The *Carland* case has been cited numerous times through the years by our Supreme Court in support of the rule that the burden of proof is upon the defendant to establish matters in mitigation or justification of a homicide to the satisfaction of the jury — not by the greater weight of the evidence nor beyond a reasonable doubt — but simply to the satisfaction of the jury. *State v. Benson,* 183 N.C. 795, 111 S.E. 869; *State v. Smith,* 187 N.C. 469, 121 S.E. 737; *State v. Meares,* 222 N.C. 436, 23 S.E. 2d 311.

We reiterate here what was said by the Court in *State v. Prince,* 223 N.C. 392, 26 S.E. 2d 875, where it was considering an instruction very similar to the instruction given by Judge Falls.

> "However, there may be found in the opinions of the Court statements which if lifted from the context may support the charge as given, but when such statements are considered contextually the rule as generally stated requires that if there be evidence sufficient for the consideration of the jury, of which the court shall be the judge, the intensity of such evidence must be 'simply to the satisfaction of the jury,' of which the jury alone is the judge."

It is clear that the defendant is not required to prove his matters in mitigation or justification of a homicide "beyond a reasonable doubt," for this would be too heavy a burden to impose upon the defendant. *State v. Ellick, supra.* But the intensity of the proof required to "satisfy the jury" of the truth of matters in mitigation or justification of a homicide cannot be defined by the Court as being "less than," "the same as," or "more than" the greater weight of the evidence or the preponderance of the evidence. Stansbury, N. C. Evidence 2d, § 214. A bare preponderance of the evidence may be sufficient to satisfy the jury. *State v. Carland, supra.* Also, proof by the greater weight of the evidence may be sufficient to satisfy the jury. *State v. Prince, supra.*

When the intentional killing of a human being with a deadly weapon is admitted, or is established by the evidence, the law then casts upon the defendant the burden of proving to the satisfaction of the jury the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or the legal justification that will excuse it altogether upon the ground of self-defense. This

burden may be carried by evidence offered by the defendant, or by the evidence offered against him, or both.

It is for the Court to determine whether there is sufficient evidence for consideration by the jury, and it is for the jury to determine what intensity of proof satisfies it. *State v. Prince, supra.*

The trial judge committed error in his charge because it put too heavy a burden upon the defendant.

The Attorney General asserts that if there was error in the charge it was not prejudicial to the defendant because the defendant was only convicted of manslaughter. This position cannot be sustained. The defendant's defense was self-defense, which, if established to the satisfaction of the jury, would entitle him to an acquittal. The charge as given imposed on the defendant an erroneous burden of proof to establish his defense.

New trial.

MALLARD, C.J., and PARKER, J., concur.

MARJORIE FRANCES WILKIE, ADMINISTRATRIX OF THE ESTATE OF MARVIN C. WILKIE, DECEASED, v. HENDERSON COUNTY.

(Filed 17 April 1968)

1. Counties § 9—

In an action brought against a county pursuant to G.S. 153-9(44), the complaint may properly allege that the county has waived its governmental immunity by purchasing liability insurance from a company duly licensed and authorized to issue insurance contracts in this State, but no part of the pleadings relating to liability insurance may be read or mentioned in the jury's presence.

2. Pleadings § 12—

Upon 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.

3. Same—

A demurrer admits, for the purpose of testing the sufficiency of the pleading, the truth of factual averments well stated and relevant inferences of fact reasonably deducible therefrom.

4. Jails and Jailers; Sheriffs § 2—

The duties of jailer and deputy sheriff are separate and distinct, and where a person appointed by the sheriff as deputy is also appointed as jailer, such person acts in a given instance either as deputy or jailer, but not both.

5. Pleadings § 15—

A demurrer based upon matters *dehors* the pleadings is a "speaking" demurrer and will not be sustained.

6. Same; Constitutional Law § 4—

In a wrongful death action based on the negligence of a county jailer, a demurrer grounded upon the alleged unconstitutionality of a local act which authorizes the commissioners of defendant county to operate the county jail and to appoint the jailer is a speaking demurrer and will be overruled.

APPEAL by plaintiff from *Bryson, J.,* in Chambers, 30 December 1967 in HENDERSON Court.

This is a civil action instituted in the General County Court of Henderson County, in which the plaintiff seeks to recover damages from the defendant for the alleged wrongful death of her intestate allegedly caused by the acts or omissions of two county jailers.

On the night of 1 October 1966, plaintiff's intestate was being detained in the Henderson County Jail. The complaint alleges that during the night and while in custody of the jailer and assistant jailer, the deceased was being transferred from a cell on the second floor of the jail to a cell on the third floor; that during this transfer, one of the jailers struck plaintiff's intestate on the head several times with a blackjack and then one of them shot plaintiff's intestate in the leg with a pistol. The complaint further alleges that the jailers then failed to exercise due diligence in obtaining medical aid for the plaintiff's intestate with the result that said intestate was permitted to lie on the cell floor and bleed and later die from loss of blood.

Plaintiff instituted this action under G.S. 153-9(44) and alleges the waiver of governmental immunity by virtue of the purchase of liability insurance by defendant. Plaintiff alleges the defendant was the owner of a certain policy of insurance which was in effect at the time herein complained of. The policy was to indemnify the defendant "for damages resulting from bodily injury and death of persons on county property proximately caused by the negligence or wrongful act of county officials and county employees while acting within the scope of their authority or within the course of their employment."

Defendant County filed a motion to strike. The General County Court allowed the motion in part and denied it in part. From the refusal to grant its motion *in toto,* including refusal to strike allegations concerning liability insurance, defendant appealed to the Superior Court.

While the appeal was pending in the Superior Court, defendant demurred *ore tenus* for that:

(1) It appears from the face of the complaint that the matters complained of resulted from the actions of two jailers who were deputies sheriff and that the sheriff is legally responsible.

(2) The jailers were performing acts that were not circumscribed by governmental immunity as a matter of law.

On 5 January 1968, defendant filed another demurrer *ore tenus* stating the same grounds as the basis therefor and added that the complaint did not state a cause of action for that Chapter 397 of 1943 Session Laws attempted an unconstitutional alteration of the status of sheriff.

On hearing, the Superior Court found that the defendant's objections and exceptions to the order of the General County Court denying certain portions of the motion to strike, including all allegations of waiver of governmental immunity and the existence of liability insurance, should have been sustained. The Superior Court also sustained the demurrer *ore tenus* and gave plaintiff leave to amend her complaint. The plaintiff appealed.

Whitmire & Whitmire by R. Lee Whitmire, Attorneys for plaintiff appellant (by brief).

Uzzell & Dumont by Harry Dumont, Attorneys for defendant appellee.

BRITT, J. Two questions are presented by this appeal: Did the Superior Court commit error in adjudging that certain portions of the complaint should be stricken, and did it commit error in sustaining defendant's demurrer *ore tenus?*

1. Among the paragraphs of the complaint affected by Judge Bryson's order are paragraphs 6, 9, and 10.

These paragraphs, along with paragraph 7, relate to the securing of liability insurance and waiver of governmental immunity by defendant as provided by G.S. 153-9(44), part of which reads as follows:

> "No part of the pleadings which relates to or alleges facts as to a defendant's insurance against liability shall be read or mentioned in the presence of the trial jury in any action brought pursuant to this subdivision . . ."

The statute contemplates that it is appropriate for the complaint to contain allegations regarding liability insurance and waiver of governmental immunity. How else could a complaint, in cases of this kind, survive a demurrer grounded on governmental immunity?

Protection against prejudice is afforded by the statute in providing that no part of the pleadings relating to liability insurance shall be read or mentioned in the presence of the trial jury.

The cited statute also provides that any contract of insurance purchased pursuant to the statute must be issued by a company or corporation duly licensed and authorized to execute insurance contracts in this State. Paragraph 9 of the complaint sets forth the name of the company and an allegation that it is duly licensed and authorized to issue insurance contracts in North Carolina.

We hold that the Superior Court committed error in adjudging that paragraphs 6, 9, and 10 of the complaint should be stricken. Plaintiff was not prejudiced by the striking of paragraph 8 and portions of paragraphs 13 and 17.

2. Upon 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. A demurrer admits, for the purpose of testing the sufficiency of the pleading, the truth of factual averments well stated and relevant inferences of fact reasonably deducible therefrom. 3 Strong, N. C. Index, Pleadings, § 12, p. 624, and cases therein cited.

Paragraphs 3, 4, and 11 of the complaint are as follows:

> "3. That in its governmental capacity the defendant owns, maintains and manages the County Jail which is located adjacent to and just west of the Courthouse, and being at the southeast intersection of Second Avenue West and Church Street.
>
> "4. That at the time hereinafter mentioned, one George Brian was the County Jailer and one, James Phillips, was the assistant or Night Jailer, both having been appointed and placed in charge of said jail by the defendant. That both the County Jailer and the Night Jailer were public officials or public employees of Henderson County and both were authorized deputies sheriff on the night of October 1, 1966.
>
> * * *
>
> "11. That at the time and place the plaintiff's intestate sustained bodily injuries in the County Jail resulting in his death a short time thereafter, the County Jailer and the Night or Assistant Jailer were the duly authorized agents, officials and employees of Henderson County and were acting within the scope of their authority and within the course of their employment."

Defendant's argument in support of its demurrer is directed to

the closing portion of paragraph 4, ". . . and both were authorized deputies sheriff on the night of October 1, 1966," and completely ignores paragraph 3, the remaining portion of paragraph 4, and paragraph 11.

In Henderson County, until 1943, the sheriff had complete care and custody of the jail under G.S. 162.22. The General Assembly, by Chapter 397, Session Laws of 1943, vested in the Board of Commissioners of Henderson County "the authority to properly operate the Henderson County Jail, and to that end they may employ such assistants at such salary as in their discretion may be expedient." The Act further provides: "A jailer shall be appointed with the approval of the sheriff of the county. The jailer shall have charge of the prisoners who are incarcerated therein. . . ."

A similar local act was enacted by the 1935 General Assembly for Alamance County. Thereafter, the case of *Gowens v. Alamance*, 216 N.C. 107, 3 S.E. 2d 339, arose involving the status of the jailer. Pertinent principles of law declared in that case by Barnhill, J., (later C.J.) are applicable to the instant case. "There is no such position as deputy sheriff-jailer known to the law." "While these two offices, or positions, (deputy and jailer) are usually held by one person for convenience and efficiency, they are separate and distinct." When such person acts in a given instance, he can be acting either as jailer by virtue of his employment by the county or as deputy sheriff under his appointment by the sheriff. *Gowens v. Alamance, supra.*

Where the grounds for demurrer invoke matters not appearing on the face of the complaint, the demurrer is bad as a "speaking" demurrer. *Buchanan v. Smawley*, 246 N.C. 592, 99 S.E. 2d 787. Our Supreme Court in *Ellis v. Perley*, 200 N.C. 403, 157 S.E. 29, held that a demurrer to the complaint upon the ground that the statute conferring jurisdiction on the court is unconstitutional is bad as a speaking demurrer. In like manner, defendant in the instant case improperly attempts to attack the constitutionality of Chapter 397 of the 1943 Session Laws, a local act, by demurrer.

By its speaking demurrer, defendant attempts to deny and make a positive plea to material allegations of the complaint, particularly paragraph 3, most of paragraph 4, and paragraph 11. This it cannot do, and its demurrer was improperly sustained by the Superior Court.

* * *

This action is remanded to the Superior Court of Henderson

County for entry of order in accordance with this opinion and remanding the action to the General County Court of Henderson County for further proceedings.

Error and remanded.

CAMPBELL and MORRIS, JJ., concur.

HUGH R. BROWN, PLAINTIFF, v. A. H. ALEXANDER AND HELEN W. ALEXANDER, AND SOUTHERN EXPRESS, INC., A CORPORATION, DEFENDANTS.

(Filed 17 April 1968)

1. Appeal and Error § 26—

An assignment of error to the signing and entry of an order by the court requiring defendants to be adversely examined presents for review the legal sufficiency of the application for examination.

2. Bill of Discovery § 2—

In an action by plaintiff to secure the specific performance of a contract to deliver corporate stock, an order allowing the examination of the records of the corporate defendant and further allowing an inquiry into the conduct and negotiations of the corporate defendant by which it may have alienated or encumbered the stock to another corporation *is held* not authorized under plaintiff's application for the examination of individual stockholders whose connection with the corporation is not disclosed.

3. Same—

The statute allowing the examination of an adverse party, G.S. 1-568.10, does not contemplate an unrestricted "fishing expedition" through the record and recollections of the adversary.

APPEAL by defendants from *Beal, S.J.*, 1 January 1968, Schedule D, Session, MECKLENBURG Superior Court.

Plaintiff instituted this civil action in Mecklenburg County Superior Court on 31 March 1967, by issuance of summons to the defendants with an order from the Clerk extending time for filing complaint. At the time of issuance of summons the plaintiff filed an AFFIDAVIT AND APPLICATION FOR ADVERSE EXAMINATION OF DEFENDANTS ALEXANDER BEFORE FILING COMPLAINT.

In his application for adverse examination of the individual defendants, the plaintiff states the nature of this action to be for specific performance of a contract to deliver certain shares of stock of the corporate defendant, or in the alternative to recover damages. Paragraph 5 of the affidavit sets out the information which plaintiff

seeks to secure by the adverse examination of the individual defendants as follows:

> "5. That before he can prepare his complaint it is necessary for the applicant to secure information from the defendants Alexander about certain matters known to the defendants Alexander but not to the plaintiff; that said information includes the minute and other book entries in the corporate records of the defendant Southern Express, Inc., which the plaintiff is informed and believes have been removed from Mecklenburg County, North Carolina, and the names of all stockholders and directors in the period from 1963, to date; the ownership from time to time of the shares of stock in said corporation; the details of the rumored arrangement under which the defendants may have sold out to another motor carrier known as Watkins-Carolina Express, Inc., or Watkins Motor Lines, thereby threatening their capacity to respond by delivery of the stock and possibly leaving plaintiff entitled only to money damages for its non-delivery; the nature of any agreement or contract or transaction, executed or unexecuted, by which the defendants may have alienated or encumbered their stock in Southern Express, Inc.; the price or terms of said sale; to whom it was sold or to be sold and upon what terms; whether the sale has been approved by the Interstate Commerce Commission or other governmental regulatory agencies; the consideration received or to be received by the defendants; and all and sundry details of all activities and transactions of the defendants with regard to the Southern Express, Inc., stocks since 1964, to date, and the explanation, if any, as to why the defendants have fired the plaintiff from his employment with Southern Express, Inc., without fault or default on his part, and failed and refused to deliver to him the stock which was often promised but never delivered and which the plaintiff believes and avers is of great monetary value."

On 31 March 1967, the Assistant Clerk of Superior Court of Mecklenburg County entered an order requiring the individual defendants to appear before a named commissioner on 13 April 1967, and submit to examination in regard to the matters set out in the affidavit. On 7 April 1967, the defendants filed with the Clerk of Superior Court a MOTION TO VACATE ORDER FOR ADVERSE EXAMINATION, and the Clerk set a hearing on the motion for 21 April 1967.

After the hearing on 21 April 1967, the Clerk of Superior Court entered an order requiring the individual defendants to appear on

25 May 1967 before a named commissioner to be examined in regard to the matters enumerated in the order. The defendants excepted, and appealed to a Judge of Superior Court.

Thereafter the matter was heard by Judge Beal, who entered an order requiring the individual defendants to appear before a commissioner to be adversely examined. The pertinent portion of Judge Beal's order is as follows:

> "IT IS THEREFORE ORDERED that the defendants A. H. Alexander and Helen W. Alexander appear before Mrs. Rebecca D. Moore, Commissioner, at the office of Mr. Frank W. Orr, Attorney, in the Johnston Building, Charlotte, North Carolina, on the 2nd day of February, 1968, at 10:00 A.M., and submit themselves to adverse examination in regard to the following matters and things:
>
> "1. All minutes of the corporation which describe or bear upon any employment agreement between any of the defendants and the plaintiff, any share of stock authorized to be issued to the plaintiff, and any transactions of the corporation with respect to said stock;
>
> "2. The details of the rumored arrangements under which the defendants may have sold out to another motor carrier known as Watkins-Carolina Express, Inc. or Watkins Motor Lines, thereby threatening their capacity to respond by delivery of the stock and possibly leaving plaintiff entitled only to money damages for its non-delivery;
>
> "3. The nature of any agreement or contract or transaction, executed or unexecuted, by which the defendants may have alienated or encumbered their stock in Southern Express, Inc.;
>
> "4. The price or terms of said sale;
>
> "5. To whom it was sold or to be sold and upon what terms;
>
> "6. Whether the sale has been approved by the Interstate Commerce Commission or other governmental regulatory agencies;
>
> "7. The consideration received or to be received by the defendants."

The defendants appealed.

Craighill, Randleman and Clarkson by Francis O. Clarkson, Jr., attorneys for defendant appellants.

Frank W. Orr, and Helms, Mulliss, McMillan and Johnston by R. Malloy McKeithen, attorneys for plaintiff appellee.

BROCK, J. The defendants assign as error the signing and entry of the order by Judge Beal. This presents for review the legal sufficiency of the application for examination to support the order of examination. *Webb v. Gaskins*, 255 N.C. 281, 121 S.E. 2d 564.

The plaintiff by his affidavit in support of his application for examination, by the agreed statement of case on appeal, and by the statement of facts in his brief, asserts that this action was instituted for the purpose of securing *specific performance of a contract to deliver stock* of the corporate defendant; or, in the alternative, to *recover damages* for breach of the contract.

The plaintiff's AFFIDAVITS AND APPLICATION FOR ADVERSE EXAMINATION OF DEFENDANTS ALEXANDER BEFORE FILING COMPLAINT states the following in paragraph 2: ". . . the failure and refusal of the defendants to deliver the said shares of stock which have been promised by the individual defendants and the issuance and delivery of which have been authorized by a resolution of the Board of Directors of the corporate defendant . . ." Other than indicating in paragraph 4 of the application that the individual defendants own, or have owned, stock of the corporate defendant, there is no allegation of any connection between the individual defendants and the corporate defendant. The application does not disclose with whom the plaintiff contracted for stock of the corporate defendant.

The application filed by the plaintiff requests the examination of the individual defendants, but Judge Beal's order allows an examination of the individual defendants and of the corporate defendant's records. Paragraph 1 of Judge Beal's order allows examination of corporate minutes relating to some employment agreement. An examination of the records of the corporate defendant is not authorized under an application for examination of the individual defendants whose connection with the corporate defendant is described only as stockholders, past or present; nor does it seem that an application stating the cause of action to be for specific performance would authorize an order for examination concerning some employment agreement. Also, paragraph 1 of the order allows examination of corporate minutes relating to transactions of the corporation with respect to said stock. This, also, was not authorized under an application requesting examination of only the individual defendants.

Paragraphs 2, 3, 4, 5, 6 and 7 of the order by their terms allow

inquiry into conduct and negotiations of the *defendants,* which includes the conduct and negotiations of the corporate defendant. Such an order is not authorized under a request for examination of only the individual defendants.

It may be that the two individual defendants are the sole stockholders and officers of the corporation; but it may also be that they are two minority stockholders with no voice in the operation of the corporate defendant. The application sheds no light.

In any event, it seems that if the plaintiff had a contract for the delivery of stock of the corporate defendant, he would know with whom he contracted and would know when and upon what terms it was to be delivered. His application discloses none of this.

G.S. 1-568.10 does not contemplate the issuance of a general permit for the plaintiff to embark upon an unrestricted "fishing expedition" through the records and recollections of his adversaries. *Kohler v. Construction Co.,* 271 N.C. 187, 155 S.E. 2d 558.

The order entered by Judge Beal on 18 January 1968 is reversed and this cause is remanded with leave to the plaintiff to file his complaint, or to file a proper application for adverse examination if he wishes, within twenty days after this opinion is certified to the Clerk of Superior Court of Mecklenburg County.

Reversed and remanded.

MALLARD, C.J., and PARKER, J., concur.

INTERNATIONAL PAPER COMPANY, A CORPORATION, PLAINTIFF, v. MULTI-PLY CORPORATION, A CORPORATION; WHITEVILLE PLYWOOD, INC., A CORPORATION, DEFENDANTS.

(Filed 17 April 1968)

1. Sales § 10—

In the seller's action against two corporate defendants to recover the purchase price of paper cartons upon allegations that both defendants were engaged in a joint venture and were both liable for the indebtedness, the evidence of one codefendant *is held* sufficient to withstand nonsuit in its cross-action against the other defendant upon the grounds that the latter defendant had use of the goods sold by plaintiff and had agreed to assume the indebtedness incurred by the sale.

2. Trial § 33—

The charge in this case, when examined contextually, *held* not to support the appellant's contentions that the trial court, in reviewing the evi-

dence, mistakenly referred to appellant's evidence as the evidence of another party.

3. Trial § 51—

Where motion to set aside the verdict involves no question of law or legal inference, the granting of such motion is within the sound discretion of the trial judge and its ruling thereon is not reviewable in the absence of abuse of discretion.

4. Sales § 10; Pleadings § 8—

In the seller's action against two corporate defendants to recover the purchase price of paper cartons, allegations in the cross-action of one defendant to the effect that the other defendant had agreed to assume the indebtedness incurred jointly by the defendants are sufficient to state a cause of action, and a demurrer thereto is properly overruled.

THIS is an appeal by the defendant, Whiteville Plywood, Inc., from a judgment entered by *Clarkson, J.*, at the 18 September 1967, Schedule B, Jury Session, MECKLENBURG County Superior Court.

This case was instituted by International Paper Company (International) to collect an account of $1,722.99 for paper cartons to wrap plywood. International alleged that at the time of sale the defendants, Multi-Ply Corporation (Multi-Ply) and Whiteville Plywood, Inc. (Whiteville), were engaged in a joint venture and that the cartons were for, and used by, the joint venture. International claimed that Multi-Ply and Whiteville were both liable for the indebtedness. Whiteville denied any indebtedness. Multi-Ply denied any indebtedness and in a cross-action against Whiteville alleged a joint venture with Whiteville and the formation of Pan-L Finishing Corporation (Finishing) and that any merchandise furnished by International was to and for the use of Finishing. Multi-Ply further claimed that Whiteville had purchased the interest of Multi-Ply in Finishing and, as part of the purchase, agreed to assume all debts of Finishing, including any debts incurred by Multi-Ply on behalf of Finishing. Multi-Ply asserted that Whiteville was primarily liable for any indebtedness to International, if anyone was.

At close of the evidence of International, the motion of Whiteville for nonsuit of International's claim against it was sustained.

The following issues were submitted to the jury and answered as shown:

1. What amount, if any, is International Paper Company entitled to recover from the defendant, Multi-Ply Corporation, arising out of the matters and things alleged in the amended complaint?
Answer: $1,722.99.

2. Did Whiteville Plywood, Inc., assume and agree to pay the

amount of the indebtedness claimed by International Paper Company as alleged in the cross-action of Multi-Ply Corporation?

Answer: Yes.

Judgment was entered 6 October 1967 in favor of International against Multi-Ply for $1,722.99 with interest thereon from 28 March 1964, and upon payment of said judgment, Multi-Ply would be entitled to recover from Whiteville for the amount of such payment.

It is from this judgment that the defendant, Whiteville, appeals.

Ruff, Perry, Bond, Cobb, and Wade by William H. McNair for defendant Multi-Ply, appellee.

Williamson & Walton for defendant Whiteville, appellant.

CAMPBELL, J. Whiteville claims error in the trial of this case for that:

1. The evidence introduced by Multi-Ply was not sufficient to sustain the cross-action and the judgment as of nonsuit should have been entered.

2. There were errors in the charge of the court.

3. The trial court should have set the verdict aside.

Mr. Manous, President of Multi-Ply, testified that the order for cartons in question was for the benefit of Finishing and he had so informed representatives of International. He further testified that he agreed with Mr. Wallace, President of Whiteville, for Whiteville to purchase the interest of Multi-Ply in Finishing and "assume the remaining debt of Finishing and the bills." He also testified that Mr. Wallace told Mr. Dalehite of International that this bill would be taken care of. There was other evidence on behalf of Multi-Ply to the effect that the order for the cartons had been placed with International by the plant superintendent of Finishing and that the cartons were used in the business of Finishing. Mr. Wallace on behalf of Whiteville denied using the cartons or agreeing to pay this particular bill to International. A factual issue for the jury was presented. The evidence was ample to support a finding on the second issue in favor of Multi-Ply and there was no error in failing to nonsuit the cross-action.

With regard to the judge's charge to the jury, Whiteville asserts error in that the trial judge in reviewing the evidence referred to evidence offered by International and that this constituted error, for the case brought by International against Whiteville had been nonsuited at the close of the plaintiff's evidence.

A reading of the charge reveals that when the trial judge was reviewing the evidence of Whiteville he said: "Now as to the International Paper Company, their evidence tends to show," etc. Actually, the trial court by the use of the words "their evidence" was not referring to the evidence introduced by International but instead was reviewing and was referring to the evidence of Whiteville as testified to by Mr. Wallace, the President of Whiteville. We think the jury so understood and was not misled. When taken in context the charge is not objectionable.

Whiteville assigns other errors to the charge of the trial court.

We have reviewed all of these assignments of error and find no merit in them. We do not think anything would be gained by a detailed review and discussion of the charge of the trial court as no novel questions are presented and a detailed discussion would unnecessarily prolong the length of this decision.

There was no error in failing to set the verdict aside.

Setting aside a verdict, where no question of law or legal inference is involved, is a matter within the sound discretion of the trial judge. In the absence of abuse of discretion it is not reviewable on appeal. *Pruitt v. Ray,* 230 N.C. 322, 52 S.E. 2d 876.

Whiteville shows no abuse of discretion and instead ties this claimed error to a demurrer *ore tenus* asserted in this Court for the failure of the cross-action of Multi-Ply to state a cause of action.

The answer of Multi-Ply alleges that in March 1964 Multi-Ply and Whiteville entered into an agreement whereby Whiteville would purchase the interest of Multi-Ply in Finishing; that as a part of the purchase price, Whiteville agreed that it would assume and pay all outstanding debts incurred by Finishing and all outstanding debts incurred by Multi-Ply for or on behalf of Finishing; that prior to this agreement Finishing had ordered and received some or all of the merchandise described in the complaint filed by International.

We are of the opinion and hold that this cross-action filed by Multi-Ply sets forth a cause of action against Whiteville and the demurrer *ore tenus* is overruled.

Affirmed.

BROCK and BRITT, JJ., concur.

ANNIE M. SIMMS AND HUSBAND, RICHARD J. SIMMS, v. ELIZABETH REID JONES HAWKINS; JAMES L. REID; ANDREW A. REID; AND ANNIE M. SIMMS, AS ADMINISTRATRIX OF THE ESTATE OF DAISY E. STOWE.

(Filed 17 April 1968)

1. Mortgages and Deeds of Trusts § 13—

A mortgagee or trustee in a deed of trust takes the legal title to the property merely as security for payment of the debt.

2. Same—

The estate of a mortgagee or a trustee in a deed of trust is a determinable fee terminating the instant the debt is paid or other condition of the mortgage or deed of trust is performed.

3. Wills § 39; Mortgages and Deeds of Trust § 13—

Under a will devising a life estate in realty to testator's wife "with the right and power to mortgage, sell, or lease the same, at her discretion," with remainder over to testator's daughter, the execution of a deed of trust on the property by the life tenant *is held* not to divest the remainder interest of the daughter since the deed of trust, not having been foreclosed, is merely security for a debt and does not alter the estate.

APPEAL by defendant Andrew A. Reid from *Clarkson, J.*, 15 January 1968 Schedule "C" Non-Jury Session of MECKLENBURG Superior Court.

This is an action for a declaratory judgment to determine the ownership of certain funds now held by the Clerk of the Superior Court of Mecklenburg County. The case was submitted to the Superior Court upon an agreed statement of facts, summarized as follows:

Leo N. Stowe died testate in January, 1963, leaving certain real estate in the City of Charlotte. The pertinent provision of his will is as follows:

> "SECOND, I give, devise and bequeath to my beloved wife, Daisy E. Stowe, all of my right, title and interest whatsoever in all of my property, both personal and real, wheresoever situated, including that real estate located in the District of Columbia and in the City of Charlotte in the State of North Carolina, for, and during the period of her natural life, hereby granting unto my wife the right and power to mortgage, sell, or lease the same, at her discretion, both as to time and the selling price; and after her death, I hereby devise the remainder of my real estate to my daughter, Annie M. Simms, absolutely, and in fee simple. All the rest and residue of my estate, both real, personal and mixed, I give, devise and bequeath to my wife, Daisy E. Stowe,

and to my daughter, Annie M. Simms, share and share alike, as tenants in common."

On 8 July 1963, Daisy E. Stowe executed a deed of trust conveying the Charlotte property to trustees for First Federal Savings and Loan Association of Charlotte to secure a loan for $6400.00. Said deed of trust was on the customary form and included the usual covenants to the effect that grantor was seized of the property in fee with the right to convey the same in fee simple; provided that if the deed of trust were foreclosed, the proceeds, after payment of the indebtedness, expense of sale, etc., would be paid to the grantor; and that the terms and conditions of the deed of trust would bind, and the benefits inure to, the heirs of the grantor.

On 7 August 1963, Daisy E. Stowe died intestate, leaving as her heirs, two daughters and two sons. Defendant Andrew A. Reid is one of the sons and plaintiff Annie M. Simms is one of the daughters, she being a child of the marriage of Leo and Daisy Stowe; the other three were children of Daisy by a previous marriage.

Thereafter, the Housing Authority of the City of Charlotte condemned the property covered by the deed of trust and the proceeds of the condemnation action were paid to the Clerk of Mecklenburg Superior Court to be held pending determination of ownership.

The indebtedness secured by the deed of trust has been paid or will be paid from the condemnation action proceeds and there will be no foreclosure of the deed of trust.

The Superior Court entered judgment adjudging that plaintiff Annie M. Simms is entitled to the balance of the proceeds after payment of the Savings and Loan Association indebtedness and the costs of the action. Defendant Andrew A. Reid, through his guardian *ad litem,* appealed.

Mark B. Edwards, attorney and Guardian ad Litem for defendant appellant Andrew A. Reid.

Reginald S. Hamel, attorney for plaintiff appellees.

BRITT, J. Is a remainder interest in devised real estate cut off by the mere execution of a deed of trust by the life tenant who has discretionary power to mortgage, sell, or lease?

We hold that under the facts presented in this case, it is not.

Upon the execution of a mortgage or deed of trust on real estate, legal title to the land vests in the mortgagee or trustee, as the case may be, but only as security for the payment of the debt. *Gregg v. Williamson,* 246 N.C. 356, 98 S.E. 2d 481, and cases cited therein.

The estate of a mortgagee, or trustee in a deed of trust, is a determinable fee terminating the instant the debt is paid or other condition of the mortgage or deed of trust is performed. *Gregg v. Williamson, supra. Barbee v. Edwards,* 238 N.C. 215, 77 S.E. 2d 646.

In the case at bar, the real estate in question was devised to Daisy Stowe "during the period of her natural life, with the right and power to mortgage, sell, or lease the same, at her discretion." She exercised her power to "mortgage" the property — nothing more — and when the debt secured by the mortgage (deed of trust) is paid, thereby preventing foreclosure of the instrument, the estate conveyed by the deed of trust completely terminates.

Appellant cites and strongly relies on the case of *Hicks v. Ward,* 107 N.C. 392, 12 S.E. 318. Our holding in the instant case is not inconsistent with *Hicks.*

The opinion in *Hicks* does not disclose the nature of the action before the court and does not state whether or not the mortgage involved in the action had been foreclosed. From the original record in the case, we find that the *Hicks* case was an action to foreclose the mortgage referred to therein and to determine who would receive the proceeds from the sale of the land after paying the indebtedness secured by the mortgage, expense of the sale, etc.

In *Hicks* the parties agreed "to rest the decision upon the construction of said will in reference to the authority of the said Hicks to execute the mortgage in question." The testamentary provision in question was to "Edward, in trust for such person, or persons, and use, or uses, as he (should) by deed or will appoint, and until, and in default of, such appointment in trust, for the sole and separate and exclusive use and benefit of his daughter-in-law Harriet (wife of said Edward), during her life and at her death to be equally divided between the children," etc. The Supreme Court held that this very clearly conferred upon Edward a general power of appointment and under it he had the power to appoint to his own use and execute a valid mortgage.

We also find in *Hicks* the following:

> "The other question to be determined is, whether the execution of the mortgage was such an appointment or revocation as to wholly defeat the trusts declared in the will. It is argued that, conceding the power to execute the mortgage, its execution was but an appointment or revocation *pro tanto,* leaving the equity of redemption, or the surplus after a sale, subject to the trusts above mentioned. This, as a general proposition, is well estab-

lished by the authorities, as in equity *mortgages are considered as only securities for money, and no alteration in the estate is made thereby.* 1 Sugden Powers, 361. (Emphasis added).

"It is equally well settled that where there is not only a mortgage, but an ulterior disposition inconsistent with the former (uses), it will operate in equity as a total appointment or revocation, unless there be a declaration that it shall be an appointment or revocation only *pro tanto.* Sugden, *supra,* 4 Cruise Dig., 202."

The court then declared that the provision in the *Hicks* mortgage providing that "the overplus is to be paid over to the said Edward H. Hicks, his heirs, executors, administrators or assigns" constituted a plain manifestation of the intention of the donee of the power to revoke the settlement and assume entire dominion over the estate.

We summarize some of the distinctions between *Hicks* and the instant case: In *Hicks* there was a general power of appointment, by deed or will; in the instant case there is only the power to mortgage, sell or lease. In *Hicks* there was a foreclosure of the mortgage, thereby fully implementing the terms and conditions of the mortgage; in the instant case there is no foreclosure of the deed of trust and "no alteration in the estate is made thereby."

We have carefully reviewed the record in this case and find no prejudicial error.

The judgment of the Superior Court is

Affirmed.

CAMPBELL and BROCK, JJ., concur.

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

(Filed 17 April 1968)

1. Master and Servant § 96—

G.S. 97-88 authorizes the Industrial Commission to award a fee to claimant's attorney as a part of the costs of an appeal by the insurer only when its decision orders the insurer to make or to continue payments of compensation to the claimant.

2. Same—

The Industrial Commission is not authorized by G.S. 97-88 to award

fees to a claimant's attorney as part of the costs where its decision relates only to an award of medical and hospital expenses, since such expenses do not constitute compensation under the Workmen's Compensation Act.

3. Master and Servant § 85—

The Industrial Commission is a creature of the General Assembly and its jurisdiction is limited to that prescribed by statute.

THIS is an appeal from an order of the Industrial Commission filed 6 November 1967.

The facts and background of this case are fully set out in the decision of the Supreme Court reported in 271 N.C. 76, 155 S.E. 2d 755, and all of the facts will not be repeated.

Hofler, Mount & White by Richard M. Hutson, II, for plaintiff appellee.

Spears, Spears, Barnes & Baker for defendant appellants.

CAMPBELL, J. The question presented is whether the Industrial Commission committed error in ordering that $1,400 of counsel fees for plaintiff's counsel be paid by defendants as part of the costs pursuant to G.S. 97-88.

After the decision of the Supreme Court, counsel for the employee petitioned the Industrial Commission to tax against the insurer, as part of the costs, a reasonable fee for the services rendered the injured employee, due to the "persistent appeals from the award of the North Carolina Industrial Commission."

The petition itemized in detail the various services rendered and the time consumed. Arguments were held on the petition on 16 October 1967 and thereafter the Commission entered an order approving counsel fees in the amount of $2,400. Of this sum, $1,400 was ordered paid by the defendant insurer as a part of the court costs pursuant to the provisions of G.S. 97-88.

It is from this order that the present appeal comes.

There is no controversy as to the reasonableness of the fee allowed.

This case presents a hardship situation with persistent appeals by the insurer from the Hearing Commissioner to the Full Commission, to the Superior Court, and to the Supreme Court. On each appeal, the insurer was unsuccessful, but the fact remains that the award throughout has been for medical treatments and at no time a "money allowance payable to the employee."

Under a differently worded Statute, the Florida Court has held that the award of compensation is not a prerequisite to the allowance

of attorney fees and the only requirement is "the successful prosecution of his claim" by the injured employee. *Ringling Bros.-Barnum & Bailey Combined Shows, Inc., v. Jones,* 134 So. 2d 244 (Fla. 1961), and *City of Miami Beach v. Schiffman,* 144 So. 2d 799 (Fla. 1962).

G.S. 97-88 authorizes reasonable attorney's fees as a part of the bill of costs, only when the decision "orders the insurer to make, or to continue payments of compensation to the injured employee."

Whether medical expenses, such as hospitals, doctors, and nurses, are to be considered within the term "compensation" has previously been decided and is no longer an open question. In the case of *Morris v. Chevrolet Company,* 217 N.C. 428, 8 S.E. 2d 484, the Court held: "The term 'compensation' means the money allowance payable to an employee or to his dependents, etc. The statute included funeral benefits, but omitted hospitals, doctors, and nurses." This case conclusively held that medical expenses, such as hospitals, doctors, and nurses, are not to be considered as "compensation." See also *Ivey v. Prison Department,* 252 N.C. 615, 114 S.E. 2d 812; *Thompson v. Railroad,* 216 N.C. 554, 6 S.E. 2d 38; *Whitted v. Palmer-Bee Co.,* 228 N.C. 447, 46 S.E. 2d 109.

In the absence of an order requiring "the insurer to make, or to continue payments of compensation to the injured employee," the Commission has no authority to award attorney's fees paid by the insurer.

The North Carolina Industrial Commission is a creature of the General Assembly and has a special or limited jurisdiction created by Statute and confined to its terms. *Bowman v. Chair Company,* 271 N.C. 702, 157 S.E. 2d 378.

The Statute does not permit the award of attorney's fees in this instance and, no matter the laudatory purpose involved, this Court is bound by the doctrine *lex scripta est.*

Reversed.

MORRIS and PARKER, JJ., concur.

A. L. BUMGARNER v. WAYNE L. SHERRILL.

(Filed 17 April 1968.)

1. Courts § 7—

Jurisdiction of the Superior Court over appeals from the District Court continues for civil cases tried in the District Court for which notice of

appeal was given on or before 30 September 1967. G.S. 7A-35(a); Supplementary Rules of the Supreme Court No. 14.

2. Appeal and Error § 1—

The Court of Appeals has jurisdiction in civil cases in which notice of appeal is given on and after 1 October 1967 to the Appellate Division from the District Court. G.S. 7A-35(c).

3. Courts § 7; Appeal and Error § 1—

Where notice of appeal was given before 1 October 1967 in a civil case in the District Court, the Court of Appeals is without jurisdiction to entertain appeal from the District Court, and the appeal is accordingly dismissed.

APPEAL by defendant from *Snyder, J.*, at the 25 September 1967 Civil Session of the District Court of CATAWBA County.

This is a civil action which was originally instituted in the Superior Court for Catawba County on 31 October 1966 in which plaintiff sought judgment against defendant in the sum of $550.00 for rental alleged to be due on real property and in the sum of $1170.00 for damages alleged to have been caused to plaintiff's property by acts of the defendant. Defendant answered, denying liability and counterclaiming for $2905.98 alleged to be due him from plaintiff by reason of expenditures made by defendant in improving plaintiff's land. After the case was instituted and effective on the first Monday in December, 1966, the District Court was established in the Twenty-fifth Judicial District, which included Catawba County. On 4 September 1967 Judge Sam J. Ervin, III, the Judge presiding over the Superior Court of Catawba County, on motion of plaintiff signed an order transferring the case to the Civil Docket of the District Court Division of the General Court of Justice. A jury trial being waived, the case was heard on 25 September 1967 before District Judge Keith S. Snyder, who signed judgment dated 25 September 1967 and filed 27 September 1967 in which he made findings of fact and adjudged that plaintiff recover a total of $950.00 of the defendant for rental and damages. In open court at the time of the hearing on 25 September 1967 defendant, through counsel, gave notice of appeal.

William H. Chamblee for defendant appellant.
J. Carroll Abernethy, Jr., for plaintiff appellee.

PARKER, J. Insofar as the record docketed in this Court discloses, the only notice of appeal from the judgment of the District Court in this case was that given by defendant's counsel in open

court at the time of the hearing before the District Judge on 25 September 1967. The transcript of the proceedings at that hearing does not disclose to what court it was intended the appeal should be taken. G.S. 7A-35(a) provides that the jurisdiction of the Superior Court over civil appeals from the District Court continued for civil cases tried in the District Court in which notice of appeal was given on or before 30 September 1967. See also, Rule 14 of Supplementary Rules of the Supreme Court, 271 N.C. at page 748. Causes in which notice of appeal is given on and after 1 October 1967 to the Appellate Division from the District Court in civil cases shall be filed with the Clerk of the Court of Appeals. G.S. 7A-35(c). Since the notice of appeal in this case was given before 1 October 1967, the appeal should have been made to the Superior Court, and the Court of Appeals has no jurisdiction. Accordingly the appeal is

Dismissed.

MALLARD, C.J., and BROCK, J., concur.

STATE OF NORTH CAROLINA v. BILL HAMLIN.
(Filed 17 April 1968.)

APPEAL by defendant from *Martin, J.*, at the 27 November 1967 "A" Term, BUNCOMBE County Superior Court.

The defendant, charged in a valid warrant with assault on a female, was tried and convicted in the General County Court of Buncombe County. From a sentence of two years, he appealed to the Superior Court. The jury returned a verdict of guilty as charged, and a 12 months sentence was imposed, from which defendant appeals.

Attorney General T. W. Bruton and Deputy Attorney General James F. Bullock for the State.

Dennis J. Winner for defendant appellant.

MORRIS, J. The defendant has appealed this case as he had a right to do under the laws of the State of North Carolina. Further, as was his right, he requested counsel; and the court, upon a determination of indigency, appointed counsel to perfect his appeal. Counsel, with commendable candor, stated to the Court that his diligent search of the record disclosed no error. Defendant, therefore,

through his counsel, excepted to the judgment and requested this Court to review the record, and if error be found, grant a new trial.

The record discloses that the evidence for the State was more than sufficient for submission to the jury. The charge of the court correctly applied the law to the evidence and fairly presented the contentions of both the State and the appellant. The jury, after deliberation, returned a verdict of guilty as charged. The sentence is within the statutory limit.

We have reviewed the record and find

No error.

CAMPBELL and BRITT, JJ., concur.

PEGGY LOUISE CLARKE v. RONALD EUGENE HOLMAN AND HUGHEY FRED TOWNSEND.

(Filed 24 April 1968.)

1. Automobiles §§ 10, 75—

Evidence that defendant had stopped his truck on the highway preparatory to making a left turn to permit oncoming traffic to pass *is held* insufficient to sustain an allegation that defendant was negligent in stopping on the main traveled portion of a highway without just cause or emergency, this being a legitimate purpose for stopping on the highway.

2. Automobiles § 9—

G.S. 20-154(a) requires a motorist to give a signal before stopping or turning from a direct line of travel only when the operation of another vehicle will be affected thereby.

3. Automobiles §§ 55, 58, 87— Evidence held insufficient to show negligence by defendant's failure to give turn signal and to show insulating negligence by codefendant.

Evidence that defendant had stopped his truck on the highway preparatory to making a left turn without signalling his intention to stop or to turn left, that defendant's truck was completely stopped when first observed by plaintiff and by a codefendant, that while waiting for oncoming traffic to pass, the defendant's truck was struck from the rear by the codefendant's vehicle, which then struck plaintiff's oncoming vehicle, and that the codefendant did not see the defendant's truck in time to have avoided striking it even if defendant had signalled, *is held* insufficient to be submitted to the jury on the issue of defendant's negligence in failing to give the signals required by G.S. 20-154, since the operation of no other vehicle was affected by defendant's action of stopping and since the statute

does not require defendant to signal his intention to turn left until he has started to do so. Conceding negligence by defendant in failing to give signals, his negligence had come to rest and was insulated by the negligence of the codefendant in failing to see defendant's truck in time to avoid the collision.

BRITT, J., dissenting.

APPEAL from *Ervin, J.*, 23 October 1967 Regular Civil Session of CALDWELL Superior Court, by the defendant Townsend.

This action was instituted for the recovery of damages for personal injuries as a result of an automobile accident which occurred at 6:45 a.m., during daylight, on 4 May 1966 on Rural Paved Road 1001 about six miles south of the town of Lenoir, Caldwell County, North Carolina.

The jury found both defendants negligent and awarded damages in the amount of $20,000.

The defendant Townsend assigns error for the failure of the trial court to nonsuit the action as to him at the close of all of the evidence.

The defendant Holman did not appeal.

West & Groome for plaintiff appellee.

James C. Smathers and Larry W. Pitts for defendant Townsend appellant.

CAMPBELL, J. Rural Paved Road 1001 ran in a northerly-southerly direction and was known locally as the Connelly Springs Road. At a point about six miles south of Lenoir, Rural Paved Road 1136 intersected the Connelly Springs Road from the west only, forming a "T" intersection. From the intersection south, the Connelly Springs Road is straight and level for a distance of 528 feet according to the investigating highway patrolman and for a distance of at least 300 feet according to the defendant Holman. From the intersection north, the Connelly Springs Road was straight and level for about one-half a mile. The Connelly Springs Road was a paved road approximately 20 feet wide with shoulders approximately four feet wide on each side. There was a marked center line and the weather was clear and dry.

The speed limit for vehicular traffic was 55 miles per hour.

The plaintiff Clarke was driving a 1964 Nash Rambler automobile in a southerly direction at a speed of approximately 45 miles per hour. Behind her, Cecil Dennis Gragg was driving a 1957 Ford automobile and was some five car lengths behind the plaintiff Clarke.

There were several vehicles in front of the plaintiff Clarke proceeding, likewise, in a southerly direction.

When the plaintiff Clarke was some 1700 feet north of the intersection, she observed a 1953 Chevrolet pickup truck operated by the defendant Townsend stopped in the road in the lane designated for northbound traffic. She did not observe any signals being given by the defendant Townsend. The pickup truck was not equipped with mechanical turn signals. At all times she observed the Chevrolet pickup truck of the defendant Townsend, it was sitting "dead still" in the road. Just as she reached the intersection, she was struck by a vehicle that she had not observed prior to that time.

The witness Gragg, who was driving the Ford automobile immediately behind the plaintiff Clarke, likewise observed the Townsend truck, and it was sitting still when he first observed it. Gragg further saw the defendant Holman driving a 1966 Ford pickup truck in a northerly direction come up behind the Townsend truck and saw Holman swerve off of the Townsend truck "that was stopped there and struck the Peggy Clarke car."

After striking the Clarke vehicle, Holman ran into the Gragg automobile.

The defendant Holman testified that he saw the Townsend vehicle sitting in the road but did not see Townsend giving any signal. Holman testified that he never saw the Townsend vehicle when he came around the curve at least 300 feet away and that he had not seen it previously along the highway. He testified that the first time he saw it, it was stopped on its side of the road headed directly north in the lane of traffic and not turned in any direction. He said that he did not see the pickup truck of the defendant Townsend until it was too late for him to stop. He testified that if he had seen the Townsend vehicle when 150 feet away from it, he would have been able to stop but that he did not see it until he was too close to stop. The evidence showed Holman's 1966 Ford pickup truck skidded 57 feet and struck the Townsend vehicle in the left rear and then crossed into the southbound lane and struck the vehicle of the plaintiff Clarke and came to rest after striking the vehicle of the witness Gragg.

The defendant Holman testified that, while he had not seen the defendant Townsend give any signals, if there had been a hand signal he could not have stopped, because he did not see the vehicle until he was too close to stop. He was within 100 feet of the stopped vehicle before he saw it. He gave no explanation as to why he had not seen the Townsend vehicle prior to that time.

Townsend testified that on reaching the intersection he stopped

for the purpose of making a left turn; that he gave a hand signal indicating his intention to turn left but, because of oncoming traffic, was not able to make a turn; and that he had been sitting there for a half a minute or more, possibly 45 seconds, when he heard brakes and tires squalling and looked in the mirror and saw the truck of Holman sliding towards him sideways. He took his hand in and braced himself on the steering wheel.

The plaintiff in her complaint alleges that the defendant Townsend was negligent in that:

1. He failed to give a signal of his intention to stop.

2. He failed to give a signal of his intention to make a left turn.

3. He stopped on the main traveled portion of a public highway without just cause or an emergency.

All of the evidence was to the effect that the defendant Townsend stopped preparatory to making a left turn, that it was necessary for him to remain in a stopped position in order to permit oncoming traffic to pass, and that there was no intent to break the continuity of the travel. This being a legitimate purpose for stopping on the highway, the evidence on behalf of the plaintiff does not sustain the third allegation of negligence. *Royal v. McClure,* 244 N.C. 186, 92 S.E. 762.

With regard to the other two allegations of negligence, namely: the failure to give a signal of intention to stop and the failure to give a signal of an intention to turn left, the statute provides: "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 if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, 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." G.S. 20-154(a).

It is to be noted that the statute provides, "whenever the operation of any other vehicle may be affected by such movement." Accordingly, whenever the operation of another vehicle will not be affected by starting, stopping, or turning, no signal is required by the statute.

"The plaintiff having first looked in both directions, and having observed no automobile or other vehicle approaching from either direction, was under no obligation, by virtue of the statute, to give any

signal of his purpose to turn to his left and enter the driveway to his home. He was therefore not negligent as a matter of law in failing to give a signal before he turned to his left and crossed the highway for the purpose of entering the driveway to his home." *Stovall v. Ragland,* 211 N.C. 536, 190 S.E. 899.

In the instant case the plaintiff, according to her testimony, when she was 1700 feet to the north of the intersection saw the vehicle of the defendant Townsend sitting still. No one testified to seeing the vehicle of the defendant Townsend moving. So far as the evidence on behalf of the plaintiff reveals, the defendant Townsend was properly stopped on the highway and, under the statute, it was not incumbent upon him to give a signal of his intention to turn left until he started to do so because the statute states: "before." The evidence in the instant case shows no requirement on the part of Townsend to give any signal.

If it be conceded that the defendant Townsend was in any way negligent in failing to give a signal indicating that he was stopped or indicating that he was intending to make a left turn, such negligent act on the part of the defendant Townsend under the evidence of this case was dormant and at rest.

The defendant Holman testified that if he had seen the Townsend vehicle when he was 150 feet from it he could have stopped, and that he ran into it simply because he did not see it until he was too close to it to stop. He gave no explanation as to why he had failed to see the vehicle previously, even though there was nothing to impede his vision of the vehicle.

If the defendant Townsend was in any way negligent, his negligence was insulated by the active negligence of the defendant Holman, and this case is controlled by the doctrine of insulated negligence as set forth in *Smith v. Grubb,* and *Construction Company v. Grubb,* 238 N.C. 665, 78 S.E. 2d 598, and *Potter v. Frosty Morn Meats, Inc.,* 242 N.C. 67, 86 S.E. 2d 780.

We have read and considered all of the cases cited in the appellant's brief. In each of those cases, all of the vehicles were moving at the time of the collision, and the facts are readily distinguishable from the facts involved in the instant case.

In the instant case, the trial court was in error in failing to sustain the motion for judgment as of nonsuit on behalf of the defendant Townsend.

Reversed.

MORRIS, J., concurs. BRITT, J., dissents.

BRITT, J., dissenting: Defendant Townsend's principle assignment of error relates to the failure of the trial court to nonsuit the action as to him.

A motion to nonsuit presents the question whether the evidence considered in the light most favorable to plaintiff is sufficient to be submitted to the jury. Discrepancies and contradictions in plaintiff's evidence are for the jury, not the court. Plaintiff is entitled to every reasonable inference to be drawn from his evidence. *Cutts v. Casey,* 271 N.C. 165, 155 S.E. 2d 519.

A decision in this case depends upon the construction of portions of G.S. 20-154. Plaintiff contends that under the facts in this case this statute required defendant Townsend to give a signal continuously for the last 200 feet before stopping or making a turn *and to continue signaling until his movement was completed.* (Emphasis added).

Our research fails to disclose that our Supreme Court has said whether or not a motorist situated as defendant Townsend was in this case must continue signaling until his left turn movement is completed. I fear that the construction given in the majority opinion is too strict.

Subsection (b) of G.S. 20-154, after describing the signal to be given, states that "all signals shall be maintained or given continuously for the last one hundred feet (two hundred feet where speed limit is 45 miles per hour or more) traveled prior to stopping or *making* a turn." (Emphasis added). In the instant case, a turn was not *made* when defendant Townsend stopped at the intersection.

In my opinion, the trial court properly submitted the case for jury determination and I vote to affirm.

WM. MUIRHEAD CONSTRUCTION COMPANY, INC. v. HOUSING AUTHORITY OF THE CITY OF DURHAM, NORTH CAROLINA, AND NATIONAL SURETY CORPORATION.

(Filed 24 April 1968.)

1. Trial § 56—

In a trial before the judge without a jury, the ordinary rules as to the competency of evidence which are applicable in a jury trial are to some extent relaxed, since the judge with knowledge of the law is able to eliminate incompetent and immaterial testimony, but if incompetent evidence is admitted, the presumption arises that it was disregarded and did not influence the judge's findings.

2. Principal and Surety § 8—

The evidence in this case *is held* sufficient to withstand motion for nonsuit and to support the trial court's findings and conclusions of law in plaintiff's action to cancel a bid bond posted on a bid for a general construction contract of public housing apartments and to enjoin the forfeiture or enforcement thereof.

3. Contracts § 2—

An essential element of every contract is mutuality of agreement; the parties thereto must assent to the same thing in the same sense, and their minds must meet as to all the terms, and if any portion of the proposed terms is not settled or no mode agreed upon by which it may be settled, there is no agreement.

4. Contracts § 3—

Unless an agreement to make a future contract is definite and certain upon the subjects to be embraced therein, it is nugatory; consequently, the acceptance of a proposition to make a contract, the terms of which are to be subsequently fixed, does not constitute a binding agreement.

5. Contracts § 12—

The heart of a contract is the intention of the parties.

6. Same—

Ambiguity in a written contract is to be inclined against the party who prepared the writing.

APPEAL by defendant Housing Authority from *Bailey, J.*, 16 October 1967 Civil Session of DURHAM Superior Court.

This is a civil action to cancel and return plaintiff's bid bond posted on a bid for the general construction contract of housing apartments and to enjoin the forfeiture or enforcement thereof.

It was stipulated in the Court below that the plaintiff, Wm. Muirhead Construction Company, Inc., is a corporation organized and engaged in the business of general construction in the State of North Carolina; that the defendant Housing Authority of the City of Durham, North Carolina, was duly incorporated and acting pursuant to Chapter 157 of the "Housing Authorities Law" of North Carolina. It was further stipulated that the National Surety Corporation is a New York corporation duly qualified to carry on a surety and bond insurance business in this State.

Jury trial was waived by all parties. Plaintiff and defendants offered evidence, both oral and documentary. The trial judge made detailed findings of fact and conclusions of law.

The facts as found by Judge Bailey are summarized as follows:

(1) Defendant Housing Authority issued invitations for bids for Housing Project NC-13-7 to be located in the City of Durham

and to be comprised of 82 dwelling buildings containing 200 family dwelling units, together with a management and maintenance building. Separate bids were invited for the general construction and the bids were to be received and opened on 30 November 1965. As a part of the invitation for bids, there was submitted to proposed bidders certain instructions for bidders and forms of bid, bid bond and contract, and form of performance and payment bond; also certain general conditions, special conditions, unit price agreements, technical specifications and drawings and addenda, all prepared by defendant Housing Authority or under its direction or by architects and engineers selected by it.

(2) On 30 November 1965, plaintiff submitted a bid. The bids were opened and it was determined that the bid submitted by plaintiff at a price of $2,337,000 was lowest and was $277,786 below the next lowest bid. Two other bids were slightly higher than the second lowest.

(3) Plaintiff submitted its bid to defendant Housing Authority on the prescribed bid form and also deposited a bid bond executed by plaintiff, as principal, and defendant Surety Corporation, as surety, on the prescribed form. The penal sum of said bond is $116,850, representing five per cent of plaintiff's bid.

(4) The instructions to bidders, Section 12, which is a part of the specifications, contained the following language: "12(a). Subsequent to bid opening, *and prior to and as a condition of award* (emphasis as in original), the successful bidder shall negotiate with the local authority and agree upon mutually acceptable unit prices for the items listed in Section 8 of the special conditions and conforming to the terms thereof." Section 8 of the Special Conditions contains nineteen separate items.

(5) "Off-site Borrow" in the general contracting business is a term meaning earth or similar material obtained from a place other than the construction site and used to raise the elevation of the construction site. The specifications do not mention the need for off-site borrow in connection with Project NC-13-7.

(6) Section 3(a) of the general conditions of the specifications, which form a part of the contract, provides, in part, as follows: "Except as otherwise specifically stated in the contract, the contractor shall provide and pay for all materials, labor, tools, equipment, water . . . and all other services and facilities of every nature whatsoever necessary to execute the work to be done under the contract. . . ."

(7) Division I of the specifications contains a large number of

specific items relating to excavation, filling and grading for Project NC-13-7. Item 13 thereof requires the contractor to remove from the site and dispose of all debris and *excess* excavated material. (Emphasis supplied.) Nowhere in said division does it appear specifically that off-site borrow would be required.

(8) From a technical analysis of the drawings it could be determined that between 40,000 and 60,000 cubic yards of off-site borrow would be required. The engineers who prepared the drawing for the grading of this area made such a determination and advised the architect of this fact prior to the time invitations to bid were submitted to prospective bidders. The architect and the engineer were responsible for preparation of the specifications and Division I was the particular responsibility of the engineer.

(9) When the plaintiff's bid was prepared and submitted, the plaintiff did not consider that off-site borrow would be required.

(10) The plaintiff raised the question of off-site borrow and of rock excavation at the first meeting of the plaintiff and defendant Housing Authority in Atlanta, Georgia, on the morning of 7 December 1965. At this time, the representative of the defendant Housing Authority refused to agree that rock excavation or off-site borrow were elements to be negotiated on a unit price basis. Subsequently, the defendant Housing Authority receded from its position as to rock excavation. It never receded as to off-site borrow. Plaintiff never agreed to furnish off-site borrow within his lump-sum bid price.

(11) On 9 December 1965, defendant Housing Authority submitted a contract to plaintiff with a request that it be executed within ten days. At this time, no unit price agreement had been reached between the plaintiff and defendant Housing Authority. On 20 December 1965, defendant Housing Authority, by letter, called upon plaintiff to negotiate a unit price agreement without delay.

(12) On 22 December 1965, plaintiff, by letter, communicated its willingness to negotiate a unit price agreement to include rock excavation and off-site borrow. This letter was acknowledged by defendant Housing Authority by letter dated 22 December 1965 and proposed a meeting for this purpose to be held on the next day.

(13) By letter dated 24 December 1965, plaintiff submitted to defendant Housing Authority a proposed unit price agreement. This proposal set forth the agreements reached on the previous day and, in addition, included an off-site borrow unit price which defendant Housing Authority had not agreed to. The proposal did not include all of the items for which a unit price agreement was required as a condition precedent to the award of the contract.

(14) On 30 December 1965, defendant Housing Authority replied to the above letter but declined to include a unit price for off-site borrow. It did, however, offer to provide a unit price for off-site borrow in the event "mulch or other unsuitable material' was encountered on the site. No agreement as to all unit prices had at this time been reached.

(15) By letter dated 31 December 1965, thirty-one days after the bids were opened, plaintiff withdrew its bid proposal.

The invitation for bids provided that "no bid shall be withdrawn for a period of thirty days subsequent to the opening of bids."

Pending the litigation, plaintiff deposited with the Clerk of the Superior Court of Durham County a certificate of deposit issued by Wachovia Bank and Trust Company, of Durham, North Carolina, in the principal sum of $116,850, bearing interest at the rate of five per cent per annum, as security for any obligations under the bid bond and for delivery to the defendant Housing Authority or return to the plaintiff as the court might adjudge.

Judge Bailey concluded that the bid documents were ambiguous and unclear as to the question of off-site borrow, that plaintiff attempted in good faith to reach a unit price agreement but was unable to do so, that no complete unit price agreement was ever reached, that no contract conforming to plaintiff's bid proposal was submitted to plaintiff, that more than thirty days elapsed after the opening of the bids before plaintiff withdrew its bid proposal, that no meeting of the minds of the parties ever occurred, that plaintiff is not indebted to defendant Housing Authority or to defendant Surety Corporation, and defendant Surety Corporation is not indebted to defendant Housing Authority.

From judgment ordering and adjudging that the bid bond be rescinded, that defendant Housing Authority recover nothing of plaintiff or defendant Surety Corporation, that defendant Surety Corporation recover nothing of plaintiff, that the Clerk of the Superior Court return to plaintiff the certificate of deposit together with all interest paid thereon and not delivered to defendant Housing Authority, that defendant Housing Authority deliver to plaintiff all interest received on said certificate of deposit, that defendant Housing Authority be permanently enjoined from enforcing or attempting to enforce the bid bond posted by plaintiff and return the same to plaintiff, and that defendant Housing Authority pay the costs of this action, defendant Housing Authority appealed.

Edwards & Manson by Daniel K. Edwards, attorneys for defendant appellant Housing Authority.

Kennon & Kennon and Robert D. Holleman, attorneys for plaintiff appellee.

BRITT, J. Several of appellant's assignments of error relate to the admission of evidence by the trial judge, sitting as judge and jury.

In a trial before the judge, sitting without a jury, the ordinary rules as to the competency of evidence applied in a trial before a jury are to some extent relaxed, for the reason that the judge with knowledge of the law is able to eliminate from the testimony he hears that which is immaterial and incompetent and consider that only which tends properly to prove the facts to be found. Stansbury, N. C. Evidence 2d, § 4a; *Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 123 S.E. 2d 590. There is a presumption that if incompetent evidence was admitted, it was disregarded and did not influence the judge's findings. Stansbury, N. C. Evidence 2d, § 4A; *Bank v. Wilder*, 255 N.C. 114, 120 S.E. 2d 404. For the most part, the testimony complained of were mere summarizations of portions of the documents properly introduced in evidence. We find no prejudicial error in the admission of the testimony complained of.

In its brief, appellant asserts that aside from procedural matters, the issue might be stated as being whether the plaintiff was right in renouncing its bid because the defendant Housing Authority did not agree with plaintiff that unit price for "borrow" should be included in the pre-negotiated unit prices. Although this may be an oversimplification of the issue, it approaches the heart of the controversy.

Appellant assigns as error the refusal of the trial judge to grant its motion for nonsuit at the close of plaintiff's evidence and renewed at the close of all the evidence. We hold that the evidence was sufficient to withstand the motion for nonsuit and this assignment of error is overruled.

Appellant's remaining assignments of error relate to the findings of fact, conclusions of law and judgment entered by Judge Bailey. We will consider these assignments as a whole.

The trial court concluded that the bid documents prepared by appellant or under its direction were ambiguous and unclear as to the question of off-site borrow and that no meeting of the minds of the contracting parties, plaintiff and defendant Housing Authority, ever occurred. The evidence in the record justifies this conclusion.

One of the essential elements of every contract is mutuality of agreement. There must be neither doubt nor difference between the parties. They must assent to the same thing in the same sense, and

their minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement. *Croom v. Lumber Co.,* 182 N.C. 217, 108 S.E. 735; 13 C.J. 264. Unless an agreement to make a future contract is definite and certain upon the subjects to be embraced therein, it is nugatory. Consequently, the acceptance of a proposition to make a contract, the terms of which are to be subsequently fixed, does not constitute a binding obligation. *Croom v. Lumber Co., supra.*

Defendant Housing Authority contends that G.S. 143-129 is explicit that once the award is made there is a binding contract. In the case before us, the contract itself altered the effect of this statute. The trial court found that the contract documents prepared by defendant Housing Authority went beyond the requirements of the statute and imposed additional conditions of award.

An offer to enter into a contract in the future must, to be binding, specify all of the essential and material terms and leave nothing to be agreed upon as a result of future negotiations. *Young v. Sweet,* 266 N.C. 623, 146 S.E. 2d 669. There must be no lack of identity between offer and acceptance, and the parties must appear to have assented to the same thing in the same sense. *Richardson v. Storage Co.,* 223 N.C. 344, 26 S.E. 2d 897. The trial court found that no unit price for off-site borrow nor for several of the listed unit price items were agreed upon, therefore, defendant Housing Authority attempted to accept the offer on terms different from those submitted by the plaintiff.

The heart of a contract is the intention of the parties. In construing contracts, it is a well-established rule that an ambiguity in a written contract is to be inclined against the party who prepared the writing. *Realty Co. v. Batson,* 256 N.C. 298, 123 S.E. 2d 744, and cases cited therein.

The trial court determined that the terms of the contract documents are ambiguous. It found that the minds of the parties never met on a material point. This was vital to the consummation of a contract and failure of the minds to meet resulted in no contract. Here the contract documents, including plans and voluminous specifications, were prepared by the defendant Housing Authority or its agents. Any ambiguities found therein must be resolved against it. *Coulter v. Finance Co.,* 266 N.C. 214, 146 S.E. 2d 97.

The trial in the Superior Court was without prejudicial error and the judgment of Judge Bailey is

Affirmed.

MALLARD, C.J., and BROCK, J., concur.

HELEN STATON TAYLOR, AS NEXT FRIEND OF FREDERICK STANDISH TAYLOR, JR., PLAINTIFF, v. CLYDE HARMON COMBS, DEFENDANT AND HELEN STATON TAYLOR, ADDITIONAL DEFENDANT

AND

HELEN STATON TAYLOR, PLAINTIFF, v. CLYDE HARMON COMBS, DEFENDANT.

(Filed 24 April 1968.)

1. Automobiles § 57—

In actions for personal injuries and property damage resulting from an intersection collision, evidence for the plaintiffs *is held* sufficient to be submitted to the jury on the issue of defendant's negligence in entering the intersection from a servient street without stopping at the stop sign and without keeping a proper lookout for traffic on the dominant street.

2. Automobiles § 19—

A driver along a dominant highway may assume, even to the last minute, that motorists on a servient highway will yield to him.

3. Automobiles § 51—

Whether a motorist was keeping a reasonably careful lookout to avoid danger is ordinarily an issue of fact for the determination of the jury.

4. Automobiles § 19—

The driver along a servient highway is not required to anticipate that a driver along a dominant highway will travel at an excessive speed or fail to observe the rules of the road applicable to him.

5. Automobiles § 57—

In defendant's counterclaim and cross-action for personal injuries and property damage resulting from an intersection collision, defendant's evidence *is held* sufficient to be submitted to the jury on the issue of plaintiff driver's negligence in operating his automobile along a dominant highway at an unlawful speed and without keeping a proper lookout to avoid the collision.

APPEAL from *Exum, J.*

These two civil actions were consolidated and tried together at 4 December 1967, Schedule D, Civil Session, MECKLENBURG County Superior Court.

In one, Helen Staton Taylor, as next friend of her son, Frederick Standish Taylor, Jr., plaintiff, sought damages for personal injuries to the son from Clyde Harmon Combs, defendant, due to the actionable negligence of Combs in operating a 1961 Oldsmobile. Combs joined Helen Staton Taylor as an additional defendant and denied liability due to the contributory negligence of the son in operating a 1961 Chevrolet automobile owned by the mother, Helen Staton Taylor. Combs also set up a counterclaim against the son

and a cross-action against the mother for property damage and personal injuries.

In the other action, Helen Staton Taylor, as plaintiff, sought damages for her 1961 Chevrolet automobile from the defendant Combs. Combs, in turn, denied liability due to the contributory negligence of the son in operating the 1961 Chevrolet automobile and also set up a counterclaim for property damage to his 1961 Oldsmobile and for his personal injuries.

For convenience Helen Staton Taylor will be referred to as "mother"; Frederick Standish Taylor, Jr., as "son"; and Clyde Harmon Combs as "Combs."

The 1961 Chevrolet automobile owned by mother and driven on the occasion in question by son was a family-purpose automobile and mother was legally responsible for the operation thereof.

At the close of the evidence for mother and son as plaintiffs, the motion for judgment as of nonsuit was allowed and they appealed.

At the close of the evidence for Combs as defendant on his counterclaims and cross-action, the motion for judgment as of nonsuit was allowed and he appealed.

Ervin, Horack and McCartha by C. Eugene McCartha and Carpenter, Webb and Golding by James P. Crews, attorneys for plaintiffs-appellants.

Leon Olive and Kennedy, Covington, Lobdell and Hickman by J. Donnell Lassiter, attorneys for defendant-appellant.

CAMPBELL, J. The automobile collision between the Chevrolet automobile owned by mother and driven by son and the Oldsmobile automobile owned and driven by Combs occurred on Sunday, 17 April 1966, at approximately 12:45 p.m. at the right-angle intersection of Unaka Avenue and Lanier Avenue in the City of Charlotte. The weather was clear.

Lanier Avenue is for two-way traffic and is 25 to 30 feet wide. It runs in a generally northerly and southerly direction and is the dominant street.

Unaka Avenue is for two-way traffic and is 20 to 25 feet wide. It runs in a generally easterly and westerly direction and has a "stop" sign controlling vehicular traffic before entering Lanier Avenue and it is the servient street.

The speed limit was 35 miles per hour.

The Chevrolet automobile driven by son was proceeding in a southerly direction along Lanier Avenue.

The Oldsmobile automobile driven by Combs was proceeding in a westerly direction along Unaka Avenue.

The two vehicles collided in the intersection causing property damage to each vehicle and personal injuries to son and Combs.

Since both cases will again be tried, we will omit a detailed discussion of the evidence, except as deemed essential, so as not to prejudice either party on the further hearing.

The evidence for the plaintiff would permit but not require the jury to find:

1. From a point at the northeast corner of the intersection one could see an automobile traveling south on Lanier Avenue for a distance of 350 to 400 feet north of the intersection.

2. The Chevrolet was being driven south on Lanier Avenue, the dominant street, at a lawful speed not in excess of 35 miles per hour.

3. A reasonably prudent person, keeping a proper lookout, could see an automobile traveling south on Lanier Avenue, from a stopped position on Unaka Avenue, the servient street, in time to yield the right of way and not proceed out into the intersection and collide with the automobile on the dominant street.

4. The defendant, Combs, did not see the Chevrolet prior to the collision and, therefore, was not keeping a proper lookout or else failed to stop and look for traffic on the dominant street.

5. Son, driving the Chevrolet on the dominant street at a lawful speed, had the right of way and the right to expect other motorists on the servient street would yield to him. Son had the right to act upon this assumption, even to the last minute. *Peeden v. Tait,* 254 N.C. 489, 119 S.E. 2d 450.

6. Defendant, Combs, did not yield the right of way to the Chevrolet and instead precipitated a collision in the intersection.

7. Whether son was keeping a reasonably careful lookout to avoid danger is ordinarily an issue of fact, and hence not contributory negligence as a matter of law. *Peeden v. Tait, supra.*

We are of the opinion and hold that the evidence for the plaintiffs, when taken in the light most favorable to them, requires submission to the jury to determine the facts and it was error to sustain the motion for judgment of nonsuit.

The evidence for the defendant, Combs, on his counterclaims and cross-action would permit but would not require the jury to find:

1. Combs drove his Oldsmobile west on Unaka Avenue and,

when he reached Lanier Avenue, stopped in compliance with the stop sign before entering the east side of Lanier Avenue.

2. After stopping Combs looked to his right or north on Lanier Avenue and could see 150 to 200 feet, and then he looked to his left or south on Lanier Avenue. He saw nothing moving on Lanier Avenue and proceeded to drive into the intersection at a speed of three to five miles an hour and was attempting to cross.

3. When the front of the Oldsmobile reached the west side of Lanier Avenue, it was struck by the Chevrolet coming from the north or right and going south on Lanier Avenue.

4. The Chevrolet came down a hill on Lanier Avenue going south at a speed of 45 or 50 miles an hour and the driver made no effort to decrease its speed before striking the Oldsmobile which had entered the intersection and was in process of crossing.

5. At the time Combs drove the Oldsmobile into the intersection a reasonably prudent person could have assumed no vehicular traffic, on Lanier Avenue, complying with lawful speed regulations would interfere with his crossing the intersection in safety.

6. No collision would have occurred if the driver of the Chevrolet had been operating it at a lawful speed not in excess of 35 miles per hour.

7. No collision would have occurred if the driver of the Chevrolet had been keeping a reasonably careful lookout and had slowed down for the vehicle in the intersection in process of completing a crossing. *Blalock v. Hart,* 239 N.C. 475, 80 S.E. 2d 373.

We are of the opinion and hold that the evidence for defendant, Combs, when taken in the light most favorable to him, requires submission to the jury to determine the facts and it was error to sustain the motion for judgment of nonsuit.

For reasons stated the judgment rendered by the trial tribunal should be reversed, and a new trial had as to all issues.

BRITT and MORRIS, JJ., concur.

THAD R. SMITH AND WIFE, MAE SMITH, v. CECIL STARNES AND SMITH MOORE, T/A S & M CONSTRUCTION COMPANY AND GENE INGLE, T/A GRANITE SAND COMPANY.

(Filed 24 April 1968.)

1. Boundaries § 13; Evidence § 25—

The introduction in evidence of a map purporting to show by a line drawn thereon the correct representation of the boundary line contended for by the plaintiffs in their action in trespass, *is held* erroneous where plaintiffs offered no evidence as to the source of the map and where the line drawn thereon is not connected by testimony of plaintiffs' witnesses to the calls and distances of plaintiffs' land.

2. Boundaries § 10—

Parol evidence of monuments or natural boundaries, to be competent, must be shown to relate to the courses and distances set out in the instrument under which title is claimed, and a mere understanding of the parties, or their predecessors in title, as to the location of boundaries, without more, will not control its location.

3. Appeal and Error § 39—

If the record on appeal is not docketed within ninety days after the date of the judgment, order, decree, or determination appealed from, the case may be dismissed under Rule 17, if the appellee shall file a proper certificate prior to the docketing of such record on appeal; provided, the trial tribunal may, for good cause, extend the time not exceeding sixty days for docketing the record on appeal. Rule of Practice in the Court of Appeals No. 5.

4. Same—

Authority of trial tribunal pursuant to Rule 5 to extend, for good cause, the time for docketing the record in the Court of Appeals cannot be accomplished by an order allowing appellant additional time to serve his case on appeal upon the appellee, and therefore the docketing of a record of appeal in such case more than 90 days after date of entry of judgment is subject to dismissal.

APPEAL by defendants from *Ervin, J.*, November, 1967, Session, CALDWELL Superior Court.

Plaintiffs and the defendants are adjoining property owners. The plaintiffs bring this action for damages to their real estate and crops by reason of trespass upon their lands by the defendants. The defendants counterclaim against the plaintiffs for damages to the defendants' real estate by reason of trespass thereon by the plaintiffs.

The case was tried before a jury, and from an adverse verdict and judgment entered thereon, the defendants appealed.

West and Groome by Ted G. West, attorneys for plaintiff appellees.

L. H. Wall, attorney for defendant appellants.

BROCK, J. When this case was called for trial, the parties stipulated that plaintiffs are successors in title to Lot No. 1 and defendants are successors in title to Lot No. 2 according to a partition by commissioners in a special proceeding in 1912 entitled *Jenkins v. Jones*, Caldwell County Superior Court. The plaintiffs then offered into evidence the full report of the partition by commissioners which contains a description by metes and bounds of both Lot No. 1 and Lot No. 2. Lot No. 1, now owned by the plaintiffs, lies contiguous to and south of Lot No. 2, now owned by the defendants.

Immediately thereafter the plaintiffs offered in evidence a map entitled "Boundary Survey" and the Court dictated the following:

> "Let the record show that there is offered in evidence the map entitled 'Boundary Survey' regarding *Thad R. Smith and wife Mae Smith, plaintiff vs. Cecil Starnes, Smith Moore and Gene Ingle, defendants* dated December 30th, 1966, is offered in evidence at the outset of this matter; that the attorney for the plaintiff stipulates and agrees with the reference to the map that the line designated on said map in green and marked as running from point 'A' to point 'B' is a correct representation of the boundary line contended for by the plaintiffs; and the defendants stipulate and agree that the line on said map shown in red and designated as running from point 'X' to point 'Y' is a correct representation of the boundary line as contended for by defendants.
>
> "Let the record show both parties reserve the right to challenge certain of the information contained on the map, the sole purpose of the stipulation being to place before the jury the respective contentions of the parties as to location of the boundary line between the properties of the plaintiff and the properties of the defendants."

The defendants objected and excepted to the green line being shown on the map and referred to as a boundary line. This exception is defendants' first assignment of error.

The purported stipulations dictated by the Court constituted no more than unilateral assertions by each party, and upon objection by the defendant, the map should not have been allowed in evidence without proper identification. The plaintiffs offered no evidence as to the source of the map, or what it purported to show; nor was the green line thereon offered to illustrate the testimony of any witness concerning the calls and distances of plaintiffs' land as described in the commissioners' partition report. The plaintiffs' witness Isbell, a surveyor, testified that he did not know what the green line on the

map indicated; he testified that his survey led to a steel stake at point "X" on the map, which is at the terminus of the red line. Stansbury, N. C. Evidence 2d, § 34. The defendants' first assignment of error is sustained.

The plaintiffs' evidence consisted of plaintiff's own testimony and that of several other witnesses, testifying as to the existence of rose bushes, "hack" marked trees, a fence, and field boundaries to establish the true boundary line between plaintiffs' land and that of defendants. None of plaintiffs' witnesses undertook to connect the described items with any corner or line of plaintiffs' land as described by metes and bounds in the partition division under which they claim title. They only undertook to relate them to the green line shown on the map. In order to make parol evidence of monuments or natural boundaries competent, they must be shown to relate to the courses and distances set out in the instrument under which title is claimed. A mere understanding of the parties, or their predecessors in title, as to the location of the boundary, without more, will not control its location. *Wynne v. Alexander,* 29 N.C. 237. *Lumber Co. v. Lumber Co.,* 169 N.C. 80, 85 S.E. 438.

The defendants objected to and moved to strike the parol testimony referred to above and assign its admission as errors. These assignments of error are sustained.

The judgment appealed from in this case was signed on the 4th day of November 1967. The record on appeal was docketed in the Court of Appeals on the 4th day of March 1968. This was 31 days too late, and therefore subject to dismissal. Rule 5 of the Rules of Practice in the Court of Appeals of North Carolina provides in part as follows:

> "If the record on appeal is not docketed *within ninety days* after the date of the judgment, order, decree, or determination appealed from, the case may be dismissed under Rule 17, if the appellee shall file a proper certificate prior to the docketing of such record on appeal; provided, the trial tribunal may, *for good cause,* extend the time not exceeding sixty days, *for docketing the record on appeal.*" (Emphasis added.)

The time for docketing the record on appeal in the Court of Appeals is determined by Rule 5, *supra,* and should not be confused with the time allowed for serving case on appeal and the time allowed for serving countercase or exceptions. The case on appeal, and the countercase or exceptions, and the settlement of case on appeal by the trial tribunal must all be accomplished within a time which will allow docketing of the record on appeal within the time

allowed under Rule 5. The trial tribunal, upon motion by appellant, and upon a finding of *good cause* therefor, may enter an order extending the time *for docketing the record on appeal* in the Court of Appeals not exceeding a period of 60 days beyond the 90 days provided by Rule 5. However, this cannot be accomplished by an order allowing additional time to serve case on appeal.

In this case, the trial tribunal, at the time of signing judgment on 4 November 1967, signed appeal entries allowing appellant 60 days to serve case on appeal, and allowing appellee 30 days thereafter to serve countercase or exceptions. This amounted to a full 90 days, and if the parties used all of the time allowed under the order, the record on appeal could not reasonably have been docketed in the Court of Appeals within the 90 days provided by Rule 5. Thereafter, purporting to act under authority of the proviso of Rule 5, the trial tribunal entered an order (apparently *ex parte*) on 23 December 1967, allowing appellant an additional 20 days to serve case on appeal, and allowing appellee 20 days thereafter to serve countercase or exceptions. This order allowed a total of 100 days, which, if used by the parties, would run beyond the 90-day limitation for docketing the record on appeal provided for in Rule 5. Nowhere does it appear that the trial tribunal found *good cause,* upon a motion by appellant, *for an extension of time to docket the record on appeal* in the Court of Appeals.

Presumably counsel prepared the appeal entries, and also prepared the order extending time for serving case on appeal. Counsel is responsible for making certain that appellate rules are complied with.

Nevertheless, absent a motion by appellee to dismiss the appeal for failure to comply with the rules, we have chosen not to dismiss it *ex mero motu* and have considered the appeal upon its merits.

New trial.

MALLARD, C.J., and PARKER, J., concur.

SOUTHERN RAILWAY COMPANY v. BOYD J. DOCKERY.

(Filed 24 April 1968.)

1. Trial § 19—

Motion to nonsuit presents the question whether the evidence, considered in the light most favorable to defendant, is sufficient to be submitted to the jury.

2. Trial § 21—

On motion to nonsuit, plaintiff is entitled to every reasonable inference to be drawn from his evidence and with all discrepancies and contradictions resolved in his favor.

3. Negligence § 24a—

In order to establish actionable negligence, plaintiff must show a failure to exercise proper care in the performance of some legal duty which defendant owed plaintiff under the circumstances and that such negligent breach of duty was the proximate cause of injury, which 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 the facts as they existed.

4. Negligence § 1—

Negligence is the failure to exercise that degree of care for the safety of others or their property which a reasonably prudent man, under like circumstances, would exercise, and may consist either of acts of commission or omission.

5. Automobiles § 8—

It is the duty of a motorist to exercise that degree of care an ordinarily prudent person would exercise under similar circumstances, which requires him to keep his vehicle under control and to keep a reasonably careful lookout.

6. Railroads § 5—

Plaintiff's evidence tending to show that defendant, in attempting to traverse a paved railroad crossing, ran the front of his automobile off the paved surface into a ditch adjacent to the railroad, leaving the rear portion of the automobile across plaintiff's tracks where it was struck by plaintiff's train, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence in not keeping his automobile under proper control or in not keeping a proper lookout.

APPEAL by plaintiff from *McLean, J.*, November 1967 Civil Session of GASTON Superior Court.

This is a civil action to recover damages to plaintiff's train sustained in a collision with defendant's automobile at the O'Quinn crossing near Lowell, in Gaston County. Defendant filed an answer to the complaint denying liability and setting up a counterclaim for damages to his automobile.

Plaintiff's evidence tended to show the following: N. C. Highway No. 7 runs parallel to plaintiff's tracks. The O'Quinn crossing connects said highway with an unpaved road running parallel to the tracks on the opposite side. At said crossing, plaintiff's tracks are several feet higher than the roads running on each side of the tracks, thereby making an incline at each end of the O'Quinn cross-

ing. The road constituting the crossing is paved for a width of 13 or 15 feet.

On the morning of 3 November 1965, at approximately 1:30 a.m., defendant drove his car from Highway No. 7 onto the O'Quinn crossing, and as he was traveling over the last tracks, his car left the pavement on the right, and the front of his car went into a ditch between the tracks and the unpaved road, with the result that the rear portion of the car lodged across plaintiff's track.

Plaintiff's evidence showed that defendant made the statement following the collision that he was blinded by an oncoming car which caused him to turn too far to the right.

Defendant attempted to back his car out of the ditch and off the tracks but was unsuccessful. After being in the ditch for some five or six minutes, he heard and saw plaintiff's train approaching at about 60 miles per hour. Defendant took his flashlight and attempted to stop the train, but his efforts were unsuccessful.

Plaintiff's engineer testified that he saw the automobile when the train was approximately 700 to 800 feet from it, that he immediately applied emergency brakes, but the train struck the car and traveled approximately one-half mile up the track after the collision. There were no speed restrictions on the train applicable to the area.

Plaintiff alleges that its locomotive was extensively damaged in the collision and that said damage was proximately caused by the negligence of the defendant.

Plaintiff specifically alleges that defendant (1) drove his automobile off the paved portion of the highway onto the tracks of the plaintiff, (2) approached the tracks in a careless and reckless manner, (3) failed to keep his automobile under proper control, and (4) failed to keep a proper lookout.

At the close of plaintiff's evidence, defendant moved for judgment of involuntary nonsuit and the motion was allowed. Defendant then submitted to judgment of voluntary nonsuit on his counterclaim. Plaintiff appealed.

Mullen, Holland & Harrell by James Mullen, and W. T. Joyner, attorneys for plaintiff appellant.

E. R. Warren and Sanders & Lafar by Julius T. Sanders, attorneys for defendant appellee.

BRITT, J. Plaintiff's two assignments of error relate to the allowance of defendant's motion for judgment as of involuntary nonsuit and the entry of judgment thereon.

Certain well-established principles of law pertinent to this appeal

are succinctly stated by Parker, C.J., in the recent case of *Cutts v. Casey,* 271 N.C. 165, 155 S.E. 2d 519, as follows:

> "A motion to nonsuit presents the question whether the evidence considered in the light most favorable to plaintiff is sufficient to be submitted to the jury. *Walker v. Story,* 256 N.C. 453, 124 S.E. 2d 113. Discrepancies and contradictions in plaintiff's evidence are for the jury, not the court. *Clinard v. Trust Co.,* 264 N.C. 247, 141 S.E. 2d 271. Plaintiff is entitled to every reasonable inference to be drawn from his evidence. *Pinyan v. Settle,* 263 N.C. 578, 139 S.E. 2d 863."

In order to establish a case of actionable negligence in this suit, plaintiff must show: First, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff, under the circumstances in which they were placed; and, second, that such negligent breach of duty was the proximate cause of the injury — a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed. *Mattingly v. R. R.,* 253 N.C. 746, 117 S.E. 2d 844; *Ramsbottom v. R. R.,* 138 N.C. 38, 50 S.E. 448.

Negligence is the failure to exercise that degree of care for the safety of other persons or their property which a reasonably prudent man, under like circumstances, would exercise, and may consist either of acts of commission or omission. 3 Strong, N. C. Index, Negligence, § 1, p. 442, and cases therein cited.

It is also a general rule of law in North Carolina that the operator of a motor vehicle must exercise ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. And in the exercise of such duty it is incumbent upon the operator of a motor vehicle to keep same under control, and to keep a reasonably careful lookout. *Mattingly v. R. R., supra; Smith v. Rawlins,* 253 N.C. 67, 116 S.E. 2d 184, 185; *Clontz v. Krimminger,* 253 N.C. 252, 116 S.E. 2d 804.

The evidence presented by plaintiff in this action when viewed in the light most favorable to plaintiff is sufficient to justify, though not necessarily to impel, the inference of negligence on the part of the defendant. Hence, an issue arises for the determination of the jury. *Peeden v. Tait,* 254 N.C. 489, 119 S.E. 2d 450.

The testimony would support the inference that the defendant, in crossing plaintiff's tracks, did not keep his automobile under proper control or did not keep a proper lookout. Although defendant

contends that he was blinded by a car which he was meeting, a question of fact to be decided by the jury arises. *Williams v. Express Lines,* 198 N.C. 193, 151 S.E. 197.

In his brief, defendant does not argue contributory negligence as a matter of law on the part of plaintiff. We hold that plaintiff's evidence does not disclose contributory negligence as a matter of law.

The trial court erred in granting defendant's motion for judgment as of involuntary nonsuit, necessitating a

New trial.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. JOE SQUIRES AND CARL JOHNSON.

(Filed 24 April 1968.)

Criminal Law § 155—

Although appeals of the indigent defendants were subject to dismissal in this case for failure to docket record on appeal within 90 days from date of sentence of imprisonment, Rule of Practice of the Court of Appeals No. 5, the Court of Appeals considered defendants' assignments of error and found them to be without merit.

APPEALS by defendants from *Hasty, J.,* 15 November 1967 Regular Criminal Session, MECKLENBURG.

The defendants were jointly charged in a bill of indictment with felonious breaking and entering and with felonious larceny. They were tried together in the Superior Court and found guilty on both counts by the same jury. From judgment of imprisonment, each defendant appealed.

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

Guy E. Possinger for defendant appellant Joe Squires.

Barry M. Storick for defendant appellant Carl Johnson.

MALLARD, C.J. Each of the defendants was found by the trial judge to be indigent, and orders were entered appointing counsel to perfect their appeals, and providing that Mecklenburg County should

pay the costs of the transcripts of the trial and the costs of printing of the record on appeal and the briefs.

The appeals of the defendants were docketed in the Court of Appeals as two cases. The testimony, the charge, and the argument of the Solicitor are included in the transcript filed in this Court; also the testimony is narrated in the record on appeal, and the argument of the Solicitor as well as the charge of the Court are again set forth in the printed record on appeal. Thus we have before us the testimony four times, the argument of the Solicitor four times, and the charge of the Court four times. Obviously, such repetition is unnecessary for the purpose of aiding this Court in a review of the assignments of error. Obviously, also, such repetition creates an unnecessary expense for Mecklenburg County. The fact of indigency should not be considered by a defendant as a license to be a spendthrift with the county's money.

Aside from needing only one record on appeal instead of two for co-defendants, we note that the assignments of error made by the defendants are the same and that they relate only to the argument of the Solicitor. Yet, we have the testimony of the witnesses and the charge of the court each reproduced before us four times.

The records on appeal in each of the defendants' appeals were filed too late to comply with Rule 5 of the Rules of Practice in the Court of Appeals of North Carolina. If, as the record on appeal seems to indicate, the defendants were sentenced on 16 November 1967, the record on appeal should have been docketed in the Court of Appeals no later than 16 February 1968. They were both docketed in this Court on 27 February 1968. (For an explanation of Rule 5, see the opinion in *Smith v. Starnes* [192 *ante*], which is being filed by this Court the same date as this opinion.)

Although the appeals were subject to dismissal for failure to comply with Rule 5, we have carefully considered each of the assignments of error and find them to be without merit. Each of the assignments of error by each of the defendants is overruled.

We find no error.

BROCK and PARKER, JJ., concur.

STOCKS *v.* THOMPSON.

LEROY STOCKS, PAUL L. SUTTON, D. E. BAGGETT, ROBERT E. BUTLER, LONNIE M. BULLARD, ERNEST D. PRIDGEN, L. E. MOORE AND CHARLES M. LOVE v. LACY THOMPSON, EDISON BURNS, H. J. WATTS, W. O. JOHNSON AND ROLAND GORE, BEING ALL THE INDIVIDUAL MEMBERS OF THE BOARD OF COMMISSIONERS OF COLUMBUS COUNTY, NORTH CAROLINA, AND THE BOARD OF COMMISSIONERS OF COLUMBUS COUNTY, NORTH CAROLINA, AND J. HUBERT NORRIS, AND MRS. VENIE H. ROUSE.

(Filed 15 May 1968.)

1. Appeal and Error § 10; Pleadings § 13—

A demurrer *ore tenus* on the ground that the complaint fails to state facts sufficient to constitute a cause of action cannot be waived and may be taken advantage of at any time, even in the Appellate Court. G.S. 1-134.

2. Mandamus § 2—

Mandamus is the proper remedy where the act required to be done is imposed by law and is merely ministerial, and where the claimant has a clear right to performance and is without other adequate remedy; but it will not lie where the act to be done involves the exercise of judgment and discretion.

3. Taxation § 25; Mandamus § 7—

Mandamus will lie to compel the board of county commissioners to include tobacco allotments as an element of value in the appraisal and assessment of county real property for *ad valorem* taxes. G.S. 105-281, G.S. 105-294.

4. Mandamus § 1—

Mandamus will lie to compel a board or public official to exercise its judgment or discretion, but will not lie to direct the manner in which such judgment or discretion shall be exercised.

5. Same—

Mandamus will not lie where other adequate remedies are available.

6. Administrative Law § 2—

A taxpayer is not required to exhaust his administrative remedies before resorting to the courts when the only administrative remedies available are totally inadequate.

7. Taxation § 25—

Taxpayers who seek writ of *mandamus* to compel the county board of commissioners to consider tobacco allotments as an element of value in appraising all tracts of real estate throughout the county are not bound to pursue and exhaust remedies before the county board of equalization and review, G.S. 105-327(g)(2), and before the State Board of Assessment, G.S. 105-329, since the requirement of separate taxpayer appeals as to each tract of land would render the statutory remedies practically unavailable.

ON Writ of *Certiorari to* review an order of *Hall*, J., at the October 1967 Civil Term of the Superior Court of COLUMBUS County.

Plaintiffs, who are citizens and residents of Columbus County, North Carolina, filed this suit on 26 May 1966 in the Superior Court of Columbus County against the defendants, who are the Board of Commissioners of Columbus County, both individually and in their capacity as Commissioners, the Tax Collector and Tax Supervisor, and the Assistant Tax Supervisor of Columbus County. In substance plaintiffs' complaint alleges: That the defendants are obligated under the pertinent provisions of the General Statutes of North Carolina to include tobacco allotments as an element of value in the appraisal and assessment of Columbus County real estate for *ad valorem* tax purposes; that following the General Election of 1964 the defendant Board of Commissioners directed the appraisal company, which had been employed by the previous Board of Commissioners to appraise Columbus County property for *ad valorem* tax purposes, to cease assignment of any value to tobacco crop allotments and to delete any reference to such allotments on the property record cards of Columbus County; that these actions of the defendant Board of Commissioners had resulted in the complete elimination of tobacco allotments as an element of value in the appraisal and assessment of Columbus County real property for *ad valorem* tax purposes in violation of the laws of the State; and that plaintiffs and others have repeatedly urged the defendants to comply with the law in the matter of these appraisals and assessments and the defendants have uniformly refused to do so. On these allegations, plaintiffs assert that they are entitled to an order of the Court directing the defendants to include the value of tobacco allotments in the appraisal value of all real properties in Columbus County to which such allotments apply.

Upon the filing of the complaint, treated as an affidavit, Judge Henry A. McKinnon, Jr., Judge presiding, signed an order directing the defendants to appear and show cause why the relief prayed for in the complaint should not be granted. In apt time defendants demurred to the complaint on the grounds of misjoinder of parties defendant and for failure to state a cause of action. After argument, Judge McKinnon on 16 June 1966 overruled the demurrer. Defendants then filed answer in which they denied the material allegations of the complaint and in a further answer alleged that in performing their statutory obligation to accomplish a periodic reappraisal of real and personal property in Columbus County for *ad valorem* tax purposes, they had exercised their best judgment. Defendants further alleged that although a specific value on each acre of tobacco allotment was not imposed, general consideration to tobacco allotments was given, and all property in Columbus County, real and

personal, as far as practicable had been appraised and valued at its true value in money as by law required.

After filing answer, the defendants on 25 September 1967 filed a motion to dismiss the plaintiffs' action on the grounds that plaintiffs had failed to exhaust their administrative remedies before bringing this suit, in that plaintiffs had not appealed the appraisal of the Board of Commissioners to the County Board of Equalization and Review as provided by G.S. 105-327, or to the State Board of Assessments as provided by G.S. 105-329. This motion to dismiss was heard by Judge C. W. Hall, presiding at the October 1967 Civil Term of Superior Court of Columbus County, who overruled the defendants' motion. Defendants excepted and petitioned the Court of Appeals for Writ of *Certiorari.* Because of the importance of the questions presented in connection with the administration of the laws relating to evaluation and assessment of property for *ad valorem* tax purposes, we allowed *Certiorari.*

R. C. Soles, Jr. and W. Earl Britt for defendant appellants.

Sherman T. Rock, R. S. Langley, and Wallace, Langley and Barwick for plaintiff appellees.

PARKER, J. After we allowed *Certiorari,* defendants filed in the Court of Appeals demurrer *ore tenus* on the grounds that the complaint does not state facts sufficient to constitute a cause of action. Since such an objection cannot be waived and may be taken advantage of at any time, even in the Appellate Court (G.S. 1-134; *Howze v. McCall,* 249 N.C. 250, 106 S.E. 2d 236), we shall first consider the sufficiency of the complaint to state a cause of action.

In this action plaintiffs seek the extraordinary remedy of *mandamus.* "The rule is generally stated that *mandamus* is the proper remedy where the act required to be done is imposed by law, is merely ministerial, the claimant has a clear right to performance, and is without other adequate remedy; but it will not lie where the act to be done involves the exercise of judgment and discretion." 2 McIntosh, N. C. Practice 2d, § 2445(3).

Defendants' demurrer challenges the validity of the complaint for failure to state a cause of action on the grounds that: (1) There is no clear requirement of law imposing on defendants the duty to perform the act which plaintiffs are here seeking to require defendants to perform; and (2) In any event the act sought to be required involves the exercise of judgment and discretion on the part of the defendants, and is not merely ministerial in nature. In making these contentions, defendants have interpreted plaintiffs' com-

plaint to mean that the "act sought to be enforced" in this case is the inclusion of a fixed value per acre for tobacco allotments in the valuation of real properties in Columbus County. If that interpretation of the complaint should be correct, then we would agree with defendants that, while the inclusion of a fixed value per acre for tobacco allotments is one of the lawful ways authorized by statute to take tobacco allotments into account as an element of value in appraising real properties for *ad valorem* tax purposes [see G.S. 105-279(3)(e)], there is no requirement of law that this must necessarily be done in that fashion. Defendants have, however, misread plaintiffs' complaint. Plaintiffs' complaint does not allege, and plaintiffs have not asserted in their argument before us, that the defendants are under any legal duty to assign any particular fixed valuation per acre to tobacco allotments. What plaintiffs' complaint does allege is that the defendants have taken certain affirmative actions, the intent and result of which have been to eliminate tobacco allotments altogether as an element of value in appraising real properties in Columbus County for *ad valorem* tax purposes. Plaintiffs seek in this suit to compel defendants, not to assign any particular per acre valuation to tobacco allotments, but to give consideration to tobacco allotments as *one* of the *elements* in the valuation and assessment of real property for *ad valorem* tax purposes. This, we think, the defendants are under a clear legal obligation to do.

G.S. 105-281 provides in part as follows:

> "All property, real and personal, within the jurisdiction of the State, not especially exempted, shall be subject to taxation."

G.S. 105-294 provides in part as follows:

> "All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. The intent and purpose of this section is to have all property and subjects of taxation appraised at their true and actual value in money, in such manner as such property and subjects of taxation are usually sold, but not by forced sale thereof; and the words 'market value,' 'true value,' or 'cash value,' whenever used in this chapter, shall be held to mean for the amount of cash or receivables the property and subjects can be transmuted into when sold in such manner as such property and subjects are usually sold."

G.S. 105-295 provides in part as follows:

> "In determining the value of land the assessors shall consider as to each tract, parcel or lot, separately listed, *at least* its ad-

vantages as to location, quality of soil, quantity and quality of timber, water power, water privileges, mineral or quarry or other valuable deposits, fertility, adaptability for agricultural, commercial or industrial uses, the past income therefrom, its probable future income, the present assessed valuation, and *any other factors which may affect its value.*" (Emphasis added.)

Tobacco allotments under the Agricultural Adjustment Act, 7 U.S.C. § 1281 *et seq.,* have been held to be property rights which should not be expropriated without due process of law, *Austin v. Jackson,* 353 F. 2d 910. The value of a crop allotment under that Act must be taken into account when the land to which the allotment is attached is being condemned by the government. See: *United States v. Citrus Valley Farms, Inc.,* 350 F. 2d 683. Certainly sellers and buyers of farm properties on which there are tobacco allotments, in arriving at their sales price, do give consideration to these allotments when such farm properties are "sold in such manner as such property and subjects are usually sold." And certainly, also, the existence of a tobacco allotment as to any particular tract of land is a factor "which may affect its value." The above-quoted sections of the Machinery Act taken together do, in our view, impose on defendants the clear legal duty, not to assign some fixed value per acre to tobacco allotments (though they may do so should they so elect), but to consider tobacco allotments as *one element* of value when appraising tracts of land to which such allotments apply.

Nor are the plaintiffs here complaining as to the *manner* of performance by defendants of the act here sought to be required of them. Should that be the case *mandamus* would not lie, since the act of appraising clearly involves the exercise of judgment and discretion. Plaintiffs complain, rather, that defendants have refused to exercise their discretion at all. *Mandamus* will lie, not to direct the manner in which defendants shall exercise their judgment and discretion, but to require that they do exercise it.

Defendants in their answer have denied the allegations of plaintiffs' complaint, and in their further answer have averred specifically "that although a specific valuation on each acre of tobacco allotment was not imposed, general consideration to tobacco allotments was given; and all property in Columbus County, real and personal, as far as practicable has been appraised and valued at its true value in money as by law required and specifically in compliance with G.S. 105-294."

Whether upon a trial of the facts plaintiffs or defendants will prevail in proving their conflicting allegations, remains to be seen. For present purposes of considering defendants' demurrer *ore tenus,*

the allegations of plaintiffs' complaint must be taken as true. When so considered, plaintiffs have stated a good cause of action and defendants' demurrer should be overruled.

In addition to the objections raised by demurrer, defendants moved to dismiss plaintiffs' action on the grounds that plaintiffs failed to exhaust their administrative remedies before seeking the assistance of the Court by way of *mandamus*. It is true that *mandamus* will not lie where other adequate remedies are available. Defendants' motion thus raises the question of whether, in the context of the factual situation alleged in the complaint, other adequate remedies were available to plaintiffs.

G.S. 105-327 constitutes the Board of County Commissioners of each county a County Board of Equalization and Review. Subsection (g) (2) of that section provides:

> "The board shall, on request, hear any and all taxpayers who own or control taxable property assessed for taxation in the county in respect to the valuation of such property or the property of others. Any such request must be made in writing to or by personal appearance before the board prior to adjournment of the board, or within fifteen days after notice is mailed by the board of a change in valuation made by said board if the notice of change was mailed less than fifteen days prior to adjournment of the board. The board shall notify any such taxpayer by mail as to the action taken on his request no later than 30 days after adjournment of the board."

G.S. 105-329 provides for an appeal from a decision of a County Board of Equalization and Review to the State Board of Assessment. This section provides, however:

> "Each taxpayer or ownership interest shall file separate and distinct appeals; no joint appeals shall be considered except by and with consent of the State Board of Assessment."

G.S. 105-273 provides for the creation of a State Board of Assessment, and G.S. 105-275 specifies the duties of such Board. Subparagraph 3 of this section is as follows:

> "(3) To hear and to adjudicate appeals from the boards of county commissioners and county boards of equalization and review as to property liable for taxation that has not been assessed or of property that has been fraudulently or improperly assessed through error or otherwise, to investigate the same, and if error, inequality, or fraud is found to exist, to take such proceedings and to make such orders as to correct the same. In

case it shall be made to appear to the State Board of Assessment that any tax list or assessment roll in any county in this State is grossly irregular, or any property is unlawfully or unequally assessed as between individuals, between sections of a county, or between counties, the said Board shall correct such irregularities, inequalities and lack of uniformity, and shall equalize and make uniform the valuation thereof *upon complaint by the board of county commissioners* under rules and regulations prescribed by it, not inconsistent with this subchapter: Provided, that no appeals shall be considered or fixed values changed unless notice of same is filed within sixty (60) days after the final values are fixed and determined by the board of county commissioners or the Board of Equalization and Review, as hereinafter provided: *Provided, further, that each taxpayer or ownership interest shall file separate and distinct appeals; no joint appeals shall be considered except by and with consent of the State Board of Assessment.*" (Emphasis added.)

The statutes quoted do provide the administrative channels through which an individual taxpayer may question and obtain review of the appraisal of his own or of some other taxpayer's property. Unless he has done so, he may not resort to the Court, "for it is the accepted position that a taxpayer is not allowed to resort to the Courts in cases of this character until he has pursued and exhausted the remedies provided before the duly constituted administrative boards having such matters in charge." *Manufacturing Company v. Commissioners,* 189 N.C. 99, 126 S.E. 114. In this case, Chief Justice Hoke, speaking for the Court, said:

> "Our State decisions to the extent they have dealt with the subject are in full approval of the principle, holding that a taxpayer must not only resort to the remedies that the Legislature has established but that he must do so at the time and in the manner that the statutes and proper regulations provide."

An individual taxpayer, seeking review of the appraisal of a particular piece of property, whether his own or another's, has a clearly defined and entirely adequate remedy. Citizens, as plaintiffs in this case, who seek not a review of the appraisal of any particular piece of property, but to require the County Commissioners to comply with the law and consider tobacco allotments as an element of value in appraising all tracts throughout the entire county, have no such clearly defined or adequate remedy. If a particular tract, chosen perhaps as a test case, had been presented for review through statutory administrative channels, the plaintiffs might have been entirely

successful and still fail of their real objective to have tobacco allotments considered as an element of value applicable to all tracts throughout the county.

Separate proceedings as to each such tract would make a multiplicity of proceedings and place such a burden upon the plaintiffs that the remedy would be not only inadequate but practically unavailable.

That the Board of County Commissioners are given the right by G.S. 105-275(3) to complain directly to the State Board of Assessment in any case where "any tax list or assessment roll in any county in this State is grossly irregular," is of small comfort to citizens situated as were the plaintiffs in this case, whose grievance is against the Board of County Commissioners itself. No such clearly defined right of direct access to the State Board of Assessment to review an entire tax list is spelled out as being available to individual citizens.

Where the only administrative remedies provided are so totally inadequate, citizens are not required first to exhaust them before resorting to the Courts in order to compel public officials to perform their legally imposed duties.

Defendants' demurrer *ore tenus* filed in this Court is overruled, and the judgment of the Superior Court overruling defendants' motion to dismiss is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA EX REL., EDWIN S. LANIER, COMMISSIONER OF INSURANCE v. JAMES ABNER VINES.

(Filed 15 May 1968.)

1. Constitutional Law § 7—

The General Assembly may not delegate its supreme legislative power to any other branch of the State government or to any agency, but as to a specific subject matter it may delegate a limited portion of its legislative power to an administrative agency if it prescribes the standards under which the agency is to exercise the delegated power.

2. Same; Insurance § 1—

G.S. 58-44.6, which authorizes the Commissioner of Insurance to impose a civil penalty upon persons subject to Chapter 57 or Chapter 58 of the General Statutes after conducting a hearing and finding that such person has violated a provision of those chapters for which his license may be

suspended or revoked, is not an unconstitutional delegation of legislative power, since the statute prescribes sufficient standards for the exercise of that authority, and since the function of the Commissioner of Insurance under the statute is essentially judicial in nature.

3. Constitutional Law § 7; Administrative Law § 3—

Article IV, § 3, Constitution of North Carolina authorizes the General Assembly to vest administrative agencies with such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purpose for which they were created.

4. Same—

The judicial power to impose a civil penalty granted to the Commissioner of Insurance by G.S. 58-44.6 is reasonably necessary as an incident to the accomplishment of the purposes for which the North Carolina Insurance Department was created, and is authorized by Article IV, § 3, Constitution of North Carolina.

5. Constitutional Law § 10—

A statute passed by the legislature is presumed to be constitutional and will not be declared void if it can be upheld on any reasonable ground.

6. Statutes § 4—

A statute will not be declared unconstitutional unless it is clearly so, and all reasonable doubt will be resolved in favor of its validity.

7. Parties § 2; Insurance § 1—

The Commissioner of Insurance is a real party in interest and is entitled to bring an action in Superior Court to enforce the collection of a civil penalty imposed pursuant to G.S. 58-44.6.

8. Penalties—

A civil penalty imposed pursuant to G.S. 58-44.6 is payable to the Treasurer of the State of North Carolina.

APPEAL by defendant from *Canaday, J.*, at the November 1967 Civil Non-Jury Session of WAKE Superior Court.

This is a civil action instituted by the North Carolina Commissioner of Insurance in the Superior Court of Wake County to enforce collection of a civil penalty in the amount of $3000.00 which had been imposed on defendant under authority of G.S. 58-44.6. Prior to 16 January 1967 the defendant, James Abner Vines, was a licensed insurance agent actively engaged in the business of selling insurance within the State of North Carolina. On that date the North Carolina Commissioner of Insurance served notice on defendant that his licenses as an insurance agent in North Carolina were suspended and that an administrative hearing would be held by the Insurance Department on 26 January 1967 to determine whether such licenses should be permanently revoked and whether, in addition or in lieu

thereof, a civil penalty ought to be imposed. A copy of the statement of charges was served with the notice, charging the defendant with having committed 13 separate violations of the North Carolina insurance laws. The charges dealt with the unlawful contracting of insurance with unlicensed companies and with the commission of unfair and deceptive acts.

Pursuant to the notice the matter was heard by the Insurance Commissioner on 26 and 27 January 1967, the defendant being represented by counsel and both parties offering testimony and producing evidence. On 6 April 1967 the Insurance Commissioner issued his decision in which he made full findings of fact on the basis of which he concluded that defendant had willfully violated the insurance laws of North Carolina, specifically G.S. 58-47 and G.S. 58-53.2, and that he had committed acts prohibited by and had failed to comply with certain requirements of G.S., Chap. 58 by virtue of which his licenses were subject to suspension or revocation. The decision permanently revoked any license of the defendant to act as insurance agent or broker in this State and, in addition, ordered defendant to pay to the State of North Carolina a civil penalty in the amount of $3000.00, providing that upon the payment of such amount to the Treasurer of the State of North Carolina the civil penalty should be satisfied and discharged. Defendant did not appeal the decision of the North Carolina Insurance Commissioner. He did comply with the decision to the extent of surrendering his licenses, but he refused to comply with that part of the order which imposed the civil penalty in the amount of $3000.00. The North Carolina Insurance Commissioner then filed this suit in the Superior Court of Wake County, asking for judgment ordering defendant to pay the civil penalty as imposed, with interest from 6 April 1967. Defendant answered, alleging that the provision in G.S. 58-44.6 under which the Commissioner imposed the civil penalty was unconstitutional. Upon a call of the case for trial, defendant also demurred *ore tenus* on the grounds that the complaint did not state facts sufficient to constitute a cause of action in that the statute under which the civil penalty had been imposed was unconstitutional. At the conclusion of the evidence, defendant moved for nonsuit on the further grounds that the action was not instituted by the real party in interest. On 14 November 1967 Judge Canaday entered an order in effect overruling defendant's demurrer and motion of nonsuit and ordering defendant to pay to the Treasurer of North Carolina the sum of $3000.00. From this judgment defendant appealed.

Attorney General T. W. Bruton, and Assistant Attorney General Bernard A. Harrell for plaintiff appellee.

Nance, Collier, Singleton, Kirkman and Herndon for defendant appellant.

PARKER, J. G.S. 58-44.6 provides that whenever any person subject to the provisions of G.S., Chap. 57 or Chap. 58 shall commit any act or fail to comply with any requirements prohibited or required by said chapters by virtue of which any license is subject to suspension or revocation, "the Commissioner of Insurance, in addition to or in lieu of any other official action that may be taken by him, may, in his discretion, inflict a civil penalty in an amount to be fixed by said Commissioner of Insurance not in excess of twenty-five thousand dollars ($25,000.00), . . ." The statute provides that the Commissioner of Insurance before imposing any penalty or revoking any license shall conduct a hearing and shall make all necessary findings of fact in regard to the matter under inquiry. The hearing is to be conducted under the procedures set forth in G.S. 58-54.6, which requires a notice of hearing and statement of charges to be served upon the person affected, grants such person an opportunity to be heard, provides for the making of a stenographic record of all evidence upon the request of any party and provides for the examination and cross-examination of witnesses under oath. Any person whose rights are affected by the findings and order of the Commissioner of Insurance has the right to appeal to the Superior Court of Wake County, in which event the procedures contained in G.S. 58-9.3 shall be followed.

In the case before us defendant did not avail himself of his right to appeal, nor does he raise any objection as to the conduct of the proceedings before the Commissioner of Insurance leading up to the order revoking his licenses and imposing the civil penalty. He has raised no objection to that portion of the order of the Insurance Commissioner revoking his licenses. He does object to the imposition upon him of any civil penalty, contending that the portion of the statute authorizing the Insurance Commissioner to impose such a penalty is unconstitutional, in that it grants such an unlimited discretion to the Commissioner to be exercised without the guide of sufficient legislative standards that it must be regarded as an attempted delegation of the legislative function offensive both to the State and Federal Constitutions.

In the case of *Turnpike Authority v. Pine Island,* 265 N.C. 109, 143 S.E. 2d 319, the North Carolina Supreme Court, speaking through Sharp, J., said:

> "It is settled and fundamental in our law that the legislature may not abdicate its power to make laws nor delegate its *supreme* legislative power to any other coordinate branch or to any agency which it may create. *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310. It is equally well settled that, as to some *specific* subject matter, it may delegate a *limited* portion of its legislative power to an administrative agency *if* it prescribes the standards under which the agency is to exercise the delegated powers."

Examples of attempted delegation of legislative power held to be unconstitutional may be found in *Harvell v. Scheidt,* 249 N.C. N.C. 699, 107 S.E. 2d 549 (statute which granted the Department of Motor Vehicles authority to suspend the driver's license of any person found to be a "habitual violator" of the traffic laws, held to be an unconstitutional delegation of legislative power, since it did not define the term "habitual violator," set no standards for making the determination, and left the matter to the unlimited discretion of the Department); *State v. Williams,* 253 N.C. 337, 117 S.E. 2d 444 (statute requiring persons soliciting students for private schools to obtain a license from the State Board of Education held unconstitutional as an unwarranted delegation of the lawmaking power, since the statute prescribed no standards to guide the administrative Board in granting or withholding the prescribed license); *State v. Harris,* 216 N.C. 746, 6 S.E. 2d 854 (statute purporting to grant unlimited discretion to a commission to set up standards of their own for admission to the business of " 'dry cleaning and/or pressing,' according to whatever rules or regulations they may conceive to be related to the 'public health, safety, and welfare,' " held unconstitutional).

In the case before us the Legislature has delegated to the Insurance Commissioner the power to make "rules and regulations, not inconsistent with the law, to enforce, carry out and make effective the provisions of this chapter (G.S., Chap. 58), and to make such further rules and regulations not contrary to any provisions of this chapter which will prevent practices injurious to the public by insurance companies, fraternal orders and societies, agents and adjusters." G.S. 58-9(1). We are not, however, presently called upon to determine if this delegation of legislative power has been made within sufficiently narrow channels to meet constitutional requirements. While the Commissioner is authorized by G.S. 58-9(1) to make rules and regulations, it should be noted that the section of the statute here under attack, G.S. 58-44.6, does not authorize him to inflict the monetary civil penalty in question upon any finding of a mere viola-

tion of his rules and regulations, but only upon a finding that the person upon whom the penalty is sought to be imposed: (1) Is subject to the provisions of G.S., Chap. 57 or Chap. 58; and (2) that such person has done an act or failed to comply with a requirement "prohibited or required *by said chapters,* by virtue of which any license is subject to suspension or revocation." The Legislature itself, not the Insurance Commissioner, has enacted those chapters of the General Statutes.

Unlike the statutes which were involved in the cases above referred to, the section of the statute here under attack, G.S. 58-44.6, grants no unguided discretion to the Insurance Commissioner to make any laws. It merely gives him discretion to impose a civil penalty in an amount to be fixed by him not in excess of $25,000, but only after he has given due notice to the person to be affected, granted the accused an opportunity to be heard, conducted a hearing, subpœnaed and examined witnesses, received oral and documentary evidence, caused a stenographic record of all evidence and proceedings to be made upon the request of any party, "made all necessary findings of fact in regard to the matter under inquiry," and based thereon has determined that the accused has committed some act or failed to comply with some requirements of G.S., Chap. 57 or Chap. 58.

The functions to be exercised by the Insurance Commissioner and the discretion granted to him by G.S. 58-44.6 here under attack were essentially judicial rather than legislative in nature. The Commissioner was granted no power to create any new law. The Legislature itself, not the Insurance Commissioner, enacted the laws. The Legislature did impose upon the Commissioner the duty to "see that all laws of this State governing insurance companies . . . are faithfully executed." G.S. 58-9(1). To enable him to perform this duty, the Legislature has granted him certain limited judicial powers and functions. The Legislature had the constitutional right and power to do exactly this. Article IV, § 3 of the North Carolina Constitution provides:

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

The judicial powers granted to the Commissioner of Insurance by G.S. 58-44.6, including the discretionary power to impose the civil penalty within the limit provided after conducting the proceedings

and making the appropriate findings as required by the statute, were, in our view, "reasonably necessary as an incident to the accomplishment of the purposes" for which the North Carolina Insurance Department was created. Certainly we cannot say these powers were so clearly not reasonably necessary for the accomplishment of such purposes as to invoke the judicial power to declare the statute unconstitutional. "The presumption is that any act passed by the legislature is constitutional, and the court will not strike it down if such legislation can be upheld on any reasonable ground." *Ramsey v. Veterans Commission,* 261 N.C. 645, 135 S.E. 2d 659. "If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people." *Glenn v. Board of Education,* 210 N.C. 525, 187 S.E. 781. We therefore hold that the Legislature acted within its constitutional powers in enacting G.S. 58-44.6, and defendant's demurrer based on the contention that the statute was unconstitutional was properly overruled.

In view of the statutory duty imposed upon the Insurance Commissioner to see that the laws of this State relating to the business of insurance are faithfully executed, the Commissioner has a very real interest in seeing that his orders and decisions are carried out. The limited judicial powers which have been vested in him by the Legislature do not include the judicial power to enforce his own orders or decisions. For that purpose he must necessarily resort to the courts of this State and in any court proceedings instituted by him for that purpose he is a real party in interest within the meaning of G.S. 1-57. Therefore defendant's motion for nonsuit on the grounds that this action was not instituted by the real party in interest was properly overruled.

We also hold that the provision in the judgment directing the defendant to pay the amount of the penalty to the Treasurer of the State of North Carolina was correct. While G.S. 58-44.6 does not itself specify to whom the civil penalty is to be paid, G.S. 58-63(4) does direct the Commissioner of Insurance to "collect all other fees and charges due and payable into the State treasury by any company, association, order, or individual under his department," and G.S. 58-62 directs him to pay the full amount of such funds monthly to the State Treasurer. By clear implication of those sections, the amount of any monetary civil penalty imposed and collected as authorized by G.S. 58-44.6 should also be paid over to the State Treasurer, and there was no error in the judgment so directing.

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

LUCILLE CLEMMONS v. LIFE INSURANCE COMPANY OF GEORGIA.

(Filed 15 May 1968.)

1. Pleadings § 12—

G.S. 1-151 requires the court to construe liberally a pleading challenged by demurrer with a view to substantial justice between the parties, and the demurrer will not be sustained unless the complaint is fatally and wholly defective.

2. Same—

A demurrer admits for the purpose of testing the sufficiency of the pleadings the truth of factual averments well stated and all relevant inferences of fact reasonably deducible therefrom.

3. Master and Servant § 33—

When an employee, in undertaking to do that which he was employed to do, adopts a method which constitutes a tort and inflicts injury on another, it is the fact that he is about his employer's business which imposes liability upon the employer, and the employer is not excused from liability in that the employee adopted a wrongful or unauthorized method, or even a method expressly prohibited.

4. Same— Complaint held to state a cause of action of assault by defendant's agent in the course of employment.

Plaintiff's allegations were to the effect that she was a customer of the defendant life insurance company and that she periodically paid premiums to the defendant's agents who called at her home, that on the day of collection she informed an agent of the defendant that she was not able to pay the premium for that week, that the agent became angered and threatened to cancel the policy of insurance, that at the plaintiff's demand to leave her premises the agent produced a pistol, pointed it at plaintiff, and threatened to shoot her, and that he continued to berate plaintiff about her failure to pay the premium. *Held:* The allegations of the complaint are sufficient to state a cause of action of assault by the defendant's agent within the course and scope of his employment.

CAMPBELL, J., dissenting.

APPEAL by plaintiff from *Mintz, J.*, 13 November 1967, Session, NEW HANOVER Superior Court.

The plaintiff instituted a civil action to recover compensatory and punitive damages from the defendant by reason of an alleged assault upon her by an alleged agent of the defendant.

The portions of the complaint pertinent to this appeal are as follows:

"THIRD: That for many years before Monday, November 21, 1966, the plaintiff herein had been a customer of the defendant herein, having purchased various life insurance policies from the defendant herein, the premiums for which policies the

plaintiff paid periodically to the defendant's agents who called at the plaintiff's home for the purpose of collecting such premiums.

"FOURTH: That on Monday, November 21, 1966, at about 5 o'clock P.M., one Morris Weeks, while employed by the defendant as its agent for the purpose of collecting insurance premiums from this plaintiff and others, came to the home of this plaintiff for the purpose of collecting for the defendant an insurance premium which the plaintiff herein owed to the defendant. That the said Morris Weeks had been to the plaintiff's home on many other occasions, collected premiums from the plaintiff for the defendant and was at all times hereinafter mentioned acting as agent, servant or employee of the defendant within the course and scope of his employment as such agent, servant or employee.

"FIFTH: That on November 21, 1966, at about 5 o'clock P.M., when the said Morris Weeks came to the home of the plaintiff herein for the purpose of collecting the premium then due on certain policies which the plaintiff had with the defendant, the plaintiff did not have the money to pay the premium due the defendant and so advised the defendant's agent, Morris Weeks. That when the plaintiff advised the said Morris Weeks that she did not have the necessary money to pay the premium which he had come to collect for the defendant, the said Morris Weeks became angered and in a loud and rude voice said to the plaintiff, 'I am tired of you putting me off every time I come by. If you don't have it next time I am going to lapse the insurance,' whereupon the plaintiff herein asked the said Morris Weeks to leave her home and to leave the porch upon which he was standing; the said Morris Weeks refused to leave the premises and replied to the plaintiff herein, 'You don't talk to me like that, woman,' and thereupon produced a pistol in his hand which he pointed at the plaintiff herein and the said Morris Weeks said to the plaintiff at that time, 'I will shoot you,' that the said Morris Weeks then walked out into the front yard of the plaintiff's home where he continued to berate the plaintiff for not having the money there to pay the insurance premium, telling her again that she had better have the money the next time he came until one Elsie Logan who was present stated that she would call the police and the said Morris Weeks then said, 'I don't care who you call,' went to his car which was parked in front of the plaintiff's home, stood there for a few moments, got into the car and left."

The plaintiff further alleged actual damages by way of medical expenses for treatment of hypertension brought about by the alleged assault; and alleged that she was entitled to punitive damages.

The defendant filed a demurrer to the complaint, stating as grounds therefor that the complaint does not state facts sufficient to constitute a cause of action ". . . for that it appears on the face of the Complaint that the alleged wrongful act was outside the scope of employment of the said Morris Weeks." The trial judge entered an order sustaining the demurrer, stating ". . . it appearing that the alleged wrongful act was outside the scope of the employment of the defendant *(sic)* . . ."

From the Order sustaining the defendant's demurrer to the complaint, plaintiff appealed.

W. G. Smith and Jerry Spivey, attorneys for plaintiff appellant.

Marshall and Williams by Lonnie B. Williams, attorneys for defendant appellee.

BROCK, J. G.S. 1-151 requires the Court to construe liberally a pleading challenged by demurrer with a view to substantial justice between the parties, and the demurrer will not be sustained unless the complaint is fatally and wholly defective. *Corprew v. Chemical Corp.*, 271 N.C. 485, 157 S.E. 2d 98. It is axiomatic that a demurrer admits, for the purpose of testing the sufficiency of the pleadings, the truth of factual averments well stated and all relevant inferences of fact reasonably deducible therefrom. *Corprew v. Chemical Corp., Id.*

Under the allegations of the present complaint, if there was an assault upon the plaintiff by the agent, it occurred when the agent ". . . produced a pistol in his hand which he pointed at the plaintiff . . . (and) said to the plaintiff . . . I will shoot you . . ." We may assume that the defendant did not authorize or desire such conduct on the part of its agent, but that is not the question presented. The question to be determined is whether, under a liberal construction, the complaint alleges facts from which it can be seen, or reasonably deduced, that the agent was acting in the furtherance of the defendant's business.

When the employee is undertaking to do that which he was employed to do and, in so doing, adopts a method which constitutes a tort and inflicts injury on another, it is the fact that he was about his master's business which imposes liability. That he adopted a wrongful or unauthorized method, or even a method expressly prohibited, does not excuse the employer from liability. *West v. Woolworth Co.*, 215 N.C. 211, 1 S.E. 2d 546.

Although the complaint does not allege that the agent threatened to shoot the plaintiff *if she did not pay* the premium due on her policy of insurance, nevertheless the allegations portray an agent disgruntled by past unsuccessful efforts to collect from the plaintiff, and portray an agent intent upon impressing the plaintiff with the necessity that she accede to his demands for prompt payment in the future. His drawing of the pistol merely accentuated his attempt at verbal intimidation of the plaintiff. He talked to her in a "loud and rude voice" before drawing the pistol and he "continued to berate the plaintiff for not having the money there to pay the insurance premium" after drawing the pistol.

The defendant seeks to lift from this diatribe by the agent the intervening protestations by the plaintiff that the agent leave her premises, and asserts that the drawing of the pistol was only in response to plaintiff's demand; therefore, defendant asserts, the pointing of the pistol constituted a departure from the furtherance of the defendant's business. Defendant relies heavily upon *Wegner v. Delicatessen,* 270 N.C. 62, 153 S.E. 2d 804.

We view the *Wegner* case as factually distinguishable. There the agent completely turned away from his duties as bus boy for the purpose of gratifying some unexplained personal animosity towards a customer; his assault upon the customer was not made in an effort to accomplish his duties as bus boy. In the instant case, the allegations show the agent's entire course of conduct to be designed to impress upon the plaintiff that she must have the money ready when he came back for it, and that she could not frustrate his efforts by ordering him off her premises. The allegations show that his entire course of conduct was directed towards obtaining the prompt future payment of premiums on the defendant's insurance contract (the very service which it is alleged he performs for the defendant).

We hold that the allegations of the complaint are sufficient to withstand defendant's demurrer. Whether the plaintiff can make out a case upon a trial is a different matter.

Reversed.

PARKER, J., concurs. CAMPBELL, J., dissents.

CAMPBELL, J., dissenting: I am constrained to dissent from the majority holding in this case. The facts sufficiently appear in the majority opinion, but I am of the opinion that the plaintiff has overpleaded her case. The complaint shows on its face that the agent Weeks went to the home of the plaintiff for the purpose of collecting insurance premiums and when payment was refused expressly stated:

"If you don't have it next time, I am going to lapse the insurance." This conduct on the part of Weeks was clearly within the scope of his agency.

As shown by the complaint, however, the plaintiff brought on the assault when she requested Weeks to leave her premises. Her language can only be surmised, but the complaint states that Weeks replied: "You don't talk to me like that, woman," and produced a pistol and proceeded to assault the plaintiff with the pistol, saying "I will shoot you."

The complaint shows that the agent Weeks then proceeded out into the front yard and at that point he did not continue to assault the plaintiff but instead it states that Weeks "berated" the plaintiff for not having the money to pay the insurance premium. Webster's Third New International Dictionary (1968) defines the word "berate" as "to heap reproaches on; criticize vigorously; scold or chide vehemently." It certainly does not mean an assault. The assault had terminated when the agent Weeks left the immediate vicinity of the plaintiff. The assault was in connection with the plaintiff's request that the agent Weeks leave her premises and it had no connection with or relation to the purpose of collecting the premium on behalf of the defendant.

The assault was clearly without the scope of the agency. This case is controlled by the decision of *Wegner v. Delicatessen*, 270 N.C. 62, 153 S.E. 2d 804, where the Court said: "However, the assault, according to the plaintiff's testimony, was not for the purpose of doing anything related to the duties of a bus boy, but was for some undisclosed, personal motive." In the instant case, the alleged facts are stronger for the defendant because, according to the allegations of the plaintiff herself, the assault was not for the purpose of doing anything related to the duties of collecting an insurance premium but was because of a disclosed personal motive — the agent Weeks was offended by the manner in which the plaintiff had spoken to him.

STATE OF NORTH CAROLINA v. ROBERT WHITE, JR.

(Filed 15 May 1968.)

1. Criminal Law § 82—

The rule forbidding an attorney from divulging confidential communications with his client is waived where the client, in attempting to avoid responsibility for his acts, testifies as to what he contends were communica-

tions between himself and his attorney, especially when the client's version of what transpired reflects upon the attorney, and the attorney may divulge the communications about which the client has testified.

2. Criminal Law § 23—

To invalidate a plea of guilty because of an involuntary confession, the defendant must show that the involuntary confession was a substantial factor in his decision to plead guilty.

3. Criminal Law §§ 82, 181—

In a post conviction hearing to determine whether defendant's confession was a substantial factor in his decision to plead guilty, where defendant has testified as to recommendations made to him by his attorney, the State is entitled to have the attorney fully disclose his conversations with defendant regarding defendant's plea.

APPEAL by the State from *Snepp, J.*, at the 18 September 1967 Special Mixed Session of MECKLENBURG Superior Court.

At the 7 May 1962 Criminal Term of the Superior Court of Mecklenburg County, two bills of indictment were returned against the defendant; No. 36-757 charged him with the rape of Thelma Thacker on 3 February 1962; No. 36-758 charged him with the rape of Millet Davis on 22 March 1962.

During the first week of said term, defendant, being represented by court-appointed attorney, J. Marshall Haywood, tendered written pleas of guilty to the two charges of rape. On 14 May 1962, Pless, J., sentenced defendant in case 36-757 to life imprisonment; he continued prayer for judgment in case 36-758 until 21 May 1962, at which time Copeland, J., sentenced defendant to life imprisonment in case 36-758, said sentence to commence at the expiration of the sentence imposed in case No. 36-757.

In November or December of 1964, defendant filed a petition for post-conviction review. The petition was heard on 18 March 1965 at which time Houk, J., entered an order finding and concluding that there had been no denial of any of defendant's constitutional rights and denied the petition.

Defendant then petitioned the Supreme Court for *certiorari* to review the order of Houk, J. On 28 June 1967, an order was issued from the Supreme Court remanding the cause to the Superior Court of Mecklenburg County for plenary hearing and preservation of testimony taken, particularly the testimony of Attorney Haywood.

On 29 June 1967, Clarkson, J., entered an order for a plenary hearing and appointed attorney John R. Ingle to represent the defendant.

On 19 and 20 September 1967, Judge Snepp conducted a plenary hearing in which testimony was introduced by the defendant and

the State. On 29 September 1967, Judge Snepp entered judgment finding and concluding that defendant's constitutional rights were violated before and during his trial in cases 36-757 and 36-758 and granted defendant's motion for a new trial.

The Attorney General filed a petition for writ of *certiorari* in this Court. *Certiorari* was allowed on 19 December 1967.

T. Wade Bruton, Attorney General, by Ralph A. White, Jr., and Dale Shepherd, Staff Attorneys, for the State.

John R. Ingle attorney for defendant appellee.

BRITT, J. The State's assignment of error is as follows:

> "That the Court erred in setting aside appellee's two convictions for rape and in signing the judgment to that effect for the reason that the Court erroneously concluded that appellee's constitutional rights were violated before and during his trial in cases 36-757 and 36-758, the Court erroneously concluded that the statement given by appellee to the police was not voluntary, and the Court erroneously concluded the pleas of guilty entered by appellee were not voluntarily and understandingly entered."

In his findings of fact, Snepp, J., found that at the time of the alleged offenses defendant was twenty years of age and had completed the ninth grade in school; that defendant was arrested on the afternoon of 2 April 1962 and was interrogated at length by police officers on three separate occasions during the following night and again at 8:00 the next morning, at which time the defendant "made a statement to the police officers implicating himself in an offense of rape"; that Attorney Haywood was appointed to represent the defendant approximately three weeks prior to the time of his trial and that after discussions with defendant and his sister, Attorney Haywood recommended that defendant plead guilty to the two charges of rape; that the inculpatory statement given to the police by defendant was a substantial factor in his decision to enter the pleas of guilty.

During the hearing, Attorney Haywood was called by the Solicitor as a witness for the State. The transcript of testimony discloses that the following transpired:

> Question to Mr. Haywood by Solicitor: "Well, what was the nature of your conversations with Mr. White about these cases?" Answer: "We discussed first of all the fact whether or not he was guilty as charged, whether or not he did, in fact, commit

these crimes. On all occasions but one he readily admitted it and my recollection —

"Court: Wait a minute here. Have you ever heard about about *(sic)* a privileged communication?"

Attorney Haywood was thus prevented from testifying about his conversation with the defendant, which conversation no doubt was a factor in Attorney Haywood's recommendation that the defendant plead guilty. We think the court erroneously excluded testimony of Attorney Haywood in this instance. Two of the grounds on which defendant challenged the constitutionality of his trial were that he was not represented by competent counsel and that the pleas of guilty entered by him were not voluntarily and understandingly made. Defendant testified regarding his conferences with and recommendations made by the attorney.

In *Cooper v. United States,* 6 Cir., 5 F. 2d 824, 825, the Court stated:

> "The rule which forbids an attorney from divulging matters communicated to him by his client in the course of professional employment is for the benefit of the client. But it may be waived by the client; and when a client, in attempting to avoid responsibility for his acts, as in this case, divulges in his testimony what he claims were communications between himself and his attorney, and especially *when his version of what transpired reflects upon the attorney, the reason for the rule ceases to exist, and the attorney is at liberty to divulge the communications about which the client has testified.*" (Emphasis added.)

To the same effect are *Farnsworth v. Sandford,* 5 Cir., 115 F. 2d 375, 377; *United States v. Mahoney,* D.C., 43 F. Supp. 943, 946; *Mahoney v. United States,* D.C., 48 F. Supp. 212, 215; and *United States v. Monti,* D.C., 100 F. Supp. 209, 212.

Any confession or inculpatory statement which the defendant made to the police officers following his arrest was not introduced in evidence. It then becomes necessary to consider whether the confession or inculpatory statement was a *substantial* factor in the defendant's decision to plead guilty. In his testimony, Attorney Haywood, in answer to the question as to whether the confession or inculpatory statement had any bearing on his recommendation to the defendant, stated: "It certainly had some bearing on it. I did give it some weight. My conversations with him and his sister contributed *more heavily* (emphasis added), I would say, but it certainly had some weight on the decision."

In a determination by the court as to whether the confession or

inculpatory statement of the defendant was a substantial factor in his decision to plead guilty, based upon recommendations by his attorney testified to by the defendant, the State is entitled to have the court consider full disclosures by defendant's attorney of conversations had between him and his client.

In *Commonwealth v. Garrett,* 229 A. 2d 922, the Supreme Court of Pennsylvania declared:

> "The mere existence of an involuntary confession, however, is not sufficient to invalidate a guilty plea for the petitioner would still have to prove that the involuntary confession was the *primary motivation* for his plea of guilty." (Emphasis added.) Citing *Brown v. Turner,* 257 F. Supp. 734, 738, and *Gilmore v. People of State of California,* 9 Cir., 364 F. 2d 916.

The judgment of Judge Snepp is vacated, and this cause is remanded to the Superior Court of Mecklenburg County to the end that another plenary hearing may be held in accordance with this opinion.

Error and remanded.

MALLARD, C.J., and MORRIS, J., concur.

STATE v. WILLIS JENKINS.

(Filed 15 May 1968.)

1. Criminal Law § 106—

If there is more than a scintilla of competent evidence to support the allegations of the indictment, it is the court's duty to submit the case to the jury.

2. Same—

When the State's evidence is conflicting, some tending to incriminate and some tending to exculpate the defendant, it is sufficient to repel a motion for judgment of nonsuit, and must be submitted to the jury.

3. Same—

A jury is not compelled to believe the whole of a confession, but may, in its sound discretion and in its role as trier of fact, believe a part and reject a part.

4. Homicide § 21— Circumstantial evidence of defendant's guilt of homicide held sufficient for the jury although it was conflicting.

The State's evidence tended to show that the defendant went to the house of a woman with whom he had previously lived, that they fought

intermittently during the night, that defendant remembered hitting her in the face but he stated that she was alive when he left the premises. The woman was found dead the next morning in her bed. There was medical expert testimony that the woman had numerous recent bruises about her face, neck and body, that five of her ribs were completely broken and that the cause of death was the result of the rib fractures and strangulation; the expert also testified that there was methyl alcohol in her blood and that he could not rule out the possibility that the amount of wood alcohol would have been a fatal amount. There was in evidence, also, a statement by defendant, referring to the woman, that "when I go back, I will go for murder." *Held:* The evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of murder in the second degree.

APPEAL from *Mintz, J.* and a jury, December 1967 Session, NEW HANOVER Superior Court. In a valid bill of indictment, the defendant was charged with the capital offense of murder of Sadie Thompson on 5 November 1967.

The defendant entered a plea of not guilty and the solicitor on behalf of the State elected to try him for second-degree murder and not the capital offense.

From a verdict of guilty as to manslaughter, the defendant was sentenced to a term of not less than 14 nor more than 18 years.

The State offered evidence. The defendant offered none.

T. W. Bruton, Attorney General; Harrison Lewis, Deputy Attorney General; Charles W. Wilkinson, Jr., Staff Attorney and Claude W. Harris, Trial Attorney for the State.

O. K. Pridgen, II, for defendant appellant.

CAMPBELL, J. The defendant challenges the sufficiency of the State's evidence, considered in the light most favorable to the State, and giving to the State the benefit of every reasonable inference fairly to be drawn therefrom, to carry the case to the jury. If there is more than a scintilla of competent evidence to support the allegations, it is the court's duty to submit the case to the jury. *State v. Horner,* 248 N.C. 342, 103 S.E. 2d 694.

The evidence reveals:

Bernice Johnson, a daughter of the deceased, Sadie Thompson, saw the deceased on Saturday night, 4 November 1967, about 8:00 p.m. and then again shortly before 11:00 p.m. When last seen, the deceased appeared to have had some alcoholic beverage to drink. She saw the deceased next on Sunday morning, 5 November 1967, about 9:00 or 10:00 a.m. lying on the bed in her bedroom and the deceased did not answer her call to open the door and let her in. Wilmington police officers were notified and on arrival they found

the deceased dead with her head at the foot of the bed. About 4:00 p.m. Sunday afternoon, 5 November 1967, the defendant was placed under arrest. At that time he was intoxicated and the officers were unable to question him until the next day.

A detective of the City of Wilmington testified that the defendant told him that he went to Sadie's house about 11:00 or 11:30 p.m. Saturday night. Sadie was not at home and he went to a nearby vacant house and sat down on the front porch and waited. A short time later Sadie arrived in a taxicab and went to her front door and tried to open it without success. She then went to a window and ripped the screen on the window, but the window was too high for her to get in and she came back to the front door. She was in a highly intoxicated condition and a Negro man by the name of J. D. Bullard came down the alley by the side of the house and opened the door and let her in. This man left and did not go in the house. The defendant had known Sadie between 12 and 15 years, had lived with her, and had fathered her last two children. After Sadie entered he went to the house and went in and lay down on Sadie's bed. Later, Sadie lay down on the bed and they got to cursing each other and started fighting. The defendant hit Sadie several times in the face and during the fight they rolled off of the bed and on to the floor. The defendant sat straddled of her and hit her several times. Then he got up and got back on the bed and Sadie, likewise, got up on her own power and got back on the bed. He put a blanket over the two of them and dozed off to sleep. Later, the defendant woke up and did not know the exact time but it was somewhere between 3:00 and 4:00 in the morning. He and Sadie got to arguing and fussing again and he then told her: "If you are going to do this, I will get up and leave and go to my apartment." He did get up and went to his apartment and the next thing he heard was that Sadie was dead. The defendant said that Sadie was not dead when he left the house. He said that he had never gotten up this way before and left.

The defendant produced the shirt and vest he was wearing at the time he was with Sadie and these both had blood on them and the defendant stated: "That must be Sadie's blood." When asked about choking the deceased, the defendant said that if he choked her, he did not remember it, but he did remember hitting her in the face.

The deceased, Sadie Thompson, was an alcoholic.

The State also offered the testimony of Nathan Hawkins who testified that he had known the defendant something over 30 years and had known the deceased, Sadie Thompson, for 12 or 13 years. This witness cared for the two little girls of the deceased and the defendant. About a month before the deceased was found dead, this

witness had a conversation with the defendant and it was at a time when the defendant and the deceased had been fighting. This witness told the defendant that he should stop acting that way before he got in trouble. This witness testified that to this admonition the defendant stated: "I ain't going to pull any more time for Sadie Thompson, for her to get a welfare check and drink it up. When I go back, I will go for murder." And again the defendant stated: "I am not going back and make sixty days or ninety days or more for her to get welfare check off of me and drink wine."

The State also offered in evidence the testimony of Dr. J. F. Lewis, a pathologist who performed an autopsy on Sadie Thompson on Monday, 6 November 1967. He testified that the autopsy revealed numerous recent bruises and hemorrhages about the skin, neck, shoulders, arms and left thigh and a bruise mark across her neck. There were hemorrhages into the soft tissue around the base of her neck, around her windpipe on both the front and the side and along the small bones immediately above the windpipe. She also had five ribs completely broken on the right side. The toxicological examination revealed no significant level of ethyl alcohol in her blood but there was some methyl alcohol. This doctor further testified: "In my opinion, her death was due to combination of rib fractures and strangulation." The doctor testified that the methyl alcohol is commonly referred to as wood alcohol and that it is poisonous. He testified that the concentration he found from the blood analysis was 178 milligrams per cent. The doctor testified that it would be very difficult for him to say whether or not that per cent of methyl alcohol would be fatal to the particular person, Sadie Thompson, and that he could not rule out the possibility that that amount of wood alcohol would be a fatal amount.

We think the present case is distinguishable from *State v. Tolbert*, 240 N.C. 445, 82 S.E. 2d 201, and that this case is controlled by *State v. Horner, supra*, where it is stated: "When the State's evidence is conflicting — some tending to incriminate and some to exculpate the defendant — it is sufficient to repel a motion for judgment of nonsuit, and must be submitted to the jury. * * * A jury is not compelled to believe the whole of a confession. The twelve are the triers of fact, and may, in their sound discretion, believe a part and reject a part."

We have reviewed the entire record and conclude that the defendant has had a fair and impartial trial, free of any prejudicial error and that the case was properly submitted to the jury.

Affirmed.

BROCK and PARKER, JJ., concur.

INTERNATIONAL SPEEDWAYS, INC., PLAINTIFF, v. L. G. AMAN AND WIFE, BERNICE H. AMAN, DEFENDANTS.

(Filed 15 May 1968.)

1. Vendor and Purchaser § 2—

An option in a lease giving the lessee the right to purchase the leased premises at any time before the expiration of the lease is a continuing offer to sell on the terms set forth in the option and may not be withdrawn by the lessor within the time limited.

2. Vendor and Purchaser § 1—

The lease is a sufficient consideration to support specific performance of an option of purchase granted therein.

3. Vendor and Purchaser § 2—

Where the terms of an option do not require payment of any part of the purchase price before the option is exercised but require merely that notice be given of the election to exercise the option, tender of the purchase price is not a prerequisite to the exercise of the option.

THIS is an appeal from *Bundy, J.,* at the 18 March 1967 Session of ONSLOW Superior Court. The plaintiff instituted this action for specific performance to enforce an agreement pertaining to the purchase of real estate and for damages for failure to convey the property. After a jury had been selected and empaneled, the defendant filed a demurrer *ore tenus* to the complaint on the ground that it failed to state a cause of action. The trial court sustained the demurrer and dismissed the action and entered judgment accordingly. The plaintiff appealed to this Court.

The plaintiff in the complaint alleges that it and the defendants entered into a written lease agreement on 19 June 1964 whereby the plaintiff leased for a period of two years, commencing 19 June 1964 and ending 18 June 1966, certain property therein described situate in White Oak Township, Onslow County, North Carolina, and estimated to contain 60 acres, more or less. A copy of the lease agreement was attached to the complaint as an exhibit. The plaintiff further alleged that pursuant to the lease agreement it had paid the agreed rental for the two years at the time of the execution and delivery of the lease agreement.

Paragraphs seven and eight of the complaint are as follows:

"7. That prior to the expiration of the two (2) year term provided for in said Lease Agreement, the plaintiff elected to exercise the option granted to it by paragraph 8 of the Lease Agreement and on June 17, 1966, notified the defendants in writing of its election to exercise said option and requested the defendants to advise the plaintiff immediately of the date which would be

agreeable to make the survey; that a true and exact copy of the written notice delivered to the defendants is attached hereto and made a part of this Complaint by reference as if fully set out herein.

"8. That on the date of the aforesaid written notice to the defendants, to-wit on June 17, 1966, and at all times thereafter to and including the present time, the plaintiff was ready, willing and able to pay the costs of the survey contemplated by the Lease Agreement and the balance of the purchase price of the land covered by said option; that although demand has been made upon the defendants to honor the option provision of the Lease Agreement, the defendants have failed and refused to do so, and plaintiff is entitled to specific performance of the same, and is further entitled to have the Court order the said defendants to carry out the terms of said Lease Agreement."

There were other allegations for damages together with punitive damages. Since those allegations are not material to this decision, no further reference will be made to them.

The decision in this case is controlled by paragraphs seven and eight of the complaint set out above and paragraph eight of the lease agreement, together with the letter of 17 June 1966.

Paragraph eight of the lease agreement reads as follows:

"8. The Lessee shall have and is hereby given the right and option to purchase the leased premises at any time within the original two (2) year term of this Lease for the price of Three Hundred Seventy-Five ($375.00) Dollars per acre, the acreage to be determined according to survey to be made at the expense of the Lessee. In the event the Lessee elects to exercise this option it shall give to the Lessors notice in writing of its election and shall pay to the Lessors, upon completion of said survey, the sum of Three Hundred Seventy-Five ($375.00) Dollars per acre in cash, and the Lessors shall convey the premises to the Lessee by good and sufficient warranty Deed, free and clear of all encumbrances, provided, however, that the Lessee shall be credited with Two Thousand ($2,000.00) Dollars against the amount payable to the Lessors, that is, the agreed value of the stock being transferred to the Lessors by the Lessee, to-wit, Two Thousand ($2,000.00) Dollars, as the lease rental for the original two (2) year term, shall be credited towards the purchase price in the event the Lessee exercises its option to purchase. Should the Lessee exercise its option to purchase the leased premises the Lessor shall remove all buildings from the premises at the re-

quest of the Lessee, except the concession stand, which shall be the property of the Lessee."

The letter of 17 June 1966 reads as follows:

"INTERNATIONAL SPEEDWAYS, INC.
200 Randolph Road
Charlotte, North Carolina

"June 17, 1966

"Mr. and Mrs. L. G. Aman
Grants Creek Road
Route 2, Box 555
Jacksonville, North Carolina

Dear Mr. and Mrs. Aman:

In accordance with the provisions of paragraph 8 of the Lease Agreement entered into with you under date of June 19, 1964, International Speedways, Inc., has elected to exercise its option to purchase the property covered by and described in said Lease Agreement.

We are prepared to survey the property immediately and to pay you the sum of Three Hundred Seventy-Five and No/100 ($375.00) Dollars per acre in cash upon delivery of a good and sufficient Warranty Deed, warranting the property to be free and clear of all incumbrances, less the Two Thousand and No/100 ($2,000.00) Dollars in stock which has been issued to you by the Corporation.

Please advise us immediately of the date which will be agreeable with you to make the above mentioned survey and we will meet you on the premises or such other place you prefer to begin the survey.

Very truly yours,
INTERNATIONAL SPEEDWAYS, INC.
By: /s/ E. L. Harris
E. L. Harris, President"

The defendants assert that the written notice as contained in the letter of 17 June 1966 did not meet the requirements imposed upon the plaintiff in order to enable the plaintiff to exercise the option.

Venters and Dotson by Carl V. Venters for plaintiff appellant.

Ellis, Hooper, Warlick and Waters by Albert J. Ellis for defendant appellees.

CAMPBELL, J. "An option in a lease, which gives the lessee the right to purchase the leased premises at any time before the expira-

tion of the lease, is a continuing offer to sell on the terms set forth in the option, and may not be withdrawn by the lessor within the time limited. The lease is a sufficient consideration to support specific performance of the option of purchase granted therein. * * * Moreover, the real consideration in an agreement to convey land is the contract price." *Crotts v. Thomas,* 226 N.C. 385, 38 S.E. 2d 158.

The defendants assert: "To comply with the requirements of the option agreement, it was incumbent upon the plaintiff to have a survey made and to tender or pay to the defendants the agreed purchase price per acre as set out in the agreement before the defendants became obligated to convey the *locus in quo.*"

The option as contained in the lease agreement in the instant case did not impose this requirement upon the plaintiff. There was no requirement for the survey to be made prior to exercising the option. The lease agreement specifically provided that: "at any time within the original two (2) year term of this lease" the option could be exercised and "in the event the Lessee elects to exercise this option it shall give to the Lessors notice in writing of its election." There was no provision for payment or tender of payment until the survey had been completed. It was not incumbent upon the lessee to have a survey made until the option had been exercised. When the plaintiff notified the defendants in writing by the letter of 17 June 1966, it was prior to the termination of the two year term and constituted a valid exercise of the option as contained in the lease agreement. Having exercised the option by accepting the offer of sale on the terms set forth in the agreement, the plaintiff was under no obligation to tender the purchase price until the completion of the survey.

Where the terms of the option do not require payment of the purchase price or any part thereof before it is exercised, no tender must be shown. The terms of the option may require merely that notice be given of the exercise thereof and may be such as not to require the payment of the purchase money in order to exercise the option. This was the case here.

This case is controlled by the reasoning in *Kottler v. Martin,* 241 N.C. 369, 85 S.E. 2d 314.

For the reasons herein stated, the ruling of the trial court in sustaining the demurrer *ore tenus* is

Reversed.

BROCK and PARKER, JJ., concur.

NORTH CAROLINA STATE PORTS AUTHORITY v. SOUTHERN FELT CORPORATION AND LLOYD A. FRY ROOFING COMPANY.

(Filed 15 May 1968.)

1. Eminent Domain §§ 4, 7—

The right to authorize the power of eminent domain and the mode of the exercise thereof are wholly legislative, subject to the constitutional limitations that private property may not be taken for public use without just compensation and reasonable notice and opportunity to be heard.

2. Eminent Domain § 7—

The North Carolina State Ports Authority must obtain the approval of the Governor and Council of State before instituting proceedings to condemn land for its authorized purposes, G.S. 143-218.1, and the Ports Authority must affirmatively plead such prior approval in any condemnation action instituted by it, and the failure to do so renders the complaint demurrable.

APPEAL by plaintiff from *Bone, E.J.*, at the 27 November 1967 Civil Session of the Superior Court of CARTERET County.

Plaintiff, the North Carolina State Ports Authority, instituted this action in the Superior Court of Carteret County for the purpose of condemning whatever right, title or interest defendants may have in certain real property particularly described in the complaint. Paragraph 2 of the complaint is as follows:

> "2. That, pursuant to authority vested in the plaintiff under the provisions of Chapter 143 of the General Statutes of North Carolina, and pursuant to a resolution of said North Carolina State Ports Authority duly passed, it is necessary to condemn and appropriate whatever right, title or interest the defendants herein may have in that certain property described in paragraph 4 of this complaint, for dock extension and for additions to the port facilities of the Morehead City Ocean Terminal of the North Carolina State Ports Authority at Morehead City, North Carolina."

With its complaint plaintiff filed a Declaration of Taking and Notice of Deposit and deposited with the court the sum which plaintiff alleged it had estimated to be just compensation for the taking. The complaint did not expressly allege that the transactions relating to the acquisition of defendants' real property had been subject to prior review by the Governor and Council of State, or that the same had been approved by the Governor and Council of State. Defendants demurred to the complaint for failure to state facts sufficient to constitute a cause of action, in that the complaint failed to allege the prior review and approval of the transaction by the Gov-

ernor and Council of State of North Carolina. From order sustaining the demurrer, plaintiff appealed.

Attorney General Bruton, Assistant Attorney General Icenhour, and White, Hooten and White for plaintiff appellant.

Wheatly and Bennett, and Brooks and Brooks for defendant appellees.

PARKER, J. The sole question presented by this appeal is whether the North Carolina State Ports Authority must obtain prior approval of the Governor and Council of State before instituting proceedings to condemn land for its authorized purposes and, if so, whether it must affirmatively plead such prior approval in its complaint in any condemnation action instituted by it.

G.S., Chap. 143, Art. 22, provides for the creation, purposes, powers and jurisdiction of the North Carolina State Ports Authority as an instrumentality of the State. G.S. 143-220 grants to the Authority right and power to acquire property necessary for its purposes as therein set forth "by purchase, by negotiation, or by condemnation," and provides that should it elect to exercise the right of eminent domain "it may proceed in the manner provided by the General Laws of the State of North Carolina for the procedure by any county, municipality or authority organized under the laws of this State, or by the North Carolina State Highway Department, or by railroad corporations, or in any other manner provided by law, as the Authority may, in its discretion, elect."

In the case before us the North Carolina State Ports Authority elected, as it had a right to do, to proceed under the statutory provisions applicable to the State Highway Commission as set forth in G.S., Chap. 136, Art. 9, and the complaint does contain the allegations as required by G.S. 136-103 of that Article. It does not, however, allege that the transactions relating to the acquisition has been subject to prior review and has been approved by the Governor and the Council of State. The first sentence of G.S. 143-218.1, enacted in 1959, is as follows:

> "Any transactions relating to the acquisition or disposition of real property or any estate or interest in real property, by the North Carolina State Ports Authority, *shall be subject to prior review by the Governor and Council of State, and shall become effective only after the same has been approved by the Governor and Council of State.*" (Emphasis added.)

The North Carolina State Ports Authority is not freed from the

provisions of G.S. 143-218.1 merely because the Authority has the right under G.S. 143-220 to select the particular procedure it will follow in exercising its power of eminent domain. The right to authorize the exercise of the power of eminent domain and the mode of exercise thereof is wholly legislative, limited only by Constitutional provisions which require reasonable notice and opportunity to be heard and payment of just compensation for taking of private property for public uses. *Hedrick v. Graham,* 245 N.C. 249, 96 S.E. 2d 129; *Board of Education v. Allen,* 243 N.C. 520, 91 S.E. 2d 180.

In the case before us, the Legislature, by enacting G.S. 143-218.1, expressly provided that the North Carolina State Ports Authority in acquiring or disposing of real property could not act independently, but any transactions relating thereto shall be subject to *prior* review by the Governor and Council of State, and shall become effective only *after* the same has been approved by the Governor and Council of State. Here the Authority has filed its complaint in condemnation and a Declaration of Taking by which it purports to appropriate to itself such title as defendants may have in the real property in question. This is certainly a "transaction relating to the acquisition of real property," and this it had no power to do without first obtaining the required review and approval of the Governor and the Council of State. Since plaintiff was powerless to act without such prior review and approval, the fact of such prior review and approval must be alleged and proved.

The North Carolina Supreme Court considered a similar defect in pleading in a condemnation proceeding in the case of *Redevelopment Commission v. Hagins,* 258 N.C. 220, 128 S.E. 2d 391. In that case the Court, speaking through Higgins, J., and quoting from the case of *R. R. v. R. R.,* 106 N.C. 16, 10 S.E. 1041, said:

> ". . . (T)he performance of the preliminaries required is indispensably necessary before proceedings to condemn can be instituted. It is said that, although the petition in this case fails to allege the performance of these conditions, the omission is not fatal, and that it is but a defective statement of a good cause of action. We do not concur in this view. The exercise of the power of eminent domain is in derogation of common right, and all laws conferring such power must be strictly construed. By the very terms of the law under consideration, these allegations *must* be made in the petition, and we think that they are as much jurisdictional in their character as is the fact that the landowner and the railroad company have failed to agree. 'If the petition does not state the facts required by the statute to

be stated, an objection in that regard can be raised preliminarily . . . by way of demurrer, . . .'"

In the case before us the complaint was fatally defective and the demurrer was properly sustained.

Affirmed.

MALLARD, C.J. and BROCK, J., concur.

MRS. WILLA BLANCHE HEWETT, WIDOW; BARBARA RUTH HEWETT, MINOR DAUGHTER, BY HER NEXT FRIEND, REBECCA WILSON, CARL HAYES HEWETT, DECEASED EMPLOYEE, v. S. W. GARRETT, EMPLOYER, GLENS FALLS INSURANCE CO., CARRIER.

(Filed 15 May 1968.)

Master and Servant § 79—

Under the provisions of the Workmen's Compensation Act a surviving child is conclusively presumed to be wholly dependent for support upon the deceased employee, and it is error for the Industrial Commission to require that there be evidence and findings of fact that the deceased employee, at the time of his death, was in fact engaged in furnishing support to his acknowledged illegitimate child before the claim of such child could be recognized. G.S. 97-39; G.S. 97-2(12).

APPEAL by minor plaintiff from an opinion and award, 6 November 1967, of the North Carolina Industrial Commission.

This is a proceeding under the Workmen's Compensation Act by the widow and by a minor illegitimate child of Cary Hayes Hewett, deceased employee, to recover compensation for his death. At the hearing the parties stipulated certain of the facts and evidence was introduced which would show the following: Carl Hayes Hewett died 19 May 1963. At the date of his death he was an employee of S. W. Garrett and both he and his employer were subject to the provisions of the North Carolina Workmen's Compensation Act. His death resulted from personal injuries which were caused by an accident which arose out of and in the course of his employment. He was survived by his widow, Willa Blanche Hewett, to whom he had been married on 21 October 1960 and with whom he had lived until approximately one month prior to his death. At that time they separated because of threats made by Carl Hayes Hewett.

Prior to his second marriage to Willa Blanche Hewett, Carl Hayes Hewett had lived at Brevard, North Carolina with one Barbara Wilson, to whom he was not married, but with whom he lived

together as husband and wife. On 8 June 1957 a child, Barbara Ruth Hewett, was born to the deceased employee and Barbara Wilson and this child continued to live with her father and mother at Brevard until 4 July 1958, when Barbara Wilson took her infant daughter and moved in with her mother, Rebecca Wilson, in New York. Approximately two weeks thereafter the deceased employee also moved into the same household and continued to live as husband and wife with Barbara Wilson and their infant child, Barbara Ruth Hewett. Approximately 1 October 1958 Rebecca Wilson discovered that Carl Hayes Hewett and Barbara Wilson were not married, and at that time Carl Hayes Hewett moved from the household. During the period from July to October, 1958, Carl Hayes Hewett paid part of the expenses for the four persons residing in the household in New York. After moving from the household in October, 1958, he paid nothing further toward the support of Barbara Ruth Hewett. There was also testimony from members of the deceased employee's family that he had many times acknowledged that Barbara Ruth Hewett was his child.

The Hearing Commissioner made findings of fact substantially as above recited and concluded as a matter of law that the deceased employee had died as a result of injuries received by accident arising out of and in the course of his employment with the defendant employer; that Willa Blanche Hewett was the lawful widow of the deceased employee, was living apart from her husband at the time of his death for justifiable cause, and was conclusively presumed to be wholly dependent upon the deceased employee; that Barbara Ruth Hewett is the illegitimate daughter of the deceased, "but was not a dependent of the deceased for some five years prior to May 19, 1963, and thereby is excluded from any recovery." Based on these findings of fact and conclusions of law, the Hearing Commissioner made an award to the widow, Willa Blanche Hewett, but made no award to the minor illegitimate daughter. On appeal, the Full Commission adopted as its own the findings of fact, conclusions of law, and award of the Hearing Commissioner. From this decision, the minor plaintiff appealed.

Aaron Goldberg for minor plaintiff (Barbara Ruth Hewett) appellant.

James, James and Crossley, John F. Crossley for plaintiff-widow (Mrs. Willa Blanche Hewett) appellee.

PARKER, J. G.S. 97-39 provides:

"A widow, a widower and/or a child shall be conclusively presumed to be wholly dependent for support upon the deceased

employee. In all other cases questions of dependency, in whole or in part shall be determined in accordance with the facts as the facts may be at the time of the accident, but . . . no compensation shall be allowed unless the dependency existed for a period of three months or more prior to the accident."

G.S. 97-2(12) provides:

"The term 'child' shall include a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent upon him."

In the case before us the Industrial Commission has ignored the conclusive presumption of dependency of a child created by G.S. 97-39, and has interpreted the words "dependent upon the deceased" as the same appear in G.S. 97-2(12) as meaning dependent *in fact* upon the deceased. In accord with this interpretation the Industrial Commission required that there be evidence and finding that the deceased, at the time of his death, was actually engaged in furnishing support to his acknowledged illegitimate child before the claim of such a child can be recognized.

However, in construing these same statutory sections in a case involving the claim of a posthumous, illegitimate child, the North Carolina Supreme Court has treated the dependency referred to in G.S. 97-2(12) as a legal, rather than as a factual concept. In the case of *Lippard v. Express Co.*, 207 N.C. 507, 177 S.E. 801, the Supreme Court, speaking through Connor, J., said:

"The dependency which the statute recognizes as the basis of the right of the child to compensation grows out of the relationship, which in itself imposes upon the father the duty to support the child, and confers upon the child the right to support by its father. The status of the child, social or legal, is immaterial.

"The philosophy of the common law, which denied an illegitimate child any rights, legal or social, as against its father, and imposed no duty upon the father with respect to the child, is discarded by the statute."

We recognize that there is a possible ambiguity between G.S. 97-2(12) which defines the term "child" as including an acknowledged illegitimate child dependent upon the deceased, and the language of G.S. 97-39 which provides that a "child shall be conclusively presumed to be wholly dependent for support upon the deceased em-

ployee." Exactly the same ambiguity existed, however, at the time the North Carolina Supreme Court decided the case of *Lippard v. Express Co., supra,* and the Supreme Court resolved it in favor of the conclusive presumption created by the latter section of the statute. In the case of a similar ambiguity between the language of G.S. 97-39 and the definition contained in G.S. 97-2(15) which defines the term "widower" to include only the decedent's husband who "was dependent for support upon her," the North Carolina Supreme Court upheld the claim of a widower, even though it was acknowledged in that case that as a matter of fact he had received no support from his deceased wife, the Court holding that the conclusive presumption created by G.S. 97-39 was controlling. *Martin v. Sanatorium,* 200 N.C. 221, 156 S.E. 849.

In view of the holdings in the *Lippard* and *Martin* cases, *supra,* the opinion and award of the Industrial Commission in the case before us was in error, and the cause is remanded to the Industrial Commission with the direction that judgment be entered in accordance with this opinion.

Reversed and remanded.

CAMPBELL and BROCK, JJ., concur.

STATE OF NORTH CAROLINA v. RALPH HARRELL McCABE.

(Filed 15 May 1968.)

Automobiles § 126; Criminal Law § 64; Constitutional Law § 33—

Failure by officers to advise defendant of his right to refuse to take a breathalyzer test does not render the result of the test inadmissible in evidence, defendant having impliedly consented to the test by virtue of driving an automobile on the public highways of the State, G.S. 20-16.2, and the test having been administered after arrest and without the use of force or violence.

THIS is an appeal from *Cowper, J.* and a jury, October 1967 Criminal Session, LENOIR Superior Court.

The defendant was charged in a warrant with wilfully operating a motor vehicle on the public roads while under the influence of intoxicating liquors. The defendant entered a plea of not guilty. The jury found the defendant guilty and he was ordered to pay a fine of $100 and the court costs.

From this judgment, the defendant appeals and assigns as error the admission of a breathalyzer test, which test was administered after the defendant had been placed under arrest, but before the defendant had been advised of any of his constitutional rights.

The evidence discloses that the defendant and a male companion had attended drag races in Lenoir County on Sunday afternoon, 26 March 1967. After leaving the drag races, the defendant was in a line of traffic intending to return to his home in Goldsboro, North Carolina. The line of traffic stopped in front of the defendant, and the defendant, driving a Comet automobile, ran into the rear of a Chevrolet automobile causing the Chevrolet automobile to strike a Plymouth automobile which at the time was being operated by Trooper J. S. Irving, an officer of the North Carolina State Highway Patrol. The Plymouth automobile driven by Trooper Irving, in turn, struck a Ford automobile so that there were four automobiles involved in the collision.

As Trooper Irving got out of his automobile, he observed the defendant getting out of the driver's seat of the Comet automobile. The defendant had a handkerchief up to his mouth. Trooper Irving and the defendant met at the Chevrolet automobile and Trooper Irving asked the defendant to permit him to look at his mouth. When the defendant removed the handkerchief from his mouth, Trooper Irving saw that the defendant's mouth was bleeding and, likewise, at that time detected an odor of alcoholic beverage upon the breath of the defendant.

Trooper Irving by radio called Troopers Baker and Wallace to the scene of the wreck and Troopers Baker and Wallace proceeded to investigate the wreck.

Trooper Baker placed the defendant under arrest and took him to the police station in Kinston. The wreck occurred about 4:55 p.m. and Troopers Baker and Wallace arrived about 5:00 p.m.

At 6:10 p.m. State Highway Patrolman P. C. Eure, a duly licensed breathalyzer operator, administered a breathalyzer test to the defendant.

At the time of administering the breathalyzer test to the defendant, he had not been advised of his constitutional rights. He was taken into the room where the breathalyzer machine was located and the arresting officer, Trooper Baker, told him to sit down and take the breathalyzer test and he did so.

Sometime after the breathalyzer test had been administered, the arresting officer, Trooper Baker, advised him as follows:

"I told him he had the right to remain silent, that anything he said could be used against him in court; that he had the right to

have a lawyer and have him present while he was being questioned; that if he could not afford a lawyer he had the right to request the court to appoint one for him before he answered any questions; that if you decide to answer any questions without a lawyer that you may refuse to answer any particular question and stop answering at any time you wish to do so; having been advised of your rights do you want to answer questions now before you talk with a lawyer?"

To this, the defendant stated that he knew what his rights were and proceeded to answer questions.

The breathalyzer test revealed 0.20 per cent by weight of alcohol in the blood of the defendant, and it was to the admission of this report that the defendant objects and excepts and assigns error.

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

Braswell & Strickland by Thomas E. Strickland for defendant appellant.

CAMPBELL, J. It is to be noted that Troopers J. S. Irving, T. A. Baker, and P. C. Eure all testified that in their opinion the defendant was under the influence of some intoxicating beverage to an appreciable extent.

The only question presented is whether or not a breathalyzer test may be administered under these circumstances without first advising the accused that he has the right to refuse to take the test.

In our opinion and we so hold the answer to this question is "yes".

G.S. 20-16.2 provides: "(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 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."

In addition to the implied consent given by the defendant by virtue of driving an automobile on the public highways as provided in the statute above mentioned, the breath test in the instant case was administered only after the defendant had been arrested and as an incident to his arrest. It is to be noted that there was no force or violence used in making the test and there was no conduct that "shocks the conscience" or "offends a sense of justice." See the article entitled: "Chemical Tests and Implied Consent", 42 N. C. Law Review 841. *State of Ohio v. Titak,* 144 N.E. 2d 255. The case of *State v. Mobley,* 273 N.C. 471 is distinguishable on its facts.

Affirmed.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIE WOOTEN.

(Filed 15 May 1968.)

1. Criminal Law § 104—

On motion to nonsuit, the evidence must be considered in the light most favorable to the State, and the State is entitled to the benefit of every reasonable inference fairly deducible therefrom.

2. Burglary and Unlawful Breakings § 2—

Defendant's breaking of a store window with the requisite intent to commit a felony therein completes the offense defined in G.S. 14-54 even though defendant is interrupted or otherwise abandons his purpose without actually entering the building.

3. Burglary and Unlawful Breakings § 5—

Evidence in this case *held* sufficient to be submitted to the jury on the issue of defendant's guilt of breaking or entering a filling station with the intent to commit the felony of larceny.

STATE *v.* WOOTEN.

APPEAL by defendant Wooten from *Cahoon, J.*, October 1967 Session of DARE Superior Court.

By indictments proper in form, the defendant Willie Wooten and one Rudolph Arnold were charged with the offense of breaking and entering the Midway Service Station, owned by Philip H. Quidley, with the intent to commit the felony of larceny.

By consent, the cases were consolidated for trial and each defendant pled not guilty. The jury found the defendant Wooten guilty and the defendant Arnold not guilty.

The evidence for the State, consisting primarily of the testimony of Deputies-Sheriff Johnson and Daniels, James Brown, and Philip H. Quidley, tended to show the following:

Mr. Quidley and his employee James Brown closed the station on 24 September 1967 and left between 12:00 and 12:30 at night. All the doors and windows were closed and locked and there were no broken windows. Approximately thirty minutes later — around 1:00 a.m. — Deputies Daniels and Johnson had occasion to go to the Midway Service Station. On reaching the north side of the station, they observed a station wagon parked on the north side of the building near the rear. The station wagon did not have its lights on. Deputy Daniels then observed Arnold come from behind the building and put a piece of metal into the back of the station wagon. Arnold then turned and moved toward the back of the building. The officers gave chase and Deputy Daniels observed Arnold, accompanied by two others, running toward the woods approximately 500-600 yards on the south side of the building. Deputy Daniels identified Wooten as one of the individuals seen running from the station. Deputy Daniels returned to the patrol car and drove to the woods while Officer Johnson proceeded on foot. Defendant Wooten was found about 35 feet inside the woods, lying behind a bush and acting as if he were asleep. No one else was found in the woods. Arnold was later found at his home and claimed to have just returned from Roper.

An examination of the Quidley building disclosed that a metal sash window on the south side had been pried open; a glass pane broken and a handle for opening and closing on the inside had been opened; part of a concrete block of which the building was constructed and located under the window sash was broken where a bar had been used for leverage; the metal sash of the window was bent in a half moon. No one was found in the building.

James Brown, employee of Quidley, testified that he saw both defendants in the station in the company of two women some time between 11:00 and 11:30 p.m. on the Saturday night in question;

that the group came in and looked around for sandwiches but did not buy anything.

Mr. Quidley testified that, on being called by the police, he returned to the station shortly after 1:00 a.m.; that he found the wooden door at the rear of the building open; that said door had been locked before he left; that a window was broken on the south side and its frame bent upward.

Defendant testified in his own defense and admitted that previously he had been convicted in four surrounding counties for breaking and entering.

The jury found Arnold not guilty but found defendant Wooten guilty, and from prison sentence imposed, defendant appealed.

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

McCown & McCown by Wallace H. McCown, attorneys for dedendant appellant.

BRITT, J. Defendant's first assignment of error is that the trial court erred in failing to grant his motion for judgment as of nonsuit.

On motion for nonsuit, we must consider the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference fairly deducible therefrom. *State v. Mullinax,* 263 N.C. 512, 139 S.E. 2d 639.

The pertinent language of G.S. 14-54 is, "If any person, with intent to commit a felony or other infamous crime therein, shall break *or* enter . . . any storehouse, shop . . . or other building where any merchandise . . . or other personal property shall be . . . he shall be guilty of a felony." (Emphasis added.) The breaking of the station window, with the requisite intent to commit a felony therein, completes the offense even though the defendant is interrupted or otherwise abandons his purpose without actually entering the building. *State v. Burgess,* 1 N.C. App. 104, 160 S.E. 2d 110.

"If a person breaks or enters . . . with intent to commit the crime of larceny, he does so with intent to commit a felony, without reference to whether he is completely frustrated before he accomplishes his felonious intent. . . . (H)is criminal conduct is not determinable on the basis of the success of his felonious venture." *State v. Nichols,* 268 N.C. 152, 150 S.E. 2d 21, and cases cited therein.

We hold that defendant's motion for judgment as of nonsuit was properly overruled. The circumstances in this case make it a question for the jury. *State v. Burgess, supra.*

Defendant's remaining assignments of error relate to the trial

judge's charge to the jury. We have carefully reviewed the charge and find it to be free from prejudicial error.

The defendant had a fair trial. The judgment of the Superior Court is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

DOROTHY B. LAWS v. RAYVON R. LAWS.

(Filed 15 May 1968.)

1. Trial § 1—

There is no statute or rule requiring that calendars be prepared of civil cases to be tried in the Superior or District Courts, and whether a calendar will be prepared rests in the discretion of the trial court. Rule of Practice in the Superior Court No. 22, G.S. 7A-193.

2. Same; Trial § 2—

There is no requirement that a defendant in an uncontested divorce action be given actual notice of the time of trial of the action at a criminal session of court. G.S. 7-72, G.S. 7A-190.

3. Divorce and Alimony § 1; Notice § 1—

The District Court has authority to hear an uncontested divorce action at a criminal session of court notwithstanding the case was not calendared for trial and defendant was not given actual notice of the time of trial.

4. Divorce and Alimony § 26—

To set aside a judgment of absolute divorce for irregularity or excusable neglect, the movant must show that he has a meritorious defense.

5. Divorce and Alimony § 13—

In an action for divorce on the ground of a one-year separation, a defendant waives his right to trial by jury by failing to file a request therefor prior to the call of the action for trial. G.S. 50-10.

APPEAL by defendant from *Ervin, J.*, at the November 1967 Civil Session of CALDWELL Superior Court.

Plaintiff filed her complaint for absolute divorce based on one-year separation on 24 April 1967 in the District Court of Caldwell County. Personal service was obtained on defendant on 11 May 1967, but defendant failed to answer or to request extension of time in which to answer. Neither party requested a jury trial.

On 15 June 1967, a regular one-day session of the District Court

for the trial of criminal cases was held in Caldwell County. At the request of plaintiff's attorney, the presiding judge at said session heard plaintiff's divorce action without a jury and granted her an absolute divorce.

On 26 June 1967, defendant filed a motion in the cause asking that the judgment be set aside, contending that the action was not calendared for trial on that date and that he was not given actual notice of the trial.

The motion was heard by the District Court on 11 September 1967 and was denied. Defendant appealed to the Superior Court where his motion was heard before Ervin, J., at the November 1967 Session of Caldwell Superior Court.

Judge Ervin affirmed the District Court and dismissed defendant's appeal. Defendant appealed to this Court.

No counsel for plaintiff appellee.
L. H. Wall attorney for defendant appellant.

BRITT, J. Defendant's sole assignment of error is that Judge Ervin erred in overruling defendant's motion to set aside the judgment of divorce, affirming said judgment, and dismissing his appeal.

Defendant contends that the District Court was without authority to hear plaintiff's divorce action without (1) calendaring the same for trial, or (2) providing defendant with actual notice of the trial.

Although in most counties printed calendars of civil cases to be tried are prepared, we find nothing in the statutes or rules that make this a requirement in the trial courts. In fact, Rule 22 of the Superior Court Rules provides that "the court will reserve the right to determine whether it is necessary to make a calendar." Thus, in the Superior Court, making a calendar for the trial of civil cases appears to be discretionary rather than mandatory; G.S. 7A-193 makes the same rule apply to the District Court.

Defendant contends that G.S. 7-72 (formerly C.S. 1444) requires that motions in civil actions at criminal terms of court may be heard upon *due notice* and cites *Dawkins v. Phillips,* 185 N.C. 608, 116 S.E. 723. The cited case was determined prior to 1947 when the General Assembly amended G.S. 7-72 by adding the following sentence: "At criminal terms of court, the court is also authorized and empowered to enter consent orders and consent judgments and to try uncontested civil actions and uncontested divorce cases." The 1947 Amendment makes no provision for notice of trial in uncontested divorce cases.

The 1965 General Assembly, in creating the District Courts, provided in G.S. 7A-190 as follows:

> "District courts always open. — The district courts shall be deemed always open for the disposition of matters properly cognizable by them. But all trials on the merits shall be conducted at trial sessions regularly scheduled as provided in this chapter."

Defendant admits in his brief that in a proceeding to set aside a judgment, either for irregularity or excusable neglect, the moving party must show that he has a meritorious defense. He contends that this does not apply to an action for divorce for "it is presumed as a matter of law that there is a meritorious defense, and the facts must be found by a jury under proceedings that are regular on their face."

Although G.S. 50-10 cited by defendant provides that the material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, this section now provides that the right to have the facts determined by a jury shall be deemed to be waived in divorce actions based on a one-year separation as set forth in G.S. 50-5(4) or 50-6, where defendant has been personally served with summons, unless the defendant, or the plaintiff, files a request for a jury trial with the clerk of the court in which the action is pending, prior to the call of the action for trial.

The Supreme Court of our State in *Becker v. Becker,* 262 N.C. 685, 138 S.E. 2d 507, in commenting on the jury trial waiver portion of said statute, declared: "A party may waive the right to a jury trial in civil actions by failure to follow the statutory procedure to preserve such right."

We find no merit in defendant's assignment of error, and the judgment of the Superior Court is hereby

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. JOHNNY STOKES, JR.

(Filed 15 May 1968.)

1. Crime Against Nature § 2—

A bill of indictment charging a male defendant with committing "the abominable and detestable crime against nature, to wit: male and male"

on a specified date in a named county is sufficient, it not being required that the name of the person with whom the defendant participated be set forth.

2. Same—

The practice in this State has been to charge the offense of crime against nature in language closely following the wording of the statute, G.S. 14-177, and where defendant feels that he may be taken by surprise or that the indictment fails to impart information sufficiently specific as to the nature of the charge, he may move for a bill of particulars.

3. Crime Against Nature § 1—

In this jurisdiction crime against nature embraces sodomy, buggery and beastiality as those offenses were known and defined at common law.

APPEAL by defendant from *Bailey, J.*, at the October 1967 Criminal Session of WILSON Superior Court.

The bill of indictment under which defendant was tried provides as follows:

> "The Jurors for the State upon their oath present, that Johnny Stokes, Jr., late of the County of Wilson, on the 10th day of September, in the year of our Lord one thousand nine hundred and sixty-seven, with force and arms, at and in the county aforesaid, unlawfully, wilfully and feloniously did commit the abominable and detestable crime against nature, to wit: male and male, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The defendant was represented in the Superior Court and is represented in this Court by his court-appointed counsel. When the case was called for trial, the defendant tendered a plea of *nolo contendere*, which plea was accepted by the Solicitor.

The trial court entered judgment ordering that the defendant be confined to the state prison for a term of not less than eight nor more than ten years. From said judgment, defendant, through counsel and in open court, gave notice of appeal to the Court of Appeals.

Thereafter, defendant, through counsel, filed a motion in arrest of judgment. The trial court denied the motion, defendant excepted and appealed to this Court.

T. Wade Bruton, Attorney General, by Harry W. McGalliard, Deputy Attorney General, for the State.

Gardner, Connor & Lee by D. M. Connor, attorney for defendant appellant.

BRITT, J. Defendant's sole assignment of error is as follows:

> "That His Honor, James H. Pou Bailey, erred in not allowing the motion in arrest of judgment for the reason that it appears from the indictment that the indictment fails to state the name of the person with whom the defendant participated in the crime alleged in the indictment."

In his brief, defendant cites and quotes at length from *State v. Partlow,* 272 N.C. 60, in which our Supreme Court declared:

> ". . ., that an indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. The purpose of such constitutional provisions is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case. (Authorities cited)."

At the same time, defendant concedes that under *State v. O'Keefe,* 263 N.C. 53, 138 S.E. 2d 767, the indictment charging the offense of crime against nature does not have to allege the details of the offense with particularity.

The State relies very heavily on *State v. O'Keefe, supra,* and insists that the indictment in the case at bar was sufficient.

While it would have been preferable for the Solicitor to have included in the indictment the name of the person who was either the co-partner in or victim of the offense, we hold that in this case failure to do so did not render the indictment fatally defective.

Requirements as to the form and content of bills of indictment charging crime against nature vary somewhat in the different jurisdictions, due to differing statutory provisions and court interpretations. The practice in North Carolina has been to charge the offense in language which closely follows the wording of the statute. *State v. O'Keefe, supra.* In this jurisdiction, crime against nature embraces sodomy, buggery, and beastiality as those offenses were known and defined at common law. *State v. O'Keefe, supra; State v. Griffin,* 175 N.C. 767, 94 S.E. 678.

In charging the offense of crime against nature, because of its vile and degrading nature, there has been some laxity of the strict rules of pleading. It has never been the usual practice to describe the

particular manner or the details of the commission of the act. *State v. O'Keefe, supra.*

Our statute, G.S. 14-177, now provides:

> "If any person shall commit the crime against nature, with mankind or beast, he shall be guilty of a felony, and shall be fined or imprisoned in the discretion of the court."

In *State v. Callett,* 211 N.C. 563, 191 S.E. 27, a case involving crime against nature, the bill of indictment did not state the name of the person with whom the defendant participated in the crime alleged; in fact, it did not state whether the offense involved man or beast. Our Supreme Court declared that the bill of indictment was fatally defective but for the reason that it did not contain the word "feloniously."

If the name of the co-partner or victim in offenses between human beings is required, what designation of the beast would be required if the offense is between man and beast?

Appropriate to this case is the following paragraph from *State v. O'Keefe, supra:*

> "Certainly the defendant has little cause for complaint if the law is reluctant to spread upon the public record the revolting details of the offense. Where the defendant feels that he may be taken by surprise or that the indictment fails to impart information sufficiently specific as to the nature of the charge, he may before trial move the court to order a bill of particulars to be filed. *State v. Tessnear,* 254 N.C. 211, 118 S.E. 2d 393; *State v. Shade,* 115 N.C. 757, 20 S.E. 537."

Defendant did not move for a bill of particulars in this case.

We find no merit in the defendant's assignment of error, and the judgment of the Superior Court is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES DANIEL LYNCH.

(Filed 15 May 1968.)

Criminal Law § 147—

Rule of Practice in the Court of Appeals No. 36 requires that all motions be made in writing.

STATE *v.* LYNCH.

APPEAL by defendant from *Fountain, J.*, 13 November 1967 Session of the Superior Court of EDGECOMBE County.

Criminal prosecution upon a warrant charging defendant with operating a motor vehicle on the public highways of North Carolina while under the influence of intoxicating beverages.

Defendant, an indigent person, was represented in the Superior Court and in this Court by W. O. Warner, court-appointed counsel, and Edgecombe County was directed to pay the costs of reproducing the record on appeal and brief in this Court.

Trial was by jury upon defendant's plea of not guilty. Verdict was guilty as charged.

From a judgment of imprisonment for a term of two years, the defendant appeals.

The case was duly and properly calendared for hearing and was called for hearing in open court by this Court on 23 April 1968.

No briefs were filed by the defendant or by the State.

MALLARD, C.J. The Clerk of this Court stated to the Court when this case was called for hearing that defendant's counsel had, prior to this date, informed him verbally that the defendant desired to withdraw the appeal.

This conversation, or verbal motion if it could be considered as such, does not comply with Rule 36 of the Rules of Practice in the Court of Appeals which requires that all motions be made in writing.

The record on appeal was not docketed in this Court within the time as provided by Rule 5 of the Rules of Practice in this Court.

There was no appellant's brief filed as required by Rule 28. However, there was no motion made to dismiss the appeal for noncompliance with the Rules.

On 26 April 1968 there was filed in this Court a motion signed by the defendant and W. O. Warner, his attorney, which reads as follows:

> "Now COMES the undersigned Attorney for James Daniel Lynch, the appealing defendant in the case of *State v. Lynch,* No. 68SC117, showing unto this Court that on or before March 26, 1968 the defendant through his undersigned counsel, filed the Record with the Clerk of the Court of Appeals, and that prior to the date for filing the defendant appellant's brief, the defendant elected to withdraw his appeal, and by this Motion request that he be allowed to withdraw his appeal and that same be certified back to the Edgecombe Superior Court."

There is no assertion made in this purported motion that it was

freely, voluntarily and understandingly made by the defendant.

Under the circumstances of this case, we do not consider defendant's motion to withdraw the appeal, and we do not dismiss the appeal for failure to comply with the Rules.

We have carefully considered this case as set out in the record on appeal on its merits.

The defendant's first three assignments of error relate to the admission of evidence or the failure to strike certain parts of the evidence. These are without merit and are overruled.

The defendant's fourth assignment of error is to the overruling of his motion for nonsuit. There was evidence offered by the State tending to show that the defendant was on the date charged operating a motor vehicle on a public highway while under the influence of intoxicating liquor, and the motion was properly overruled. 2 Strong, N.C. Index 2d, Criminal Law, § 104.

The defendant's assignment of error to the charge is without merit. Judge Fountain fully and accurately charged the jury.

The defendant's assignments of error to the failure of the Court to allow his motions to set aside the verdict, and in arrest of judgment, are without merit.

The defendant has had a fair trial, free from prejudicial error. No error.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. ROBERT WATSON.

(Filed 15 May 1968.)

1. Criminal Law § 114—

In stating the defendant's contentions in a prosecution for manslaughter, the defendant not having testified, a statement by the trial judge that defendant says he could not control the car for some unknown reason, followed by the judge's comment that "it is not in evidence so maybe it could not even be explained that this car went out of control" *is held* an expression of opinion by the trial judge in violation of G.S. 1-180.

2. Same—

Where the court expresses an opinion upon the weight of the evidence while stating the contentions of the parties, the appellant is not required to bring it to the trial judge's attention before verdict, but the question can be considered for the first time on appeal upon exceptions duly noted.

STATE *v.* WATSON.

APPEAL by defendant from *Parker, Joseph W., J.*, 20 November 1967, Session BERTIE Superior Court.

The defendant was tried upon a bill of indictment charging him with manslaughter. Specifically the defendant was charged with culpable negligence in the operation of an automobile which overturned causing the death of one of the passengers, Edith Yvonne Askew, near Powellsville in the early morning hours of 27 May 1967.

Upon a plea of not guilty, he was tried by a jury and found guilty as charged. Judgment of imprisonment for a term of not less than five nor more than seven years was entered.

T. W. Bruton, Attorney General, by T. Buie Costen, Staff Attorney, for the State.

Pritchett, Cooke and Burch by Stephen R. Burch for defendant appellant.

BROCK, J. The defendant excepts to four portions of the charge of the Court wherein the trial judge was stating contentions of the State and contentions of the defendant. In stating a contention of the defendant the trial judge said: "He says he could not control the car for some unknown reason, and it is not in evidence so maybe it could not even be explained that this car went out of control on this slight curve and turned over with the resulting damages testified by some of the other witnesses."

The defendant did not testify in this case; therefore it is obvious that he has not said ". . . [H]e could not control the car for some unknown reason . . ." The rest of the above-quoted portion of the charge constitutes a critical comment by the trial judge upon the defendant's failure to explain what caused the accident. Such a comment constitutes an expression of opinion by the trial judge in violation of G.S. 1-180.

The other portions of the charge to which the defendant excepts contain statements of contentions of the State. In this case the learned and experienced trial judge correctly explained the law to the jury and applied the law to the evidence, but in undertaking to state the contentions of the State and the defendant he has slipped into the error so often accompanying a statement of contentions; they become weighted too heavily on one side.

Objections to the statement of contentions should be brought to the trial judge's attention in order that a misstatement can be corrected by the trial judge before verdict; otherwise they are deemed to have been waived. *Doss v. Sewell*, 257 N.C. 404, 125 S.E. 2d 899. But the prohibition against the court expressing an opinion on the

evidence applies to the manner of stating the contentions of the parties as well as in any other portion of the charge. 4 Strong, N. C. Index, Trial, § 35, p. 341. Therefore, where the court expresses an opinion upon the weight of the evidence while stating contentions it is not required that it must be brought to the trial judge's attention before verdict; this question can be considered for the first time on appeal upon exceptions duly noted.

A statement of contentions by the judge is not required; and although a statement of contentions is permissible, the trial judge must exercise extreme care to retain, and convey the appearance of retaining, a cold neutrality. In this case we hold that in the statements of the contentions the trial judge expressed an opinion upon the weight of the evidence, and that this constituted prejudicial error which entitles the defendant to a new trial.

There were exceptions by the defendant to the introduction of evidence by the State which appear to have merit but we refrain from passing upon them because the questions will probably not arise again.

New trial.

CAMPBELL and PARKER, JJ., concur.

LESTER L. BRITT v. MALLARD-GRIFFIN, INC.

(Filed 15 May 1968.)

1. Negligence § 37b— Invitee's loss of hand held not due to defendant's negligence in maintaining power saw.

Plaintiff's evidence was to the effect that he purchased several items of building material from defendant's place of business, that he received permission to use a power-radial saw located on the premises in order to cut a piece of molding, that he had used the saw on previous occasions and was familiar with the fact that the saw could not be operated until a switch beneath the handle was depressed, that as plaintiff attempted to retrieve a piece of molding that had fallen underneath the saw he slipped on a mound of dirt and sawdust, grabbed for the handle of the saw to catch himself and thereby activated the switch, causing the saw to cut off his hand. *Held:* The evidence is insufficient to establish defendant's negligence, the condition of the saw and the premises surrounding the saw being as obvious to plaintiff as to the defendant.

2. Same—

The proprietor of a business establishment has the duty to keep his premises in a safe condition for the foreseeable use by his invitee and to

warn him of any hidden dangers or unsafe conditions of which the proprietor knew or in the exercise of reasonable supervision and inspection should have known and which were unknown to the invitee.

THIS is an appeal from *Copeland, S.J.*, 13 November 1967, Civil Session of the Superior Court of LENOIR County.

The plaintiff's evidence tended to show the following. The plaintiff, a 57 year old man in good health, on 27 November 1964 went to the defendant's place of business for the purpose of purchasing some building materials. He purchased several items of building material, including some one-half inch quarter-round molding. The molding was in a nine-foot length and he desired to cut it to a different length. He asked for and received permission to use a power-radial saw which was located next to the wall outside of the building. On previous occasions when he had made purchases from the defendant, he had procured permission to use the saw to cut his materials and had done so.

The plaintiff was familiar with this type of saw and had used a similar saw for many years and at one time had been an instructor at "Grady School" and used a saw similar to this for five years.

The plaintiff knew that a saw of this type was dangerous. The switch on the saw was beneath the handle, and the saw was constructed in such a way that the saw would not operate until the handle of the saw was held and the trigger switch under the handle pulled. When the trigger switch was released, the operation of the saw stopped.

When he went to use the saw on this occasion, the piece of molding slipped back up underneath the saw and he could not see the mark that he had made on it where he desired to make the cut. In order to retrieve the piece of molding, he reached in with his right hand.

At the time, the saw was not in operation, but in order to reach back to where the piece of molding was, the plaintiff stepped upon a small mound of dirt and sawdust which had accumulated near the saw bench.

The plaintiff stepped upon the mound of dirt and sawdust in order to get additional height so he could reach back under the saw and get the piece of molding which had slipped back behind. As the plaintiff stepped upon this mound, both feet slipped out from under him due to moisture which had accumulated in the dirt beneath the top layer of sawdust which appeared dry.

The unfortunate occurrence is described by the plaintiff: "When I slipped, I must have jerked hold of the switch to catch myself and just pulled the saw out and cut my hand off."

From a judgment of nonsuit entered at the close of the plaintiff's evidence, plaintiff appealed.

Turner and Harrison by Fred W. Harrison for plaintiff appellant.

White, Hooten & White by Thomas J. White, III, for defendant appellee.

CAMPBELL, J. The plaintiff, having gone to the defendant's place of business for the purpose of purchasing building supplies and having made his purchase, asked for and received permission to use the saw to prepare his purchase for his use.

Having given permission to the plaintiff to use the saw, the defendant owed a duty to the plaintiff to warn him of any hidden dangers or unsafe conditions of which the defendant knew or in the exercise of reasonable supervision and inspection should have known and which were unknown to the plaintiff. The condition of the saw and the premises surrounding the saw were known to the plaintiff and were as obvious to the plaintiff as to the defendant.

"The rule of law is stated in the same words for all these situations — the proprietor must use the care a reasonable man similarly situated would use to keep his premises in a condition safe for the foreseeable use by his invitee — but the standard varies from one type of establishment to another because different types of businesses and different types of activities involve different risks to the invitee and require different conditions and surroundings for their normal and proper conduct." *Hedrick v. Tigniere,* 267 N.C. 62, 67, 147 S.E. 2d 550.

The evidence for the plaintiff fails to show any defect in the saw and hence the case of *Casey v. Byrd,* 259 N.C. 721, 131 S.E. 2d 375, relied upon by the plaintiff is not applicable.

The evidence, when taken in the light most favorable to the plaintiff, fails to establish actionable negligence on the part of the defendant and the motion of nonsuit was properly entered.

Affirmed.

BROCK and PARKER, JJ., concur.

STATE v. RODNEY GRAY SPEAR.

(Filed 15 May 1968.)

1. Automobiles § 126; Criminal Law § 38—

Testimony of an officer that when he first saw defendant at the scene of the accident in question some 50 minutes after the accident occurred defendant was intoxicated, *is held* competent upon the question of defendant's intoxication at the time of the accident.

2. Automobiles § 127—

Evidence of the State tending to show that defendant was the driver of a vehicle involved in an accident and that defendant was under the influence of intoxicants at the scene of the accident some 50 minutes after the accident occurred, *is held* sufficient to be submitted to the jury on the question of defendant's guilt of driving upon a public highway under the influence of intoxicating liquor.

APPEAL from *Peel, J.* and a jury, October 1967 Session, TYRRELL County Superior Court.

The defendant was charged in a valid warrant with operating a motor vehicle on a street or highway while under the influence of intoxicating liquor. He was tried and the jury returned a verdict of guilty. A sentence of four months, suspended on condition that the defendant pay a fine of $100 and the costs of court, was imposed. From this sentence, the defendant appeals.

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

Bailey and Bailey by Carl L. Bailey, Jr., for defendant appellant.

CAMPBELL, J. The evidence for the State reveals that Trooper J. H. Withers, Jr., an officer of the North Carolina State Highway Patrol, received notice of a vehicle accident and went to the scene on U. S. 64 approximately one mile west of the Town of Columbia. Trooper Withers arrived at approximately 5:00 a.m. Sunday, 9 July 1967. There were tracks of a vehicle in the road leading from a wrecked vehicle for approximately one-tenth of a mile back to the hard surface. The vehicle was stopped in a yard, having crossed a ditch and knocked down a telephone pole. The wrecked vehicle was headed in an easterly direction and was stopped across the ditch on the north side of Highway U. S. 64.

The defendant was at the scene. Trooper Withers testified to a conversation with the defendant as follows: "He was thick-tongued and hard to understand and he kept repeating. I would ask him something and he would say, 'Well, Mr. Withers, can I ask you a personal question?' Then he would ask me something that would not

be personal at all, and say something else. Then he would say, 'Mr. Withers, can I ask you another personal question?' and that was the conversation."

The trooper further testified that the defendant told him he had been driving at a speed of 55 to 60 miles an hour and started to light a cigarette when he dropped it and reached down to pick it up and ran off the road; that the defendant said the accident occurred about ten minutes past four that morning; that he had had about four beers earlier that night, had consumed the last one about 11:30 p.m. and had had nothing to drink since that time. The trooper testified that the defendant was 26 years old, that he had known him for several years, and that he detected the odor of some intoxicant upon his breath.

The trooper expressed his opinion that the defendant was under the influence of some intoxicating beverage at the time he first saw him at the scene of the accident.

The defendant assigns as error the admission of the testimony of the trooper that in his opinion the defendant was under the influence of some intoxicating beverage at 5:00 a.m. The defendant asserts that this was too remote in time to be relevant and material. We find no merit in this contention, for that the evidence on behalf of the State shows that the defendant claimed to have had nothing to drink after 11:30 p.m. the preceding evening.

Intoxication decreases with the passage of time and a person is less apt to be affected by alcoholic beverages five and one half hours after last imbibing as compared with four and one half hours after the last beer. It certainly would be relevant and material. Passage of an appreciable length of time has a sobering effect and not vice versa.

The defendant further assigns as error the failure of the court to nonsuit the action at the close of the State's evidence. We are of the opinion that the evidence of the State as revealed in the testimony of Trooper Withers was sufficient to sustain a conviction.

The defendant's defense was based on the contention that he was not driving the vehicle at the time, and he offered testimony to that effect from various witnesses.

It was a case for the jury, and the charge of the court fairly and correctly set forth the law as it applied to the evidence and was free of any prejudicial error. We have reviewed all of the exceptions asserted by the defendant. He was given a fair and impartial trial. The jury, as the ultimate trier of the facts, determined the facts against the defendant.

Affirmed.

BRITT and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. RUDOLPH FINN.

(Filed 15 May 1968.)

APPEAL by the defendant from *Parker, Joseph W., J.,* November 1967 Session, BERTIE Superior Court.

Defendant was brought to trial upon an indictment, sufficient in form and content, charging that he willfully, unlawfully, maliciously, and feloniously, damaged the dwelling house of one Lester M. Evans by the use of dynamite.

The evidence for the State tended to show as follows: The defendant, along with Ronald G. Ayers and Louis Castelloe, on the night of 22 October 1967, was at various places drinking. They started at a truck stop and went to various places, including their homes, and engaged in a regular drinking party. At the suggestion of the defendant they went to the defendant's house and got two sticks of dynamite and they then went to the home of the prosecuting witness Lester M. Evans, where the defendant threw out two sticks of dynamite in front of Evans' house. They then went away and drank some more liquor at the defendant's house, and they decided they would go back and try exploding dynamite again at the home of Evans. The dynamite was prepared, and the defendant, along with the other persons, went back to the home of Lester M. Evans, the prosecuting witness, and threw the dynamite in his yard where it exploded, blowing off the venetian blind from the front door, the pictures off the wall, broke out window lights and jarred the foundation of the house.

Ronald G. Ayers and Louis Castelloe had previously pleaded guilty to the same charges against them, and they testified in this case as witnesses for the State.

The jury returned its verdict of guilty as charged, and the trial judge imposed sentence of confinement of not less than 15 years nor more than 20 years.

The defendant appealed.

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

V. F. Daughtridge; and Jones, Jones & Jones by Joseph J. Flythe, attorneys for defendant appellant.

BROCK, J. The defendant brings forward numerous assignments of error based upon 85 exceptions. He excepts to the refusal of the trial court to grant a continuance, he takes numerous exceptions to the admission of evidence, he excepts to the refusal of the trial court

to grant him a nonsuit, and he takes numerous exceptions to the charge of the court to the jury.

Defense counsel have carefully prepared the record on appeal and the brief, and have carefully preserved all of their exceptions. We have considered all of the assignments of error and find that they present no unusual or novel questions. We have carefully read the record and hold that the defendant has had a fair trial, free of prejudicial error. A seriatim discussion of the assignments of error would serve no useful purpose.

No error.

CAMPBELL and PARKER, JJ., concur.

E. H. HARRIS, LOMER DAVENPORT, RAMONA DAVENPORT, C. W. HARRIS, ELIZABETH HARRIS, AND HARLIN PATRICK, v. THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY AND THE INDIVIDUAL MEMBERS THEREOF, NAMELY, W. R. OWENS, P. B. BROWN, H. W. PRITCHETT, J. C. HASSELL, W. W. WHITE, AND RALPH HUNTER, TAX COLLECTOR OF WASHINGTON COUNTY.

(Filed 22 May 1968.)

1. Appeal and Error §§ 6, 20—

An immediate appeal does not lie as a matter of right from the denial of a motion to strike allegations in a complaint or from the overruling of a demurrer, the proper method for seeking an immediate review being a petition for a writ of *certiorari*. Court of Appeals Rule No. 4.

2. Schools § 7—

G.S. 115-116 provides a method by which the county commissioners may be compelled to call an election to obtain an additional tax levy for school purposes, but the county commissioners are not prohibited by the statute from levying an additional tax without a vote of the people for the purpose of supplementing teachers' salaries pursuant to G.S. 115-80(a).

3. Schools §§ 5, 7—

G.S. 115-80(b) merely provides budgetary procedures in instances where there has been an election to obtain a tax levy for school purposes and does not prohibit the county commissioners from levying an additional tax without a vote of the people for the purpose of supplementing teachers' salaries pursuant to G.S. 115-80(a).

4. Schools § 7—

The provision of G.S. 115-124 limiting the amount of supplemental taxes levied for operating schools of a higher standard than that provided by State support to the amount authorized by a vote of the people applies

only where there has been an election to obtain a tax levy and does not prohibit the county commissioners from levying an additional tax without a vote of the people for the purpose of supplementing teachers' salaries pursuant to G.S. 115-80(a).

5. Schools §§ 1, 7; Taxation § 6—

In levying an additional tax for the purpose of supplementing teachers' salaries pursuant to G.S. 115-80(a), the board of county commissioners acts as an agency of the State under a delegation of authority from the General Assembly to carry out the duty imposed upon it by Article IX, § 2, of the Constitution of North Carolina, to maintain a system of public schools, and there is no requirement that such levy be submitted to a vote of the people, the limitations imposed by Article VII, § 6, being applicable solely to municipal corporations and not to agencies of the State.

APPEAL by plaintiffs and defendants from *Peel, J.*, 16 November 1967 Session WASHINGTON Superior Court.

The plaintiffs, as citizens, residents and taxpayers of Washington County, bring this action against the members of the Board of Commissioners of Washington County in their official capacity as the Board of Commissioners, and against Ralph Hunter as Tax Collector of Washington County, to permanently restrain the levy and collection of an increase of fifteen cents on the one hundred dollar property valuation in the county property tax rate. The plaintiffs allege this increase is for the purpose of securing funds to supplement teachers' salaries in Washington County Public Schools, and that the proposed increase was not submitted to a vote of the people of the county. The plaintiffs allege that the acts of the County Commissioners in this respect are illegal and unconstitutional.

The plaintiffs' amended complaint is set out in full as follows:

"1. Plaintiffs are citizens, residents, taxpayers and property owners of Washington County, North Carolina, and act for themselves and other taxpayers similarly situated, and constitute a class of persons aggrieved and injured.

"2. The defendant Board of Commissioners of Washington County are the duly elected, qualified and acting members of the Board of County Commissioners of Washington County, a body politic and corporate. The defendant, Ralph Hunter, is the duly qualified Tax Collector of Washington County, regularly appointed and serving in such position with the duties and authorities provided by law, which include the collection of taxes levied and assessed by the defendant Board of Commissioners.

"3. Pursuant to the duties imposed upon them by law, the

defendant members of the Board of County Commissioners of Washington County met in a duly called session on the night of Monday, April 24. The purpose of the meeting was to discuss the problems and needs of the schools of Washington County. A motion was made by Commissioner W. R. Owens to increase the tax rate 15¢ per $100.00 for the stated purpose of raising the educational level of the Washington County schools. After the said motion was made, a second to it was withheld pending a joint discussion with the Board of Education of Washington County.

"After such discussion, the motion was reput and carried by a vote of three to two. The motion did not provide that the people of Washington County, including these plaintiffs, should be given an opportunity to pass upon the 15¢ per $100.00 additional levy for the purpose of raising the educational level of Washington County schools, but contemplated that the levy should be authorized solely upon the action of the defendant Board of Commissioners.

"As will be hereinafter more particularly set out, such action was contrary to the Statutory Law of the State of North Carolina, or if not so contrary, then it constituted a violation of Article 7, Section 6 of the Constitution of North Carolina and such action does not come within the purview of Article 9, Section 2. That such attempt to levy taxes is without an affirmative vote of the people of Washington County and such act is illegal, invalid and for an unauthorized purpose.

"4. The next meeting of the defendant Board was held on May 1, 1967. Minutes were duly adopted, the second paragraph of which consisted of the following sentence, 'The Board read and acknowledged the many letters and resolutions from citizens and organizations in the County that were sent in support of the 15¢ per $100.00 tax increase for education.' That the educational purpose which the 15¢ increased levy was supposed to accomplish was an increase in teachers's *(sic)* salaries in the Washington County schools for the school year 1967-68 ranging from approximately $100.00 per teacher to approximately $125.00 per teacher.

"Thereafter on May 19, 1967 the defendant Board met again for the stated purpose of accepting tentative gudgets *(sic)*, including the school budget for 1967-68. That attached to the minutes of said meeting is a local school fund budget which same disclosed an increase of $20,932 for instructional services. That it had been stated in the discussion concerning the raise

in teachers's *(sic)* salaries by all the Commissioners that the primary purpose of such increased levy was to furnish funds for the said increase in the teachers's *(sic)* salaries and in effect that was and is the said purpose.

"5. The defendant Board met next on June 5, 1967. The minutes of said meeting reveal that delegations were heard in support of the increased levy of 15¢ per $100.00 on the grounds that it was needed for better education. No further action was taken at the said meeting. The next meeting of the defendant Board was held on July 10, 1967. At said meeting a motion was made by Commissioner W. R. Owens, seconded by Commissioner P. W. Brown and supported by Commissioner W. W. White to the effect that a letter dated July 10, 1967 from the Washington County Board of Education to the County Commissioners shows a necessity and peculiar local condition to necessitate a supplement to the current expense fund. That the said letter was dated July 10, 1967 and was on the subject, 'Additional Request of Funds to Raise the Educational Level in Washington County Schools — April 24, 1967.'

"That the letter or communication further stated, 'That necessity has been shown to the Board of County Commissioners on the above mentioned date at the several meetings since then that the public schools in Washington County have unusual and great needs beyond the regular needs as listed below.' That the said listing below undertook, among other things, to show the necessity of supplementing teachers's *(sic)* salaries. That as previously alleged and set out, the main purpose of the request for additional funds to be derived from a 15¢ increase in the tax levy was to supplement school salaries and that the remaining purposes were, to use the words of the letter, 'Beyond the regular needs.'

"That at the said meeting the resolution above referred to was carried by a vote of three to two. Thereafter at the same meeting, the 1967-68 county budget with a levy of $1.85 per $100.00 was approved and accepted.

"6. That an examination of the said budget adopted at the meeting described in the preceding paragraph, and which same is attached to the minutes of said meeting, shows that the tax levy in the county has increased 15¢ on the $100.00 assessed evaluation from $1.70 in 1966-67 to $1.85 in 1967-68 and the items bringing about the said increase consists of supplements to teachers's *(sic)* salaries and as so labeled as supplements in the local school budget current expense fund.

"7. That the attempt to levy a supplemental tax of 15¢ on the $100.00 purportedly authorized by the defendant Board at its April 24, 1967 meeting and included in the budget for the school year 1967-68 at the July, 1967 meeting of the Board, is in violation of the Statutory Laws of the State of North Carolina and in particular General Statute 115-116 which provides in substance that when voters authorize funds for school supplement purposes by approving them in an election, such funds may be used for any object of expenditure for supplemental purposes. That the procedure set out in the said Statute is exclusive for the proper and legal authorization of the expenditure of funds for the purpose of supplementing teachers's *(sic)* salaries and particularly the supplement here proposed by the defendant board. That no provision has been made for the calling of an election by the defendant Board or by any other legally constituted authority of Washington County and that none is intended; but that the defendant Board of Commissioners are undertaking to collect a 15¢ on the $100.00 additional levy for the purpose of supplementing teachers's *(sic)* salaries without the use of the procedure provided in G.S. 115-116, and in defiance of the provisions thereof.

"8. That the attempted levy by the defendant Board hereinbefore described and identified is in violation of another provision of the Statutory Laws of the State of North Carolina, namely G.S. 115-224 which in substance provides that the tax levying authorities of the county may not levy taxes exceeding the amount of a tax levy authorized by a vote of the people. That such action is a clear violation of the provisions of this Statute.

"9. That the said attempted levy hereinbefore described is a violation of another of the Statutory Laws of North Carolina, namely G.S. 115-80(b). That this said Statute provides that in order to operate schools of a higher standard than that provided by state support, County Boards of Education shall file a budget not in excess of the rate voted by the people in their said county. That as aforesaid, the purpose for which the 15¢ on the $100.00 levy is made is for the purported purpose of operating schools of a higher standard than that provided by state support. That the same is shown on the current expense fund subhead of the local school fund budget for 1967-68 of Washington County and is identified therein as supplements to salaries of teachers.

"10. That the defendant Board has attempted to disguise its illegal additional 15¢ on the $100.00 levy, which same is made as previously alleged for an unauthorized purpose, by a typewritten notation at the bottom of page one of its local school fund budget which reads as follows, 'Appropriations for Codes 621-2 and 622-2 totaling $21,750 are to be derived entirely from non-tax funds listed in Codes 962 and 966-2 under sources of income.'

"That the said statement is tied by asterisks to and identifies sums set aside to supplement teachers's *(sic)* salaries. That the said Codes 962 and 966-2 are A.B.C. Funds and fines, forfeitures and penalties. That the said listing is a sham made for the attempted purpose of disguising the fact that the revenue to pay the said supplements is to be derived from the 15¢ additional tax levy.

"That the A.B.C. Funds in Washington County in years past and for the current year are paid directly into the General Fund after the expenses of law enforcement authorized by G.S. 18-45 have been met. That they have not been otherwise segregated and there has been no resolution of the said Board directing or authorizing their use for the purpose of school supplements. Even with the inclusion of the said A.B.C. Funds, there is not sufficient funds to make the said supplement and pay the other necessary expenses of Washington County without the 15¢ supplementary tax levy. That there is no authority for or legal method by which such segregation could be properly accomplished by the defendant Board for the school year 1967-68 and the same has not been legally so accomplished.

"11. That the defendant Board attempts to justify its illegal levy for an unauthorized purpose by stating that it relies upon G.S. 115-80, Subsection A, particularly as amended by Chapter 1263 of the Session Laws of 1967. That said amendment was not ratified until the 6th day of July, 1967 and the action of the Board which purports to furnish the authority for the said illegal levy for an unauthorized purpose was taken on April 24, 1967.

"12. That G.S. 115-80(a), even as amended, furnishes no Statutory authority for the imposition of the said levy for that the same must be read in conjunction with Subsection B of the same Statute, with G.S. 115-116 and other pertinent Statutes hereinbefore mentioned, and with the remainder of the said Chapter 115 of the General Statutes.

"13. That should the Court be of the opinion and so hold that the said Statute does furnish authority for the said 15¢ on the $100.00 levy, then the said Chapter insofar as it does purport to authorize such levy violates the Constitution of the State of North Carolina and in particular Article 7, Section 6 of the said Constitution which provides that no county shall levy or collect any tax except for the necessary expenses thereof unless approved by a majority of the electorate. The proposed levy hereinbefore described is not a necessary expense within the legal meaning of the term. That as aforesaid, no authorization has been given by the electorate for such supplemental levy. If the Court should be of the opinion that Statutory authority exists for such levy, then such Statutory authority directly contravenes Article 7, Section 6 of the Constitution of the State of North Carolina for the reasons stated.

"14. That the 15¢ tax levy or assessment is itself illegal and invalid and for an illegal and unauthorized purpose and the plaintiffs in their capacity as taxpayers of the unit in which the said tax is to be levied, namely Washington County, are, therefore, entitled to have the assessment and the collection of the same enjoined as provided by the laws of the State of North Carolina and in particular G.S. 105-406."

Plaintiffs applied for a restraining order pending final hearing. Defendants moved to strike certain portions of the complaint, and demurred to the complaint for failure to state a cause of action. Plaintiffs' application for a temporary restraining order, and the defendants' motion to strike and defendants' demurrer were heard by Judge Peel on 15 September 1967, on 29 September 1967, and on 4 October 1967. On 16 November 1967, Judge Peel entered an order wherein he made findings of fact from affidavits offered in evidence. He denied plaintiffs' application for a temporary restraining order, he denied defendants' motion to strike and overruled defendants' demurrer.

Plaintiffs and defendants appealed.

Wilkinson and Vosburgh by John A. Wilkinson, attorneys for plaintiffs appellants-appellees.

Bailey and Bailey by Carl L. Bailey, Jr., and Norman, Rodman and Hutchins by R. W. Hutchins, attorneys for defendants appellants-appellees.

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

BROCK, J. The Attorney General requested, and was granted, leave to file for the State a brief *amici curiæ* in this Court.

Defendants were not entitled to appeal as a matter of right from the Order denying their motion to strike or from the Order overruling their demurrer, but were entitled to an immediate review only upon allowance of a petition for writ of *certiorari.* Rule 4, Rules of Practice in the Court of Appeals of North Carolina. Even so, since plaintiffs have perfected their appeal, the entire case is before us; and this Court will consider the exceptions appearing in the record on appeal at this time.

DEFENDANTS' APPEAL.

The defendants assert by their demurrer to the complaint that, admitting the truth of all factual averments well stated and all relevant inferences of fact reasonably deducible therefrom, the complaint fails to state a cause of action. If the complaint does not state a cause of action, the plaintiffs' application for a temporary restraining order was properly denied. 4 Strong, N. C. Index 2d, Injunctions, § 12, p. 414. Likewise, if the complaint does not state a cause of action, the overruling of defendants' motion to strike from the complaint is immaterial, although many allegations seem to be evidentiary and argumentative. Therefore, a determination of whether the complaint does or does not state a cause of action should be made first.

The main theme and impetus of the allegations of the complaint are that the County Commissioners, on July 10, 1967, passed a resolution finding that the County Board of Education had shown a "necessity and peculiar local condition to necessitate a supplement to the current expense fund" and had requested additional funds to supplement the current expense fund (paragraph 5); that the County Commissioners, on July 10, 1967, approved the request and passed a resolution to increase the county tax levy from $1.70 to $1.85 per $100.00 valuation to supplement teachers' salaries in the public schools of Washington County; and that this was done without submitting the question of the fifteen cent increase to a vote of the people (paragraphs 3, 4, 5 and 6). These allegations are admitted by the demurrer.

Effective 6 July 1967 the 1967 Legislature rewrote the last paragraph of G.S. 115-80(a) to read as follows:

> "Notwithstanding any other provisions of this chapter, when necessity is shown by county and city boards of education, or peculiar local conditions demand, for adding or supplementing items of expenditure in the current expense fund, *including additional personnel and/or supplements to the salaries of per-*

> *sonnel,* the board of county commissioners may approve or disapprove, in part or in whole, any such proposed and requested expenditure. For those items it approves, *the board of county commissioners shall make a sufficient tax levy to provide the funds:* Provided, that nothing in this chapter shall prevent the use of federal or privately donated funds which may be made available for the operation of the public schools under such regulations as the State Board of Education may prescribe." (Emphasis added.)

If the foregoing grant of authority to tax is not violative of the Constitution of North Carolina, or contradictory of some other statute, the action of the County Commissioners in increasing the tax levy seems authorized.

The plaintiffs assert that the increased levy without a vote of the people violates the provisions of G.S. 115-116, and is therefore unlawful. G.S., Chap. 115, Art. 14 makes provision whereby various boards of education, as well as school committees of a district and the people in the area of a school system may petition for an election for various purposes. G.S. 115-116 defines the purposes for which an election may be called. G.S. 115-118 defines who may petition for an election. G.S. 115-119 spells out the information which must be contained in the petition. G.S. 115-120 requires the Board of Education to whom a petition may be addressed to give the petition due consideration. G.S. 115-121 requires the county commissioners (or the governing body of the municipality) to call an election upon petitions approved by the board of education. G.S. 115-122 through 115-124 provide the rules for such an election and the rules governing various matters following such an election. The clear intent of these statutes is to provide a method by which the county commissioners may be compelled to call an election to obtain a tax levy or for other purposes. None of these statutes would prohibit the county commissioners, upon a proper finding of necessity, from levying an additional tax to supplement the current expense fund for the purpose of supplementing teachers' salaries, if the county commissioners are otherwise authorized to do so.

The plaintiffs assert that the increased tax levy without a vote of the people violates the provisions of G.S. 115-80(b). This section is entitled "Supplemental Tax Budget" and merely provides for budgetary procedures in instances where there has been an election to obtain a tax levy. It in no way prohibits the county commissioners, upon a proper finding of necessity, from levying an additional tax to supplement the current expense fund for the purpose of sup-

plementing teachers' salaries, if they are otherwise authorized to do so.

Plaintiffs assert that G.S. 115-80(a) is unconstitutional because it violates Article VII, Section 6 (formerly Section 7), of the Constitution of North Carolina, and therefore can furnish no authority for the action of the county commissioners in levying the tax without submitting the question to a vote of the people. Article VII, Section 6 (formerly Section 7), of our Constitution is as follows:

> "No debt or loan except by a majority of voters. — No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless approved by a majority of those who shall vote thereon in any election held for such purpose. (Const. 1868; 1947, c. 34.)"

Constitutional limitations upon the independent powers of a county, city, town, or other municipal corporation is not the real question raised by this appeal. Under G.S. 115-80(a) a county operates under a delegation of authority from the General Assembly to carry out a function imposed upon the General Assembly by Article IX, Section 2 of the Constitution of North Carolina; therefore the real question is whether there is a constitutional limitation upon the authority of the General Assembly to authorize a tax levy to carry out its function of providing for a system of public schools. The pertinent parts of Article IX, Section 2, reads as follows:

> "General Assembly shall provide for schools; separation of the races. — The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years. . . . (Const. 1868; Convention 1875.)"

In the case of *Bridges v. Charlotte,* 221 N.C. 472, 20 S.E. 2d 825, the Supreme Court was considering the constitutionality of a tax levy, which was not submitted to a vote of the people. The levy was made by the local governing authorities for the purpose of payments to be made to the State Retirement System for the teachers in the Charlotte school district. It was contended there that the tax was not for a necessary purpose and that the statute authorizing a levy for that purpose was unconstitutional. The tax levied was defended under the authority of Chapter 24, Public Laws of 1941, section 8,

subsection (c) (now codified as G.S. 135-8(b)(3)), which read in part as follows:

> "Provided, that for the purpose of enabling the County Boards of Education and the Board of Trustees of city administrative units to make such payment, the tax levying authorities in each such city or county administrative unit are hereby authorized, empowered and directed to provide the necessary funds therefor."

In passing upon the question in the *Bridges* case our Supreme Court said:

> "The plea that the levy of such a tax by a county, without submission to popular vote, is prohibited by Article VII, section 7, of the Constitution, as not being for a necessary expense was raised, and settled in *Collie v. Commissioners,* 145 N.C. 170, 59 S.E. 44, by the declaration that the requirement that the public schools be maintained is a mandate of a coordinate article of the Constitution of equal dignity and force, and must be obeyed; and that Article VII, section 7, had no relation by way of limitation on the taxing power exercised for that purpose. Three of the Justices of the great Court which decided this case, in separate concurring opinions, wrote their names upon this monument to our educational progress.
>
> "There was in the mind of the Court a clear comprehension of the functions and powers of the State and of the agencies set up to perform this duty, and there was no confusion at any time as to where the ultimate duty and power was seated; and none, we think, as to the consequences which must follow a delegation of this duty and power as a matter of convenience of administration to the agencies selected. Nor should there be any doubt today that maintenance of the public schools and the furnishing of those things which are reasonably essential to that end are within the mandatory provision of the Constitution, unaffected by the 'necessary expense' provision contained in the municipal section of the Constitution.
>
> "The State is not a municipality within the meaning of the Constitution. It seems to us self-evident that it may perform the duties required of it by the Constitution, as well as exercise those powers not otherwise prohibited, without embarrassment by constitutional limitations expressly operating on municipalities alone. Const., Art. IX, secs. 2, 3; Const., Art. VII, sec. 7. The public school system, including all its units, is under the exclusive control of the State, organized and established as its instru-

mentality in discharging an obligation which has always been considered direct, primary and inevitable. When functioning within this sphere, the units of the public school system do not exercise derived powers such as are given to a municipality for local government, so general as to require appropriate limitations on their exercise; they express the immediate power of the State, as its agencies for the performance of a special mandatory duty resting upon it under the Constitution, and under its direct delegation."

* * *

"We understand that what courts appropriately refer to as the 'mandate' of Article IX of the Constitution carries with it not merely the bare necessity of instructional service, but all facilities reasonably necessary to accomplish this main purpose. And in this respect the word 'necessary' has long been regarded as a relative, not an exigent, term — certainly not one which may be used to drain the life and substance out of a project with which it is connected, but one which itself must accept an interpretation consonant with the reasonable demands of social progress. We do not differ with the General Assembly in its policy as expressed in this legislation, but we point out that the matter is exclusively within the province of that body."

In a concurring opinion in the *Bridges* case, Justice Barnhill had this to say:

"It is the duty of the Legislature, under the mandate of the Constitution, to establish and maintain, within the means of the State, 'a general and uniform system of public schools.' The schools thus provided must be maintained for a minimum term of six months each year. Subject to this limitation the discretionary power to determine what is necessary and adequate and within the means of the State rests in the General Assembly. Any reasonable expense incurred to this end may be met by taxation without a vote of the people."

We hold therefore that the action of the county commissioners, as described by the allegations of the complaint, does not violate the provisions of G.S. 115-116, nor G.S. 115-124 (alleged as 115-224 in the complaint), nor G.S. 115-80(b).

We also hold that the action of the county commissioners in increasing the county tax levy by fifteen cents on the one hundred dollar property valuation for the purpose of supplementing teachers' salaries without submitting the question of the levy to a vote of

the people, as alleged in the complaint, was authorized by G.S. 115-80(a).

In view of what has heretofore been said, we further hold that the last paragraph of G.S. 115-80(a), is authorized by N. C. Const., Art. IX, § 2, and does not violate the provisions of N. C. Const., Art. VII, § 6 (formerly § 7); and that the enactment by the General Assembly of the last paragraph of G.S. 115-80(a) was a constitutional enactment.

It follows that the conduct of the county commissioners, as described in the complaint and admitted by demurrer, was in compliance with a constitutional statute, and the plaintiffs have, therefore, failed to state a cause of action. The question of whether the budget allotments were changed becomes immaterial in the light of this holding.

The trial judge was correct in denying plaintiffs' application for a restraining order, but he was in error in overruling defendants' demurrer to the complaint. The demurrer should have been sustained and the action dismissed.

Upon plaintiffs' appeal, affirmed.

Upon defendants' appeal, reversed.

MALLARD, C.J., and PARKER, J., concur.

REDEVELOPMENT COMMISSION OF THE CITY OF WASHINGTON, NORTH CAROLINA v. J. R. ABEYOUNIS AND WIFE, JAMAL R. ABEYOUNIS.

(Filed 22 May 1968.)

1. Eminent Domain § 9—

A Redevelopment Commission has the power to acquire property by eminent domain, G.S. 160-462(6), and this right is to be exercised in accordance with the provisions of G.S. Chapter 40.

2. Eminent Domain § 1—

The exercise of the power of eminent domain is in derogation of common right, and all laws conferring such power must be strictly construed.

3. Eminent Domain § 9—

The petition in a proceeding by a housing authority to condemn land for a housing project must affirmatively show compliance with the statutory requirements, including the approval by the community governing body of the redevelopment plans, the contents or adequacy of the plan for redevelopment, and the nature of the public business and the specific use

to which the land will be put, and if the petition fails to allege any of these essentials it is fatally defective. G.S. 160-463.

4. Same—

The procedures required by G.S. 160-463 are designed to guard against arbitrary action by either the governing body of the community or the Redevelopment Commission, thereby affording protection to property owners in the affected area, and unless the procedures are strictly followed a Redevelopment Commission has no authority to exercise the power of eminent domain.

5. Same—

Under G.S. 160-465(2) there is an instantaneous condemnation merely by the act of the Commission paying into court the sum specified by the commissioners of appraisal.

APPEAL by both petitioner and respondents from *Peel, J.*, 16 October 1967 Session BEAUFORT Superior Court.

The petitioner, Redevelopment Commission of The City of Washington, North Carolina, seeking to condemn two lots of land belonging to respondents, filed the following Petition in the Superior Court on 2 September 1966:

"The petitioner, Redevelopment Commission of the City of Washington, North Carolina, respectfully shows to the Court:

"1. That the Petitioner is a body corporate and politic, exercising public and essential governmental powers granted to it by its charter and under the provisions of Article 37 of Chapter 160 of the General Statutes of North Carolina.

"2. That Petitioner possesses under the laws of the State of North Carolina the right of eminent domain to enable it to acquire properties necessary to carry out its urban redevelopment plans.

"3. That the lands herein sought to be acquired lie within an area designated as East End Urban Renewal Area; that Petitioner has developed and obtained due approval of the plans for the redevelopment of said area; that it is reasonably necessary for petitioner to acquire fee simple title to the lands herein sought to be acquired in order to adequately carry out said redevelopment plans.

"4. That in conformity with the redevelopment plans hereinabove referred to, petitioner is proceeding diligently with the redevelopment of said area and the acquisition of the lands necessary to carry out said plans; that petitioner has on hand or available to it sufficient funds to accomplish said plans.

"5. That petitioner has in good faith attempted to purchase property herein sought to be acquired from the respondents and has offered respondents fair and just compensation for said property; that petitioner has been unable to acquire said property by negotiation and that compensation therefor must be established pursuant to the provisions of Chapter 40 of the General Statutes of North Carolina.

"6. That the lands herein sought to be acquired by petitioner are described as follows:"

(First and Second Parcels are here described by metes and bounds in the Petition.)

"7. That petitioner is informed and believes and upon such information and belief alleges that the owners of the lands hereinabove described and their places of residence and ages, if minors, so far as the same can by reasonable diligence be ascertained, together with the holders of liens or encumbrances thereto, are as follows:

"J. R. Abeyounis	409 Bonner Street Washington, North Carolina
"Jamal R. Abeyounis	409 Bonner Street Washington, North Carolina

"8. That the interest in the above lands sought to be acquired is a fee simple title free and clear of all liens and encumbrances.

"WHEREFORE, petitioner prays:

"1. That this Court enter an order for the appointment of three competent and disinterested freeholders, residing in Beaufort County, whose duty it shall be to appraise the value of the property herein sought to be acquired by petitioners as above set out and that the Court fix a time and place of the first meeting of said Commissioners.

"2. For a decree declaring petitioner the owner of said lands upon payment of just compensation therefor to be fixed by the Commissioners in accordance with law.

"3. For such other and further relief as may be just and proper in the premises."

By Answer respondents admit all of the allegations of the Petition except those contained in paragraphs 4 and 5 thereof.

Upon exceptions to the award of the commissioners of appraisal, the issue of just compensation was submitted to and answered by a jury at the 16 October 1967 Session. Thereafter respondents demurred *ore tenus* to the Petition for failure to state a cause of action, and moved in arrest of judgment. The trial judge sustained the demurrer, arrested judgment, and dismissed the action.

From the order sustaining the demurrer, arresting judgment, and dismissing the action, petitioner appeals.

Respondents gave notice of appeal, assigning as error rulings by the trial judge upon admissions and exclusions of evidence, and portions of the charge.

William P. Mayo, attorney for petitioner, appellant-appellee.

Wilkinson and Vosburgh by James R. Vosburgh, attorneys for respondents, appellants-appellees.

BROCK, J. One of the powers granted to a Redevelopment Commission under G.S. Chapter 160 is the power to acquire property by eminent domain. G.S. 160-462(6). Under the Urban Redevelopment Law as originally enacted in 1951, this power was to be exercised in the manner provided by law for the exercise of such right by municipalities. Chapter 1095, sec. 12, Session Laws of 1951, codified as G.S. 160-465. The manner provided by law for the exercise of the right of eminent domain by municipalities is set out in G.S. 160-205, which in turn prescribes for municipalities the manner and procedure in G.S., Chap. 40, Art. 2 (G.S. 40-11, *et seq.*). In 1965 the Legislature amended G.S. 160-465 to provide that a Redevelopment Commission may exercise the right of eminent domain in accordance with the provisions of G.S. Chap. 40, Art. 2. Chap. 679, sec. 3, Session Laws of 1965. This latter amendment made no change in the basic prerequisites to a Redevelopment Commission's gaining the authority to exercise the power of eminent domain; it merely abandoned reference to procedures by municipalities. Therefore the basic prerequisites to a Redevelopment Commission's gaining the authority to exercise the power of eminent domain are now, and at all times have been, the prerequisite procedures required by G.S., Chap. 40, Art. 2, and Chap. 160, Art. 37, with the modifications as now set out in G.S. 160-465. It follows then that the prerequisites to gaining authority to exercise the power are the same as those applicable at the time of the decision in *Redevelopment Commission v. Hagins*, 258 N.C. 220, 128 S.E. 2d 391 (1962).

The allegations in the present Petition are very similar to those condemned by the opinion in the first *Hagins* case, *supra.* There the Supreme Court held to be fatal the failure of the Commission to show by its allegations that the provisions of G.S. 160-463 had been complied with. Similarly, in the present case, the petitioner has failed to show by its allegations that the requirements of G.S. 160-463 have been complied with. The statute under which the petitioner purports to proceed (G.S. 40-12) requires that the condemning corporation must state in its Petition ". . . in detail the nature of such public business, and the specific use of such land."

Petitioner urges that the allegations of paragraph 3 of the Petition, which are admitted by the Answer, supplies the showing of a compliance with G.S. 160-463 as was approved in the second *Hagins* case. *Redevelopment Commission v. Hagins,* 267 N.C. 622, 148 S.E. 2d 585 (1966). We do not agree with this contention.

The Petition of the Redevelopment Commission is not set out in the opinion in the second *Hagins* case, and in order that the difference may be made apparent we set forth here in full the Petition which was before the Supreme Court in the second *Hagins* case:

"PETITION FOR CONDEMNATION.

"COMES Now the petitioner, Redevelopment Commission of Greensboro, and respectfully shows unto the Court:

"I. That the petitioner is a body politic and corporate, having and exercising the rights, powers and authority conferred by Chapter 75 of the Ordinances of the City of Greensboro, as amended, by the applicable General Statutes of North Carolina, and powers contained in its Article of Incorporation.

"II. That on the 15th day of October, 1951, the City Council of the City of Greensboro regularly, lawfully and unanimously enacted an ordinance designated as 'Chapter 75, Redevelopment Commission of the City of Greensboro;' that thereafter a Certificate of Incorporation was issued by the Secretary of State of the State of North Carolina. Copies of said resolution and Certificate are attached hereto, marked Exhibits 'A' and 'B', and made a part of this petition.

"III. That the petitioner is informed and believes, and alleges upon information and belief, that those persons whose names and addresses are set forth in Exhibit 'C', attached hereto and made a part hereof, are the only persons who have or claim to have an interest in the property described in the attached Exhibit 'D', insofar as the same can, by reasonable

diligence, be ascertained; that said persons are under no legal disability except as stated in Exhibit 'C'.

"IV. That the tract or tracts of land to be taken by this proceeding are described in Exhibit 'D', attached hereto and made a part hereof.

"V. That the petitioner is informed and believes, and alleges upon information and belief, that the said property is subject only to such liens and encumbrances as are set forth in Exhibit 'C', attached hereto.

"VI. That on the 13th day of December, 1955, the Greensboro Planning Board certified an area located within the City of Greensboro to be a blighted and redevelopment area, to be known as CUMBERLAND PROJECT, N. C. R-1. A copy of said certification, together with an amendment thereto, is hereto attached, marked Exhibit 'E', and made a part of this Petition. A map of said area is hereto attached, contained in Exhibit 'F', page 4, and made a part of this Petition. That said area meets all requirements as set out in G.S. 160-454, *et seq.*, designating said area as a slum and blighted area.

"VII. That thereafter the Redevelopment Commission of Greensboro prepared a redevelopment and slum clearance plan for the area referred to in Paragraph VI hereof, hereinafter referred to as CUMBERLAND PROJECT, N. C. R-1; that said slum clearance and redevelopment plan is attached hereto, marked Exhibit 'F', and made a part of this Petition.

"VIII. In conformity with such a redevelopment area plan of slum clearance, on the 18th day of August, 1959, after due notice as by law required, a public hearing on said redevelopment and slum clearance plan was held before the Redevelopment Commission of Greensboro, and the plan, as set forth in Paragraph VII hereof, was approved. A copy of the action of the Redevelopment Commission of Greensboro in approving said plan and an amendment thereto is hereto attached, marked Exhibit 'G' and made a part of this Petition. Thereafter the Greensboro Planning Board of the City of Greensboro reaffirmed that CUMBERLAND PROJECT N. C. R-1 is a blighted and slum area within the meaning of G.S. 160-454, *et seq.* A copy of said resolution reaffirming said fact is attached hereto, marked Exhibit 'H' and made a part of this Petition. A copy of a resolution approving said plan, as amended, by the Greensboro Planning Board of the City of Greensboro is hereto attached, marked Exhibit 'I' and made a part of this Petition.

"IX. That the plan of slum clearance as approved by the Greensboro Planning Board and presented to the City Council was heard, after due advertisement, at a public hearing before said Council on the 5th day of October, 1959, as provided by law. That the City Council passed a proper resolution approving said plan as presented, the same being attached hereto, marked Exhibit 'J', and made a part of this Petition.

"X. In conformity with the redevelopment plan, as set forth in paragraph VII hereof and the attached Exhibits, the Redevelopment Commission of Greensboro is proceeding with the plan for redevelopment of the area; that monies have been and will be expended in the accomplishment of said plan.

"XI. The redevelopment area as shown by Exhibit 'F', page 4, attached hereto, is 'a blighted area' within the meaning of G.S. 160-454, *et seq.*, and it is essential to the public welfare, health and safety of the City of Greensboro that the slum conditions and their attendant ills, existing in such slum and 'blighted areas,' be abolished under a plan and conditions which will prevent a recurrence of the same in the future. That the abolition of slum conditions and the taking of private property to effect said plan of redevelopment is and has been held to be for a public purpose.

"XII. The real property described in Exhibit 'D', attached hereto, lies within and is a part of the redevelopment area shown by Exhibit 'F', page 4, attached hereto, and is an integral part of the entire slum clearance and redevelopment project; it is necessary that said real property be taken in order to accomplish the objectives of the slum clearance and redevelopment project.

"XIII. The Redevelopment Commission of Greensboro proposes in good faith to carry out the plan for redevelopment and slum clearance set forth in paragraph VII hereof; that public funds received by the City of Greensboro, together with certain street improvements, installation of water and sewer mains, and other public improvements, have been spent and made by the City of Greensboro for the public purpose of slum clearance; that the petitioner has been advised and so alleges that the City of Greensboro will continue to spend public funds and perform public improvements within the area until said redevelopment plan has been completed; that all of the monies spent and allocated by the City of Greensboro have been and will be

received from sources other than income from *ad valorem* taxes. That the plan of redevelopment heretofore approved by the City Council has qualified under the Home and Housing Finance Act passed by Congress whereby two-thirds (⅔) of all expense and cost of said project is paid from Federal funds as provided in said Act. That petitioner has adequate funds on hand to acquire respondent's property.

"XIV. That petitioner has been unable to acquire said property for that the parties have been unable to agree on the fair market value of same, and respondent has refused to accept the sum offered for the said property by the petitioner. That efforts to acquire said property by purchase having failed, the petitioner, by resolution duly adopted on the 18th day of April, 1961, authorized that said property be condemned as provided by G.S. 160-465 and G.S. 40-11, *et seq.*

"XV. That by G.S. 160-465 the petitioner is granted the power of eminent domain to be exercised in the manner provided in G.S. 160-204, 205, pertaining to said power as exercised by municipalities; that the petitioner has complied with all requirements and requisites set forth in G.S. 160-463(a)-(k) inclusive; that petitioner has proceeded under G.S. 40-11, 40-12, *et seq.*, entitled Eminent Domain, and has met all requirements thereunder.

"WHEREFORE, petitioner prays that the Court appoint Commissioners of Appraisal for the purpose of determining the amount of compensation that should be paid as damages to the respondent(s) for the taking of said property, as set forth in Exhibit 'D' hereof, and for such other and further relief as to the Court may seem just and proper.

"THIS the 14 day of January, 1963."

The allegations of the Petition in the present case fall far short of showing compliance with the provisions of G.S. Chap. 160, Art. 37, as is required by G.S. Chap. 40, Art. 2. If it should seem burdensome to make all of the necessary allegations and showings each time a Petition is filed to acquire title to a parcel of land, we reiterate here what was said by Justice Higgins in the first *Hagins* case, *supra:* "We may seriously question whether the Legislature contemplated a separate judicial proceeding for each lot or parcel of land any more than it contemplated a separate plan for each parcel. It seems obvious the plan embraces the whole area as a unit. . . . Reason does not appear why the condemnation proceedings covering the whole planned area may not be instituted and all interested

parties served with process and all defenses heard, leaving only the question of just compensation due each respondent to be determined in a separate inquiry."

The admission in the Answer of the allegations of paragraph 3 of the Petition admits only (1) that respondents' property lies within an area, (2) that petitioner has developed and obtained approval of plans for redevelopment, and (3) that in order to carry out the plans it is necessary to acquire respondents' property. This admission does not admit, for example, that the governing body of the community has approved the redevelopment plans. G.S. 160-463(c). It does not admit, for example, the contents or adequacy of the plan for redevelopment. G.S. 160-463(d). Nor does the stipulation ". . . that the only questions remaining to be determined *by the jury* was the fair market value of the two parcels . . ." (Emphasis added.) cure any defect in the pleadings. Whether stipulated or not, the law provides that the only question for determination by the jury is the issue of just compensation. G.S. 40-20.

The exercise of the power of eminent domain is in derogation of common right, and all laws conferring such power must be strictly construed. *Redevelopment Commission v. Hagins,* 258 N.C. 220, 128 S.E. 2d 391; *R. R. v. R. R.,* 106 N.C. 16, 10 S.E. 1041. By the very terms of G.S. 40-12 the Petition must state in detail the nature of the public business and the specific use to which the land will be put. These allegations, we think, are as much jurisdictional in their character as is an allegation of the fact that the petitioner and the respondents have been unable to agree. *R. R. v. R. R., supra.*

G.S. 160-463 provides the minimum that the redevelopment plans must include; it provides the procedures which must be followed before the governing body of the community may approve the plans; and it provides that the governing body of the community must approve the plans before the Commission may acquire property. The procedures required by this statute are designed to guard against arbitrary action by either the governing body of the community or the Redevelopment Commission, and thus afford protection to persons owning property in the affected area. Unless these procedures are strictly followed, a Redevelopment Commission has no authority to exercise the power of eminent domain.

Under the provisions of G.S. 160-465(2), there is an instantaneous condemnation merely by the act of the Commission paying into court the sum specified by the commissioners of appraisal. Therefore, the safeguards so carefully spelled out by the Legislature would mean very little indeed if the Commission were not required to al-

lege its adherence to the prerequisite procedures which give rise to a right to exercise the power of eminent domain.

A Redevelopment Commission, in order to state a cause of action for condemnation, must properly allege, *inter alia,* a redevelopment plan which complies with G.S. 160-463; the compliance with the procedures for approval of the redevelopment plan; and the approval of the plan by the governing body of the area in which the project is located.

The respondents' demurrer *ore tenus* to the Petition for failure to state a cause of action was properly sustained, and the action was properly dismissed.

What has been heretofore said renders moot the respondents' assignments of error, and accordingly we do not pass upon respondents' appeal.

The result is this:

Upon petitioner's appeal, affirmed.

MALLARD, C.J. and PARKER, J. concur.

STATE OF NORTH CAROLINA v. ROBERT BRANCH.

(Filed 22 May 1968.)

1. Burglary and Unlawful Breakings § 3; Indictment and Warrant § 9—

An indictment charging the burglarious breaking and entry of the dwelling house of a named person situated in a specified county sufficiently describes the subject premises to withstand a motion to quash.

2. Criminal Law § 75—

The requirements of *Miranda v. Arizona,* 384 U.S. 436, are not applicable to retrials of cases which were originally tried before the effective date of that decision.

3. Criminal Law § 34—

In a prosecution for second degree burglary and larceny, the admission of testimony bearing upon the discovery of stolen property at defendant's home and other places which is not related to the offense for which defendant is being tried *is held* to be prejudicial error, evidence of other offenses being inadmissible if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged.

APPEAL by defendant from *Parker, Joseph W., J.,* at 2 January 1968 Criminal Session of NASH County Superior Court.

The indictment charges that defendant did feloniously and burglariously break and enter the unoccupied house of J. C. Jones, situate in Nash County, North Carolina, in the night of 12 February 1962.

The defendant appeals from a verdict of guilty as charged.

T. W. Bruton, Attorney General by James F. Bullock, Deputy Attorney General, for the State.

Fields, Cooper and Henderson by Leon Henderson, Jr., for defendant appellant.

BROCK, J. At the outset, counsel for defendant state that assignments of error 1, 3, 4, 7, 18 and 20 are abandoned, conceding that they are without merit in fact and law. This is in accord with proper and candid procedure in appellate practice.

The defendant's second assignment of error is to the refusal of the trial judge to quash the bill of indictment because it described the premises alleged to have been entered as the dwelling house of one J. C. Jones situated in Nash County. Upon the authority of *State v. Knight,* 261 N.C. 17, 134 S.E. 2d 101, and the authority of *State v. Burgess,* 1 N.C. App. 142, 160 S.E. 2d 105, this assignment of error is overruled. By addendum to defendant's brief, counsel properly concede that this assignment of error should be overruled upon authority of the *Burgess* case.

The defendant's fifth assignment of error is to the finding of the trial judge that the defendant's confession was freely and voluntarily given, and allowing the State to place the same in evidence against the defendant. The defendant asserts that the record does not support the judge's action because the record shows that the four parts of the warning required by *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. ed. 2d 694, were not given. The defendant was not advised of his right to have an attorney present during interrogation and that one would be appointed to represent him if he were indigent.

The defendant was arrested on 26 November 1962, and later charged with the offense of second degree burglary alleged to have occurred on 12 February 1962. He was thereafter tried, convicted and sentenced to prison in January 1963. He was not represented by an attorney during his January 1963 trial. Following a Post Conviction Hearing held in October 1967, the defendant was granted a new trial in the light of *Gideon v. Wainwright,* 372 U.S. 335, 83 S. Ct. 792, 9 L. ed. 2d 799, because he was not represented by an attorney upon his trial in January 1963. This appeal is from a con-

viction upon his retrial for the 12 February 1962 offense of second degree burglary. Upon his retrial and for purposes of this appeal the defendant is represented by appointed counsel.

The defendant was arrested, interrogated and confessed in 1962. He was first tried and convicted in January 1963. According to *Johnson v. New Jersey,* 384 U.S. 719, 86 S. Ct. 1772, 16 L. ed. 2d 882, "[W]e conclude that *Escobedo* and *Miranda* should apply only to cases commenced after those decisions were announced." Also in *Johnson* it was said with respect to the *Miranda* guidelines: "[T]hese guidelines are therefore available only to persons whose trials had not begun as of June 13, 1966." In the case before us the defendant's retrial from which this appeal is taken was held in January 1968.

The crucial question is whether the guidelines in *Miranda,* made prospective only by *Johnson,* apply to this defendant's retrial so as to prevent the State from placing in evidence defendant's confession given in 1962 under proper procedural safeguards applicable before *Miranda.*

The record on appeal supports the trial judge's finding of a free and voluntary confession under the law applicable before *Miranda.* Apparently the defendant concedes in his brief that the confession meets the before *Miranda* rules, but argues that the failure of the officers to advise the defendant of his right to counsel during interrogation and right to have appointed counsel prohibits the State from using the confession upon this retrial which comes after the date of *Miranda.*

If *Johnson* is read only in a cursory manner, it would appear that the Court has used conflicting terms to designate when the *Miranda* guidelines became applicable, *i.e.:* "cases commenced after," and "trials begun after." However, we will not here engage in semantics because it seems to us that a study of the rationale of the entire opinion in *Johnson* points to the conclusion that the two terms were used interchangeably, and were given the same meaning by the Court. The object then is to explore the basic reasoning of the decision to give only prospective application to the guidelines.

In *Johnson* at page 888 of Vol. 16 L. ed. 2d, the court said: "We must look to the purpose of our new standards governing police interrogation, the reliance which may have been placed upon prior decisions on the subject, and the effect on the administration of justice of a retroactive application of *Escobedo* and *Miranda.*"

At page 891 of Vol. 16 L. ed. 2d, the court said: "Law enforcement agencies fairly relied on these prior cases, now no longer binding, in obtaining incriminating statements during the intervening years preceding *Escobedo* and *Miranda.*" At page 892 of Vol. 16 L.

ed. 2d, the court said: "*Future defendants* will benefit fully from our new standards governing in-custody interrogation, while *past defendants* may still avail themselves of the voluntariness test. *Law enforcement officers* and trial courts *will have fair notice* that statements taken in violation of these standards may not be used against an accused." (Emphasis added.)

In the light of what the court said as quoted above, the terms "cases commenced after," and "trials begun after" obviously encompass the time of interrogation. To construe the terms otherwise would render meaningless the recognition that the law enforcement agencies had fairly relied on prior cases in the years preceding *Escobedo* and *Miranda*. Also it would render meaningless the statement that law enforcement officers will have fair notice that statements taken in violation of the new standards may not be used against a defendant. The statement of the court that future defendants will benefit fully from our new standards, and that past defendants will still have the benefit of the voluntariness test adds weight to the view that the guidelines were intended to be applicable to future interrogation (interrogation conducted after June 13, 1966). This view of the intent of the *Johnson* opinion is consistent with the ruling of *Stovall v. Denno*, 388 U.S. 293, 18 L. ed. 2d 1199 (June 1967) which makes the decisions in *U. S. v. Wade*, 388 U.S. 218, 18 L. ed. 2d 1149 (June 1967), and *Gilbert v. California*, 388 U.S. 263, 18 L. ed. 2d 1179 (June 1967) prospective, and specifically applicable only to police lineups conducted after June 12, 1967.

Our research indicates that various courts have stated that *Miranda* guidelines apply to retrials of defendants whose first trials were held before *Miranda*. Also our research indicates that various courts have held that the guidelines do not apply to such retrials. The courts of the State of New York have held both ways. See *People v. LaBelle*, 277 N.Y.S. 2d 847; and *People v. Sayers*, 284 N.Y.S. 2d 481. It is significant that the courts which have stated that *Miranda* guidelines do apply to retrials have done so without articulating an analysis or interpretation of the meaning of the opinion in *Johnson v. New Jersey*. On the other hand, the courts which have held that *Miranda* guidelines do not apply to retrials have consistently articulated an analysis and interpretation of *Johnson*. Most of these cases will be referred to later in this opinion.

In the case of *Dell v. State*, ... Ind. ....., 231 N.E. 2d 522, the Supreme Court of Indiana adopted the view that the *Miranda* warning requirements were applicable to retrials occurring after the date of *Miranda*. In so holding, the Supreme Court of Indiana stated: "In view of the fact that the Third, Fifth and Ninth Circuit Courts

of Appeal have adopted the majority view we also adopt the majority holding and indicate here that on a retrial in the case at bar that the *Miranda* warning requirements, the prerequisite for the admissibility of confessions or statements, are to be applied to retrials occurring after the thirteenth day of June 1966." The Indiana Supreme Court did not undertake any construction of the meaning of *Johnson v. New Jersey,* but only cited a list of cases in support of its adoption of what it termed the majority view. It cited *Gibson v. U. S.,* 363 F. 2d 146 (5th Cir. 1966); *Government of the Virgin Islands v. Lovell,* 378 F. 2d 799 (3rd Cir. 1967); *Amsler v. U. S.,* 381 F. 2d 37 (9th Cir. 1967). In none of the Federal Circuit Court cases cited was the question presented for decision, and in each case it was an indication or suggestion that *Miranda* would apply upon a retrial of the case then before it. In the Third Circuit Court case this was done by a footnote.

The Supreme Court of Indiana also cited *State v. Brock,* 101 Ariz. 168, 416 P. 2d 601 (1966); *People v. Doherty,* 59 Cal. Rptr. 857, 429 P. 2d 177 (1967); *State v. Ruiz,* 49 Haw. 504, 421 P. 2d 305 (1966); *State v. McCarther,* 197 Kan. 279, 416 P. 2d 290 (1966). Also, the court stated "we find similar holdings by the highest court of appeals in Kentucky, North Carolina and Wisconsin." It appears that this reference to Kentucky was to *Creech v. Commonwealth,* Ky., 412 S.W. 2d 245 (1967); that the reference to North Carolina was to *State v. Jackson,* 270 N.C. 773, 155 S.E. 2d 236 (1967); and that the reference to Wisconsin was to *State v. Shoffner,* 31 Wis. 2d 412, 143 N.W. 2d 458 (1966). We have examined each of the State cases cited by the Indiana court and find that none of them has undertaken a discussion of the meaning of *Johnson v. New Jersey,* because the question was not presented upon the appeal then being heard, and in each case the court only summarily stated that upon a retrial the rules of *Miranda* would apply.

We do not view these cases as constituting authority to support the opinion by the Supreme Court of Indiana. The statement in *State v. Jackson,* (N.C.) *supra,* obviously was not necessary to a decision in the case and we are convinced that our Supreme Court has not ruled upon the question presented to us for determination.

On the other hand, we find well-reasoned opinions by the Supreme Court of New Jersey in *State v. Vigliano,* 50 N.J. 51, 232 A. 2d 129 (1967); and by the Supreme Court of Illinois in *People v. Worley,* 37 Ill. 2d 439, 227 N.E. 2d 746 (1967). In each of these cases the court was directly dealing with the question of the applicability of the *Miranda* rules to retrials where the first trial had been

conducted prior to the date of *Miranda.* In *People v. Worley, supra,* the Illinois Supreme Court said:

> "Since the language employed in the statement of the *Johnson* rule is inconclusive, in our opinion the intention of the court may best be found by examining the reasons for the rule. The court listed three factors which entered into its decision: the purpose for announcing new standards in *Miranda,* the reliance placed upon the pre-*Miranda* rules, and the seriously disruptive effect on the administration of justice of a decision that *Miranda* apply retroactively. Finding that the integrity of the fact-finding process is not as substantially improved by *Miranda* as it has been by others of its decisions, that the pre-*Miranda* rules had been relied on by law enforcement officers to obtain confessions which are inadmissible in post-*Miranda* cases, and that making *Miranda* retroactive would seriously disrupt administration of our criminal laws, the court decided against applying *Miranda* retroactively. While the disruptive effect upon our criminal laws would not be as great if we follow *Gibson* as it would have been if the Supreme Court had held that *Miranda* applied retroactively, because retrials are not required in all pre-*Miranda* decisions in which confessions are involved, the presence of a disrupting effect similar to that with which the court was concerned in *Johnson,* as well as a consistent thrust from each of the other two criteria, leads us to conclude that the Supreme Court did not intend that *Miranda* apply to retrials in cases such as the instant one."

In *State v. Vigliano, supra,* the New Jersey Supreme Court said:

> "The tenor of *Miranda,* and particularly of *Johnson,* leads us to the conclusion that the rule was intended to apply only to cases which are tried for the first time after June 13, 1966. This seems fair to the State and to the defendant because in the investigation of the alleged crime, in the interrogation of the defendant, and in the trial of the case, the accepted constitutional standard by which the conduct of the police in obtaining a confession from defendants was to be judged was different from the more rigid standard imposed prospectively by *Miranda.*"
>
> * * *
>
> "If reliance by the authorities on the previous law is sufficient reason not to apply *Miranda* to cases tried and still on direct appeal on June 13, 1966 (see, *Johnson v. State of New Jersey, supra,* 384 U.S. at p. 753, 86 S. Ct. 1772), it would seem

that such reliance should have the same operative effect if the appeal results in a reversal and an order for a new trial. We find this thought also in the recent case of *Stovall v. Denno, supra,* which held that the new rule of *United States v. Wade,* 87 S. Ct. 1926 (1967) and *Gilbert v. State of California,* 87 S. Ct. 1951 (1967) making identification of an accused in a police lineup in certain situations inadmissible at trial, when the lineup was conducted without notice and in the absence of counsel, was to be applied only when the lineup was held after the common date of the three decisions. And in that connection the Court said:

> 'We also conclude that, for these purposes, no distinction is justified between convictions now final, as in the instant case, and convictions at various stages of trial and direct review. We regard the factors of reliance and burden on the administration of justice as entitled to such overriding significance as to make that distinction unsupportable.' 87 S. Ct. at 1972."

The Supreme Court of Delaware and the Supreme Court of Pennsylvania have adopted the view that *Johnson* does not require that the rules of *Miranda* be applied to a retrial of a defendant whose first trial was conducted before the date of *Miranda. Jenkins v. State,* ..... Del. ....., 230 A. 2d 262 (1967); *Commonwealth v. Brady,* 1 Cr. L. Rep. 2305 (Pa. 1967).

We agree with the reasoning of the Supreme Courts of New Jersey, Illinois, Delaware, and Pennsylvania. It is our view that this is the intent of the United States Supreme Court in *Johnson v. New Jersey, supra.*

We hold therefore that the defendant's confession given in 1962 under the procedural safeguards applicable before *Miranda* is properly admitted in evidence upon his retrial after the date of *Miranda.* Defendant's assignment of error No. 5 is overruled.

Defendant's assignments of error Nos. 8, 9, 10, 11, 12 and 13 were brought forward at the insistence of the defendant, against the advice of counsel. We have examined each and find them to be without merit.

Defendant's assignment of error No. 15 is to the rulings of the trial judge in refusing to strike, upon defendant's motion, testimony of the sheriff in response to the solicitor's question as follows:

> "Q. Robert asked you to go to his home?
>
> "A. Yes sir. I wouldn't say that he said, 'Come on, let's go to my house,' but in talking to him, Mr. Cooper, Robert said,

('Sheriff, you have got me, and I want to get straight with you,' and he wanted to help me recover the stuff. I didn't only go to his home, I went to several surrounding counties and I picked up lawnmowers —)

"OBJECTION AND MOTION TO STRIKE BY DEFENDANT AS NOT RESPONSIVE. OVERRULED. EXCEPTION.

EXCEPTION No. 27.

"A. (I went at his request to several counties adjoining Nash County and picked up lawnmowers, televisions, wheelbarrows, hole-diggers, tools, irons, hot plates, electric stoves, we had anything you wanted practically, bedclothes, pillows, sheets, dresses. I went to his home and found names in clothes of people that reported $1800 worth of clothes missing.)

"OBJECTION AND MOTION TO STRIKE BY DEFENDANT. OVERRULED. EXCEPTION.

EXCEPTION No. 28."

The defendant did not testify in this case, nor otherwise place his character in evidence. Nevertheless, there was cross-examination by the solicitor of defendant's wife over defendant's objection which elicited testimony of stolen goods found at defendant's home and other places, which goods were not involved in the case for which the defendant was being tried, *i.e.:* the breaking and entering of the residence of one J. C. Jones, and the larceny therefrom of one Admiral Television and one camera. Such questions by the solicitor are the subjects of defendant's assignment of error No. 14.

Evidence of other offenses is inadmissible if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged. Stansbury, N. C. Evidence 2d, § 91; *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364. Obviously the only effect of the testimony by the sheriff and that elicited by the solicitor from defendant's wife was to assail the character of the defendant and show his disposition to steal. Such evidence was prejudicial to the defendant and entitles him to a new trial.

The questions raised by defendant's remaining assignments of error will probably not arise upon another trial.

New trial.

MALLARD, C.J., and PARKER, J., concur.

STARLING *v.* TAYLOR.

HOMER C. STARLING, TRUSTEE, AND RUTH I. PAGE AND WACHOVIA BANK & TRUST COMPANY, SUCCESSOR TRUSTEES UNDER AN AGREEMENT WITH B. F. PAGE, v. ELIZABETH PAGE TAYLOR AND HUSBAND, MELVIN B. TAYLOR; FRANK PAGE TAYLOR AND WIFE, LINDA TART TAYLOR, HELEN PAGE GAITHER AND HUSBAND, JOHN G. GAITHER; BETTY PAGE GAITHER HALTER AND HUSBAND, GERALD WILLIAM HALTER, MARGARET PAGE GAITHER AND WRIGHT T. DIXON, JR., GUARDIAN AD LITEM FOR SUE PAGE TAYLOR, A MINOR; JOHN B. GAITHER, JR., A MINOR; MARY HELEN GAITHER, A MINOR, WILLIAM WILEY GAITHER, II, A MINOR, FRANK PAGE TAYLOR, JR., A MINOR, AND FOR SUCH OTHER UNKNOWN OR UNBORN PERSONS WHO MAY BE INTERESTED IN THE SAID TRUST ESTATE.

(Filed 22 May 1968.)

1. Trusts § 9—

A trust indenture containing no provision for revocation is an irrevocable trust.

2. Trusts § 5—

A settlor, having created an irrevocable *inter vivos* trust devoid of any provisions with respect to modification, is thereafter without power to modify the trust.

3. Trusts § 1—

The essentials for creation of a valid trust are sufficient words manifesting an intent to raise a trust, a definite subject or trust *res*, and an ascertained object.

4. Trusts § 5—

An agreement between beneficiaries *sui juris* and the settlor of an irrevocable trust to extend the trust indenture for 10 years beyond its stated date of termination is invalid as a modification of the trust when all the beneficiaries did not consent thereto nor were all the beneficiaries *sui juris*.

5. Trusts § 1—

An agreement between beneficiaries *sui juris* and the settlor of an irrevocable trust to extend the existence of the trust for 10 years beyond its stated date of termination *is held* not to evince an intent to create a new trust absent the addition of new property to the trust assets or the substitution of different properties for trust assets.

APPEAL by defendant, Guardian *Ad Litem* for minors and such other unknown or unborn persons who may be interested in the Trust Estate, from *Godwin, J.*, at the January Assigned Non-Jury Civil Session 1968, of WAKE.

B. F. Page, father of defendants Elizabeth Page Taylor and Helen Page Gaither, executed a trust indenture under which he transferred to the trustees named therein 400 shares of the common stock of W. H. King Drug Company. The trust by its terms was to terminate on 18 June 1967. The trustees were directed "on the 18th of June, 1967, to endorse, assign, transfer and deliver Certificates

No. 141 for 200 shares of common stock of W. H. King Drug Company to my daughter, Elizabeth Moring Page, if alive, or, if dead, to such persons as may at that time be entitled to receive the personal property of my said daughter under the laws of distribution of North Carolina, each of such persons to receive the proportionate part provided by said laws." The trustees were given identical instructions with respect to Certificate No. 142 with the exception that the named transferee was Helen Page Gaither. During the existence of the trust, the income from each certificate of stock after deducting taxes and other proper costs and expenses of the trust was to be paid to each daughter "if alive, or, if dead, to those persons entitled to receive the personal estate of my said daughter under the laws of distribution of North Carolina, and in the proportionate parts provided by said laws."

On 23 December 1946, a memorandum of agreement was entered into between Elizabeth Page Erickson and Helen Page Gaither, parties of the first part, and B. F. Page, party of the second part. This memorandum recited the terms of the trust instrument and its termination date; that "the parties of the first part now believe it will be to the best interest of themselves and of their distributees that the said shares of stock be held in trust until the 18th day of June, 1977, thereby extending the life of the trust for ten years, and desire that the life of said trust be so extended"; and "the party of the second part has no objection to the said extension, although he has been advised and believes that he has no further control over said trust and no further voice in the matter". The memorandum was executed by the parties of the first part "for themselves and their executors, administrators, heirs, distributees and assigns" and by the party of the second part "for the purpose of indicating that he has no objection to said extension". The trustees were directed to continue to hold the stock in trust and to administer the same under the provisions of the trust agreement until the 18th day of June, 1977.

On 22 October 1953, Elizabeth Page Taylor and Helen Page Gaither executed an instrument directed to the trustees reciting the trust; the "Memorandum of Agreement"; and setting out the fact that they "are advised and believe that the purported Memorandum of Agreement does not now have, and never has had, any legal effect or consequence whatsoever". By this instrument the beneficiaries notified the trustees of their desire to revoke, annul, cancel and repeal said instrument.

This action was originally an action for declaratory judgment instituted by the Trustees of the B. F. Page Trust asking for instruc-

tions as to whether the trustees now have the power, authority, and duty to distribute the assets of the trust estate to Elizabeth Page Taylor and Helen Page Gaither, as provided in the trust indenture. The further answers of some of the defendants raised possible issues of fact with respect to fraud, undue influence, or duress. At a hearing before Copeland, J., the parties entered into a stipulation that there was no fraud, duress, or undue influence in connection with the memorandum of agreement, the parties waived a jury trial, and the matter came on for hearing before Godwin, J.

Godwin, J. entered an order concluding that defendants Elizabeth Page Taylor and Helen Page Gaither are entitled to distribution of the trust assets and directing the trustees, after the payment of costs of administration and costs of this action, to distribute all assets remaining in their hands to Elizabeth Page Taylor and Helen Page Gaither, share and share alike. From the judgment entered, Wright T. Dixon, Jr., Guardian *Ad Litem* for the minors, and such other unknown or unborn persons who may be interested in the trust estate, appealed.

Joyner and Howison for plaintiff appellees.

Lassiter, Leager and Walker for Elizabeth Page Taylor and Helen Page Gaither, appellees.

Bailey, Dixon and Wooten for Wright T. Dixon, Jr., Guardian Ad Litem, appellant.

MORRIS, J. Although portions of the original trust indenture are set out in the facts, the indenture itself is not before the Court for construction. We, therefore, consider it only as the instruments before us for construction relate to it.

We must first determine what legal effect, if any, is to be given to the memorandum of agreement executed on 23 December 1946, purporting to extend the original trust indenture for 10 years beyond its stated date of termination. It is clear that the extension of a trust beyond its stated duration amounts to a modification. The rules generally applicable to modifications are, therefore, applicable here.

Since the trust indenture contained no provision for revocation, it is an irrevocable trust. 3 Scott, Trusts 2d, § 330.1, p. 2394.

Obviously, the settlor here recognized the general rule that, having created an irrevocable *inter vivos* trust devoid of any provisions with respect to modification, he was without power to modify the trust. 3 Scott, Trusts 2d, § 331, pp. 2413-2414.

In *Washington v. Ellsworth,* 253 N.C. 25, 116 S.E. 2d 167, our Supreme Court refused to allow validity to an instrument seeking

to modify a trust agreement. One of the contentions of the appellees was that since the settlor reserved the right "to sell or dispose" of the property held in trust with the written consent of persons named in the instrument, she had the right to convey it to those persons who would have taken under the purported modification, and the purported modification should be construed as a deed to them. The Court in speaking to this proposition said:

> "The original instrument contained no provision reserving the right to revoke or modify the trust provisions created therein, it only reserved the right of the trustor with the consent of those parties above-named 'to sell or dispose' of the property described in the instrument.
> "The last cited authority (3 Scott, Trusts 2d) section 331, at page 2413, states: 'The same principles are applicable to the modification of a trust as are applicable to the revocation of a trust. If the settlor does not by the terms of the trust reserve a power to alter or amend or modify it, he has no power to do so.' "

In 4 Scott, Trusts 3d, § 338, p. 2687, it is said:

> "It is true that where some of the beneficiaries do not consent, the others, even with the consent of the settlor, cannot terminate the trust. But where the settlor and all of the beneficiaries are of full capacity and consent, there seems to be no good reason why they should not have power to make such disposition of the trust property as they choose."

And further at § 338, p. 2693:

> "Similarly the terms of the trust may be modified if the settlor and all of the beneficiaries so desire."

Our Supreme Court has said that where the beneficiaries of a trust are *sui juris* and their rights are vested, they may dispose of their equitable interests in the trust property. *Smyth v. McKissick*, 222 N.C. 644, 24 S.E. 2d 621.

In the case before us, however, all the beneficiaries did not consent, nor were all the beneficiaries *sui juris*. From the record and the stipulation of the parties, each of the primary beneficiaries had a child under 4 years of age at the time of the execution of the purported extension agreement. Other children were born after its execution.

The memorandum agreement had no effect as a modification of the trust indenture. Nor did it have effect as creating a new trust.

It is well settled in this State that three circumstances must con-

cur in order to constitute a valid trust: (1) sufficient words to raise a trust, (2) a definite subject or trust *res,* and (3) an ascertained object. *Finch v. Honeycutt,* 246 N.C. 91, 97 S.E. 2d 478; *Trust Co. v. Taylor,* 255 N.C. 122, 120 S.E. 2d 588. Assuming that the rights of the two primary beneficiaries in the income and corpus of the trust established by their father is a sufficient trust *res,* there is no language in the instrument evidencing any intent to create a trust, nor is there any language from which a transfer of any title or interest to trustees for the benefit of another could be inferred.

In the construction of any contract, we are required to ascertain the intent of the parties, and in so doing consider the purpose to be accomplished and the situation of the parties, among other things. *Electric Co. v. Insurance Co.,* 229 N.C. 518, 50 S.E. 2d 295.

So, also, the parties' "intention to create a trust and manifestation thereof, with reasonable certainty, are essential to the creation and existence of a trust." 54 Am. Jur., Trusts, § 33, p. 44; Bogert, Trusts & Trustees, 2d, §§ 45 and 46.

There is no language in the instrument under consideration from which an intent to create a new trust at the time of its execution could be inferred. The only expression of intention is to extend the life of an existing trust. This is not an intent to *create* a trust, absent the addition of new property to the trust assets or substitution of different properties for trust assets. Bogert, Trusts & Trustees, 2d, § 46.

Additionally, the situation of the parties at the time and allegations and admissions revealed by the pleadings herein negative any intent to create a new trust by the memorandum agreement.

We deem it unnecessary to discuss the efficacy of the instrument entitled "Revocation of Purported Agreement" executed by Elizabeth Page Erickson and Helen Page Gaither, and the application of G.S. 39-6 thereto. *A fortiori,* the doctrine of worthier title discussed by the trustees, has no application, nor is the defense of laches raised by the guardian *ad litem* available.

We have carefully considered the questions raised and the exhaustive and informative briefs of the parties, and in the judgment of the court we find

No error.

CAMPBELL and PARKER, JJ., concur.

GARY H. WATTS AND WIFE, TROY ANN WATTS, D/B/A WATTS REALTY COMPANY, v. SUPERINTENDENT OF BUILDING INSPECTION OF THE CITY OF CHARLOTTE.

(Filed 22 May 1968.)

Trial § 57—

Upon trial of an action by the court without a jury, failure of the court to find the ultimate facts necessary to support its conclusions of law is reversible error, G.S. 1-185, and the cause will be remanded for findings sufficient to support a judgment.

APPEAL by defendant from *Clarkson, J.*, 16 October 1967 "B" Civil Session of MECKLENBURG Superior Court.

The facts necessary for decision are as set out in the opinion.

W. A. Watts for defendant appellant.
No Counsel for plaintiffs.

MALLARD, C.J. The defendant appellant makes three assignments of error, asserting:

(1) That the trial court abused its discretion in issuing an order allowing plaintiff to repair the building as set out in its order, after the defendant had ordered it to be removed or demolished pursuant to the provisions of the Charlotte City Code.

(2) That the trial court committed error by refusing to vacate the temporary restraining order issued on 3 August 1967.

(3) That the trial court failed to make findings of fact or conclusions of law and to include them in its order dated 23 October 1967.

The evidence tends to show these facts. Plaintiffs were on 6 June 1967 granted a permit by the defendant to move a dwelling house from its then location to a lot owned by them at 4224 Howie Circle in Charlotte. This dwelling house had theretofore been inspected by defendant and found to be structurally sound and fit for human habitation. Thereafter, and before June 18 or 19, plaintiffs moved the house to 4224 Howie Circle as allowed by the permit. On 20 June 1967 defendant notified plaintiffs in writing that the dwelling located at 4224 Howie Circle was at that time unfit for human habitation and that a hearing on the matter would be held on 3 July 1967. After the first inspection and before the second inspection of the dwelling on June 18 or 19 at its then location at 4224 Howie Circle, the house had been vandalized to the point that it was structurally unsound. Facilities had been torn out and the exterior of the

building was damaged. This second inspection was made because some citizens had requested such inspection. The second inspection was made before the plaintiffs had had the opportunity to make repairs to the building in order to make it structurally sound and fit for human habitation. On 3 July 1967 the plaintiffs had not had time to properly repair the house.

On 3 July 1967 plaintiffs, after a hearing by the defendant, as provided by Section 10A-8 of the Housing Code of the City of Charlotte, were advised that the dwelling was unfit for human habitation and that said dwelling could not be repaired, altered, or improved at a cost of less than fifty per cent (50%) of the value of said dwelling. Plaintiffs were ordered by defendant to remove or demolish such dwelling before 3 August 1967.

Section 10A-8 of the Housing Code of the City of Charlotte provides in part that whenever the Superintendent of Building Inspection of the City of Charlotte finds "that any housing is unfit for human habitation" and if he also finds that the cost of repairs, alteration, or improvements "of the said dwelling cannot be made at a cost not to exceed fifty per cent (50%) of the value of the housing," he shall issue an order requiring the owner to remove or demolish such dwelling within a specified time. This section of said Housing Code also provides that Commissioners may be appointed to appraise the property in the event there is disagreement as to the value of the housing and the cost of improvement.

Section 10A-8 of the said Housing Code also provides that any person affected by an order issued thereunder may petition the Superior Court for an injunction to restrain the enforcement thereof. On 3 August 1967 plaintiffs instituted this action to restrain the defendant from enforcing the order dated 3 July 1967 requiring them to remove or demolish said dwelling.

On 3 August 1967 Judge Clarkson signed an order temporarily restraining the defendant herein from enforcing the said order issued 3 July 1967 and further ordered that this cause be heard on its merits at a non-jury session "at the first available trial date subsequent to September 1, 1967."

At the 16 October 1967 "B" Civil Session of Mecklenburg Superior Court this cause was heard on its merits by Judge Clarkson. Both parties offered evidence. The following judgment was entered on 23 October 1967:

> "This Cause coming on to be heard and being heard before the undersigned, Francis O. Clarkson, Judge presiding over the October 16, 1967, B Civil Session of Mecklenburg County Superior Court, and being heard upon petition of the plaintiffs

against the defendant, Supt. of Building Inspection of the City of Charlotte, and being heard before the Court on a temporary injunction by His Honor Fred H. Hasty *(sic)* against the defendant dated August 3, 1967, restraining the enforcement of the order to demolish or remove the dwelling house situated at 4224 Howie Circle, defendant being temporarily enjoined pending final disposition of the Cause.

It appearing to the Court after hearing evidence on behalf of the plaintiff and the defendant and the exhibits which are a part of the record and further from a personal inspection by the Court in company with the respective attorneys of the plaintiff and defendant, and it appearing to the Court that the interest of justice would be served by the continuance of the temporary restraining order for sixty days from this date upon the following conditions, namely:

That the plaintiff will within that time make substantial repairs to the house moved on the property known as Lot 17, Block 1 of Howie Circle, as follows:

1. That the foundation be constructed and completed in strict conformance with the building code of the City of Charlotte.

2. That a new roof of good grade composition shingles be put on the entire roof.

3. That all sills, floors, or other structural parts of the building which have decayed be replaced by sound timbers and floors.

4. That hot water heater conforming to the city building code be installed.

5. That adequate plumbing and bathroom facilities be installed to conform to the city building code.

6. That the house be rewired electrically to conform to the electrical wiring code.

7. That the house be given at least two coats of paint inside and out.

8. If the subflooring be retained after the rotten places have been repaired, that same be covered with asbestos tile or new wooden flooring.

9. That the lot be graded and landscaped in a suitable manner.

That all the work be in compliance with the building code of the City of Charlotte.

> That, upon the completion of the said work, report of same is to be made to the court by plaintiff's attorney, at which time the matter will come on for further hearing, if necessary for the parties to be heard, and also for a final order of disposition in the matter. This Cause is held open for further order."

There was evidence presented from which, if believed, facts could have been found and set out in the judgment to justify the court in entering the above order. Defendant's first two assignments of error are without merit. The statute, G.S. 1-185, reads in part, "Upon trial of an issue of fact by the court, its decisions shall be given in writing, *and shall contain a statement of the facts found,* and the conclusions of law separately." (emphasis added.)

> "Where a jury trial is waived by the parties to a civil action, the judge who tries the case is required by G.S. 1-185 to do three things in writing: (1) To find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising upon the facts found; and (3) to enter judgment accordingly. (citations omitted.) In addition, he must state his findings of fact and conclusions of law separately. (citations omitted.) The judge complies with this last requirement if he separates the findings and the conclusions in such a manner as to render them distinguishable, no matter how the separation is effected. (citations omitted.)
> "There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts. (citations omitted.) G.S. 1-185 requires the trial judge to find and state the ultimate facts only. (citations omitted.)" *Woodard v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639.

We are of the opinion, and so hold, that the trial court has not complied with the requirement of G.S. 1-185, as interpreted by the Supreme Court, in that the court's decision does not contain a statement of the facts found. The case is remanded in order that the statute may be complied with.

Error and remanded.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. JESSIE B. LEWIS.

(Filed 22 May 1968.)

1. Criminal Law § 75—

The requirements of *Miranda v. Arizona*, 384 U.S. 436, are not applicable to retrials of cases which were originally tried before the effective date of that decision.

2. Assault and Battery § 6—

In a prosecution for secret assault, the court may properly instruct the jury that even if the victim knew his assailant was present, the assailant could be found guilty of secret assault if the victim was unaware that he was about to be assaulted. G.S. 14-31.

3. Habeas Corpus § 1—

An order or judgment in a *habeas corpus* proceeding discharging a petitioner is conclusive in his favor that he is illegally held in custody, and is *res judicata* of all issues of law and fact necessarily involved in that restraint.

4. Judgments § 35; Criminal Law §§ 35, 68—

Where the question of defendant's identity as the person accused has been determined at a *habeas corpus* hearing at which defendant was awarded a new trial, refusal of the court at defendant's retrial to allow defendant to introduce evidence tending to show that he is not the accused is proper, the *habeas corpus* judgment being *res judicata* as to that question.

APPEAL by defendant from *Morris, E.J.*, October 1967 Criminal Session of NASH.

Defendant was tried on an indictment charging secret assault with a deadly weapon with intent to kill. He entered a plea of not guilty. From a verdict of guilty as charged and judgment of imprisonment for a term of 10 years, less 4 months and 16 days time served, defendant appealed.

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

Fields, Cooper and Henderson by Milton P. Fields and Leon Henderson, Jr., for defendant appellant.

MORRIS, J. The offense for which defendant was tried at the October 1967 Session occurred on 28 December 1954. At the August 1955 Term of Nash County Superior Court, he entered a plea of *nolo contendere* and was sentenced to a term of 10 years in State's Prison. He subsequently escaped; and on 9 June 1965, he was arrested in Philadelphia, Pennsylvania, and returned to North Carolina. The F. B. I. report of his activities during that time is in-

corporated in the judgment and is replete with charges and convictions in other states for a variety of violations. On 12 January 1967, he filed a petition for writ of *habeas corpus* which was heard on 2 February 1967. At the conclusion of the hearing, Cowper, J. entered judgment granting defendant a new trial. In the *habeas corpus* proceeding, defendant alleged, among other things, that he was Harold B. Richardson. Among charges for which he was tried while on escape were impersonating a physician and the unlawful practice of medicine as Harold B. Richardson, M.D. At the *habeas corpus* hearing, his identity was put in issue, he alleging that he was Harold B. Richardson and the State contending that he was Jessie B. Lewis. Upon the evidence, Cowper, J. found as a fact that Jessie B. Lewis and Dr. Harold B. Richardson are one and the same person.

Defendant's assignment of error 3 is addressed to the court's allowing the sheriff to testify to a confession made by the defendant and in finding that the statements made to the sheriff were after the defendant had been warned of his constitutional rights. The sheriff was allowed to testify that the defendant told him that he had a piece of iron taped to his body under his shirt; that when the jailer was returning him to his cell he hit him on the head with it from behind, dragged him in the bullpen and locked him up; that he had saved up enough food for escape, and he and another prisoner had been planning the escape. Defendant's assignment of error 4 is to the court's allowing the sheriff to testify that in the presence of Jessie Lewis, Dock Evans stated to the sheriff that he and Jessie Lewis had talked of escape, saved up food; that Jessie Lewis had a piece of iron taped to his body; that he hit the jailer on the head with it, knocked him on the floor, hit him at least twice more while he was on the floor, unlocked the bullpen, dragged the jailer in and left him lying there and he, Dock Evans and Jessie Lewis ran out of the jail and into the woods. Defendant contends that the ruling in *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct., 1602, (hereinafter called *Miranda*) bars not only a confession but an admission of any nature by the defendant when, as here, defendant had not been warned that he had a right prior to interrogation to the presence of an attorney either retained or appointed by the court if he had no funds with which to employ counsel. The retrial of defendant began in October 1967, and defendant insists that since it began after the *Miranda* decision, the *Miranda* guidelines must be observed or the confession is inadmissible. The investigation of this brutal assault and the interrogation of defendant began in January 1955 — more than 12 years previous to this retrial. The evidence is clear that in 1955 defendant was warned of his consti-

tutional rights in accordance with the requirements then prevailing. The warnings now required by *Miranda* were not included. Defendant concedes that if this case had been tried prior to *Miranda,* the confession involved here would have been admissible. In *Johnson v. New Jersey,* 384 U.S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772, (hereinafter referred to as *Johnson*) it was held that *Miranda* is prospective only in its application. In *Johnson,* the Court said that the *Miranda* "guidelines are therefore available only to persons whose trials had not begun as of June 13, 1966". Defendant earnestly contends that the *Miranda* guidelines must be applied. We do not agree. In *State v. Branch,* 1 N.C. App. 279, 161 S.E. 2d 492, opinion filed by Court of Appeals this day, Brock, J. discusses the question exhaustively. We concur in the conclusion that the intent of the Court in *Johnson* and the rationale of the opinion is that the terms "cases commenced after" and "trials begun after" encompass the interrogation. We, therefore, hold that Jessie Lewis' confession in 1955 given under the procedural safeguards then applicable is properly admitted in evidence on a retrial after 13 June 1966, and defendant's assignments of error 3 and 4 are overruled.

Defendant's assignment of error 7 covers exceptions 39 and 40 to the charge of the court. The court charged the jury that "it is not essential to a conviction for a secret assault under the statute as now written that the person assaulted should be unconscious of the presence of his adversary, but his purpose must not be known, for in that event the assault would not have been committed in a secret manner". Defendant contends that it was prejudicial error to instruct the jury that even if the jailer knew the defendant was present, they could find him guilty of a secret assault if they found the jailer did not know he was going to be assaulted. Prior to the amendment of the statute, the instruction would have constituted prejudicial error. However, G.S. 14-31 now reads:

> "If any person shall in a secret manner maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise, with intent to kill such other person, *notwithstanding the person so assaulted may have been conscious of the presence of his adversary,* he shall be guilty of a felony . . ." (Emphasis supplied).

All of the cases discussed by defendant arose prior to the amendment. The charge of the court is based on the amended statute, applicable here, and is correct. Assignment of error 7 is, therefore, overruled.

Defendant's assignment of error 5 relates to the court's ruling

that defendant could not introduce any evidence tending to prove that he was not Jessie B. Lewis. At a prior *habeas corpus* proceeding brought by defendant, he had alleged that he was Harold B. Richardson and not Jessie B. Lewis. In the judgment entered in that proceeding, Cowper, J. found as facts:

> "(1) that Jessie B. Lewis was arrested in 1948, in Rocky Mount, Nash County, N. C., and fingerprinted at that time, and was again arrested in 1955 and fingerprinted by the Rocky Mount Police Department, and that he was fingerprinted by the North Carolina Prison Department upon his commitment to the State's Prison on February 3, 1955; that upon the return of Jessie B. Lewis to the North Carolina Prison Department on July 11, 1965, he was again fingerprinted, and a comparison of the fingerprints taken in 1965 and the fingerprints taken in 1948 and 1955 show that they are identical, and that Jessie B. Lewis and Dr. Harold B. Richardson are one and the same person. (2) it having been admitted by the State that the petitioner was not represented by an attorney when he was tried on three counts of forgery, one count of breaking, entering and larceny, one count of escape, and one count of secret assault with a deadly weapon with intent to kill inflicting serious bodily injury, that the judgments in these cases are set aside and the petitioner is permitted to have a new hearing, and said cases are ordered duly docketed."

Based on these findings of fact, it was

> "ORDERED, ADJUDGED AND DECREED: 1. that the petition hereinabove for Writ of *Habeas Corpus* is denied and that the court finds that Dr. Harold B. Richardson is identical with Jessie B. Lewis, and is being duly held by the North Carolina Prison Department; 2. that the State of North Carolina will retry the petitioner in Cases Nos. 6469, 6470 and 6471 — Forgery; Case No. 6472 — Breaking, Entering & Larceny; Case No. 28014 — Escape; and Case No. 6713 — Secret Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Bodily Injury."

The court, on its own motion, ordered petitioner committed to Cherry Hospital for mental examination and evaluation.

Morris, E.J. held that the findings of fact and conclusions of law made by Cowper, J. with respect to the identity of the defendant constitute final judgment with respect thereto, that defendant did not give notice of appeal therefrom to the Supreme Court as he was entitled to do, and that the judgment constitutes *res judicata.*

Findings to this effect were entered in the record at the close of the State's evidence. Defendant excepted to the findings of fact and conclusions of law and to the refusal of the court to allow the introduction by defendant of any evidence as to identity in the presence of the jury.

The general rule with respect to the effect of a judgment rendered in a *habeas corpus* proceeding is that "an order or judgment discharging a petitioner is conclusive in his favor that he is illegally held in custody, and is *res judicata* of all issues of law and fact necessarily involved in that result". He, of course, could not be arrested upon the same warrant or indictment found illegal. 25 Am. Jur., *Habeas Corpus,* § 157, pp. 251-252; 39 C.J.S., *Habeas Corpus,* § 104; *State ex rel Cœciatore v. Drumwright,* 116 Fla. 496, 156 So. 721. See also *Petition of Moebus,* 74 N.H. 213, 66 A. 641. We think the same rule is applicable here. By the judgment in the *habeas corpus* proceeding, defendant was granted a new trial. He did not except to any portion of the order and made no effort to have it reviewed by the Supreme Court. It appears from the record that the same evidence sought to be introduced at his retrial was introduced at the *habeas corpus* hearing and heard by Cowper, J. Defendant now accepts the benefits of the judgment but complains about that portion affecting him adversely. Under the facts of this case, we hold that the court committed no error in refusing to allow defendant to introduce evidence as to identity. Assignment of error 5 is overruled.

Other assignments of error not set out in defendant's brief are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

In the trial below, we find

No error.

CAMPBELL and BRITT, JJ., concur.

RICHARD GREEN, FATHER; MRS. ETHEL MAE GREEN, WIDOW; WALTER E. RICKS, ADMINISTRATOR; CHARLES K. GREEN, DECEASED EMPLOYEE, v. EASTERN CONSTRUCTION COMPANY, EMPLOYER, AND HARTFORD ACCIDENT AND INDEMNITY COMPANY, CARRIER.

(Filed 22 May 1968.)

1. Master and Servant § 96—

Findings of fact of the Industrial Commission are conclusive on the courts when supported by any competent evidence, G.S. 97-86, and juris-

diction on appeal is limited to questions of law as to whether there was competent evidence to support the Commission's findings of fact and whether such findings of fact justify the legal conclusions and decisions of the Commission.

2. Marriage § 2—

Evidence that a man and woman lived together as husband and wife and were reputed to be married is admissible to prove the marriage.

3. Same; Master and Servant § 79—

Findings by the Industrial Commission upon competent evidence that the deceased employee and the *femme* claimant were married and lived together as husband and wife until the husband's death, thereby entitling the wife to an award of compensation, is binding upon the reviewing court even though there is evidence that the wife's first marriage had not been dissolved.

4. Master and Servant § 90—

Motion to offer additional evidence on appeal before the Full Commission is addressed to the discretion of the Commission, whose ruling thereon is not reviewable in the absence of an abuse of discretion.

APPEAL by plaintiff Richard Green from *Olive, E.J.*, at the 2 October 1967 Civil Session of the Superior Court of DURHAM County.

This proceeding was begun before the North Carolina Industrial Commission to recover compensation under the North Carolina Workmen's Compensation Act for the death of Charles K. Green, deceased employee. At the hearing before the Commissioner it was stipulated that Charles K. Green died as a result of an accident arising out of and in the course of his employment on 9 February 1966, at which time the parties were subject to the North Carolina Workmen's Compensation Act. The only controverted issue was the determination of the rightful beneficiary of the death benefits payable by reason of his death.

The cause first came on for hearing on 22 June 1966 at which time the only claimant was Ethel Mae Green, who alleged she was the surviving widow of the deceased employee. Thereafter Richard Green, father of the deceased employee, through counsel notified the Industrial Commission that he wished to assert a claim and on 17 October 1966 order was filed directing that the case be heard *de novo*. On 24 February 1967 the case was heard before Commissioner William F. Marshall, Jr., who after hearing evidence made findings of fact, conclusions of law, and filed his opinion and award dated 7 March 1967. Among the findings of fact were the following: About 1943 Ethel Mae Green married one James Johnson in Roxboro, North Carolina, and lived with him a maximum of two months, when she separated from him. Some three or four years later John-

son informed Ethel Mae that he had divorced her. Ethel Mae met Charles K. Green in Roxboro, and later came to Durham where she and Charles were married in a Negro minister's home about 1946. It was stipulated that there is no marriage certificate on file in the public records of Durham County showing a marriage between the deceased and Ethel Mae Green. Charles and Ethel Mae lived together as husband and wife from the time of the marriage ceremony until Charles's death on 9 February 1966, and were reputed to be husband and wife in the community. No children were born of this marriage and Ethel Mae was the only person dependent on Charles and she was wholly dependent. Based on these findings of fact, the Commissioner concluded as a matter of law that Ethel Mae Green was the surviving widow of the deceased employee and made an award to her of all compensation benefits payable by reason of his death.

The father appealed to the Full Commission and also filed motion to be permitted to present new evidence bearing upon the question of whether Ethel Mae Green and James Johnson were ever divorced. The Full Commission on 29 June 1966 entered an order denying this motion, adopted as its own the findings of fact and conclusions of law of Commissioner Marshall, and affirmed the award to Ethel Mae Green. The father appealed from the order and award of the Industrial Commission to the Superior Court. The Superior Court sustained certain assignments of error relating to the admission in evidence of testimony by Ethel Mae Green that she and the deceased were married to each other. However, the court did not consider these errors to be prejudicial, and accordingly affirmed the decision and award to Ethel Mae Green. From this order the father appealed to the Court of Appeals.

Alfred S. Bryant for Richard Green, father, appellant.

Kennon and Kennon by A. William Kennon for Ethel Mae Green, appellee.

PARKER, J. This appeal presents the question whether there was sufficient competent evidence to support the Industrial Commission's finding of fact that Ethel Mae Green and the deceased employee, Charles K. Green, were married. Findings of fact of the Industrial Commission are conclusive on the courts when supported by any competent evidence. G.S. 97-86. On appeal, our jurisdiction is limited to questions of law as to whether there was competent evidence to support the Commission's findings of fact and whether such findings of fact justify the legal conclusions and decisions of the Commission. *Thomason v. Cab Company,* 235 N.C. 602, 70 S.E. 2d 706.

Appellant contends that the Commission's crucial findings of fact in this case were based upon incompetent evidence in that Ethel Mae Green was permitted to testify that she and the deceased employee had been married to each other, that certain events had occurred at the time the marriage ceremony was performed, and that at the time of such ceremony there had been a marriage certificate which had subsequently disappeared or had been stolen. Appellant contends that this testimony was incompetent under G.S. 8-51 and that without this testimony there was insufficient competent evidence to support the Commission's crucial findings.

The Judge of the Superior Court sustained appellant's assignments of error relating to the reception in evidence of Ethel Mae Green's testimony as to her marriage to the decedent. However, the Judge did not consider the error prejudicial, since he concluded that there was sufficient competent evidence in the record to support the Commission's ultimate finding of fact that Charles K. Green and Ethel Mae Green were married. Reserving the question whether there was error in the reception in evidence of Ethel Mae Green's testimony, we agree with the Judge's conclusion.

There was testimony of an independent witness, the president of the employer company for which Charles was working at the time of his death and who had also personally employed Ethel, who had known them for a number of years and who also knew many people in the neighborhood in which they lived, to the effect that Charles had told him that he and Ethel were married in Durham County by a colored minister in the minister's home, that Charles had claimed Ethel as his dependent wife on a Federal income tax form, that they had lived together as husband and wife and both had good reputations in the community in which they lived, and that their reputation in the community in which they lived was that of being man and wife. There was also testimony of other witnesses to the effect that Charles had made statements that he and Ethel were married and that they were reputed as man and wife. Evidence that a man and woman lived together as husband and wife and were reputed to be married is admissible to prove the marriage. Stansbury, N. C. Evidence 2d, § 244; *Forbes v. Burgess,* 158 N.C. 131, 73 S.E. 792.

The father appellant contends, nevertheless, that the marriage of Ethel Mae and Charles Green was illegal because her first marriage was not dissolved. A similar contention was made in the case of *Chalmers v. Womack,* 269 N.C. 433, 152 S.E. 2d 505, in which the validity of a second marriage was involved. In that case the first spouse was still alive at the time of the trial and testified as a wit-

ness that he had never instituted an action for divorce nor had any divorce papers been served upon him. Notwithstanding this evidence the jury answered the issue in favor of the validity of the second marriage. On appeal the Supreme Court affirmed, saying (at page 436):

> "Plaintiffs' assignment of error that the court erred in failing to grant their motion to set aside the verdict as being against the greater weight of the evidence cannot be sustained. The issue was properly submitted to the jury. '"A second or subsequent marriage is presumed legal until the contrary be proved, and he who asserts its illegality must prove it. In such case the presumption of innocence and morality prevail over the presumption of the continuance of the first or former marriage." . . . (I)t is always for the jury where the demand is for an affirmative finding in favor of the party having the burden, even though the evidence may be uncontradicted. . . . Moreover, proof of the second marriage adduced by the defendant, if sufficient to establish it before the jury, raises a presumption of its validity, upon which property rights growing out of its validity must be based.' *Kearney v. Thomas,* 225 N.C. 156, 33 S.E. 2d 871; *Stewart v. Rogers,* 260 N.C. 475, 133 S.E. 2d 155."

In the case before us the Industrial Commission as finders of the facts has found against the appellant's contention and has found on competent evidence that Ethel Mae and Charles K. Green were married about 1946 and lived together as man and wife until Charles's death in 1966. We are bound by that finding.

Appellant's final assignment of error relates to the refusal of the Industrial Commission to allow appellant's motion to be permitted to offer additional evidence, being the testimony of James Johnson to the effect that he had never obtained a divorce from Ethel Mae Green. This motion was filed on 20 April 1967, approximately two months after the hearing date and approximately six weeks after the Opinion and Award of Commissioner Marshall had been filed, and at a time when the case was pending on appeal to the Full Commission. Motions to take additional evidence on appeal before the Full Commission are governed by the general law of this State for the granting of new trials on the grounds of newly discovered evidence. (See Rule XX, § 6 of Rules of the Industrial Commission.) Under our practice, a motion for new trial on the ground of new evidence 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. *Frye and Sons, Inc. v.*

Francis, 242 N.C. 107, 86 S.E. 2d 790. In the case before us the Superior Court Judge has expressly found that the ruling of the Commission denying the motion was not an abuse of its discretion, and we agree with that ruling.

The judgment of the Superior Court affirming the Opinion and Award of the North Carolina Industrial Commission is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

LELA GRANT FORREST v. S. H. KRESS & COMPANY.

(Filed 22 May 1968.)

1. Negligence § 1—

Negligence is the failure to exercise that degree of care for the safety of other persons or their property which a reasonably prudent man, under like circumstances, would exercise, and may consist of acts of commission or omission.

2. Negligence § 37b—

A proprietor is not an insurer of the safety of customers and invitees on his premises, but he is under a duty (1) to keep the aisles and passageways where customers are expected to go in a reasonably safe condition so as not unnecessarily to expose the customers to danger, and (2) to give warning of hidden dangers or unsafe conditions of which the proprietor knows or in the exercise of reasonable supervision and inspection should know.

3. Same—

Where the slippery substance upon which an invitee falls is negligently applied to the floor by the proprietor or his employees, the proprietor is liable if injury to the invitee proximately results, and in such case the injured party is under no duty to show actual or constructive knowledge of the proprietor, since a person is deemed to have knowledge of his own and his employees' act.

4. Negligence §§ 37f, 37g—

Evidence tending to show that plaintiff invitee entered defendant's store and was walking down the aisles to look at merchandise displayed on counters, that plaintiff slipped and fell upon a spot of cleaning oil, with resultant injuries to her hip, and that the floor around the area where plaintiff fell was more "slick and glazy-looking" than anywhere else, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence in improperly oiling the floor, and insufficient to show contributory negligence on the part of plaintiff as a matter of law.

APPEAL by plaintiff from *Bowman, S.J.*, at the October 1967 Civil Session of WAYNE Superior Court.

This is a civil action to recover for personal injuries sustained by plaintiff as the result of her slipping and falling on the floor of defendant's store.

Plaintiff's evidence tended to show the following:

On 1 April 1965, plaintiff, a 65-year-old woman in good health, and a friend, Mrs. Beaman, were shopping in the City of Goldsboro, N. C. They visited in various stores before entering the defendant's store some time after 11:30 that morning. Upon entering defendant's store, they walked toward the back of the store looking at merchandise displayed on counters and tables. After separating from Mrs. Beaman, plaintiff continued up an aisle and turned a corner at a counter. As she turned, plaintiff's feet suddenly slipped out from under her, causing her to fall to the floor in the middle of the aisle on her left hip. "My feet went out from under me as quick as if I had been on a pair of roller skates." The floor was made of wood, was somewhat uneven, and had some type of cleaning oil on it.

In the area where plaintiff fell (approximately one-half yard long and one-half yard wide), the floor was slick and glazy-looking, more so than anywhere else. "It looked glazier than the other part of the floor."

After her fall, plaintiff tried to lift herself with her right hand, but her hand slipped upon the oil on the floor. Her hand smelled oily, and the oil was slick like the solution identified as Mycobrite.

Plaintiff received substantial injury, primarily a fractured hip. Her medical expenses exceeded $1900.00 and her doctors testified that she would have a thirty-five per cent permanent partial disability of her left leg.

Defendant stipulated that it used Mycobrite on its floors, and a small bottle of Mycobrite was introduced in evidence. Plaintiff had Mycobrite on the back of her coat, from the hipline downward, to the extent that the coat had to be sent to the dry cleaners.

In its answer, defendant admitted that it provided for its own janitorial service, including floor cleaning and maintenance, and that it used Mycobrite on its floors.

Plaintiff alleges that in the maintenance of its floor on the day in question, defendant was careless and negligent in the following particulars:

> "(a) In that it applied oil or some other slick substance on the floor in an uneven manner, permitting spotty accumulations in large or unusual quantities so as to cause the floor to become dangerous to persons walking upon it.

"(b) In that it permitted spotty accumulations of oil or other slick substance in large or unusual quantities to remain upon the floor when the defendant knew or should have known that the same endangered the safety of persons walking upon the floor.

"(c) In that it failed to remove the oil or other slick substance from the floor or to take such other action as was reasonably necessary to protect invitees and guests in its place of business lawfully walking upon the floor.

"(d) In that it failed to give notice or warning to persons walking along the floor of the unusual, slippery, dangerous and unsafe condition of the floor."

At the close of plaintiff's evidence, defendant's motion for involuntary nonsuit was allowed. Plaintiff appealed.

Smith & Everett by W. Harrell Everett, Jr., Attorneys for plaintiff appellant.

George K. Freeman, Jr. and H. Jack Edwards, Attorneys for defendant appellee.

BRITT, J. Plaintiff's assignments of error relate to the granting of defendant's motion for judgment as of involuntary nonsuit and the entry of judgment thereon.

Considering the evidence offered by plaintiff in the light most favorable to her and giving her the benefit of every reasonable inference of fact to be drawn therefrom, as we are bound to do, we hold that the evidence was sufficient to make out a *prima facie* case of actionable negligence for the jury.

Negligence is the failure to exercise that degree of care for the safety of other persons or their property which a reasonably prudent man, under like circumstances, would exercise, and may consist of acts of commission or omission. 3 Strong, N. C. Index, Negligence, § 1, p. 442, and cases cited therein.

"Persons entering a mercantile establishment during business hours to purchase or look at merchandise do so at the actual or implied invitation of the proprietor, upon whom the law imposes the duty of exercising ordinary care (1) to keep the aisles and passageways where customers are expected to go in a reasonably safe condition, so as not unnecessarily to expose the customer to danger, and (2) to give warning of hidden dangers or unsafe conditions of which the proprietor knows or in the exercise of reasonable supervision and inspection should know. However, the proprietor is not

an insurer of the safety of customers and invitees while on the premises and is only liable for injuries resulting from his negligence. *Lee v. Green & Co.*, 236 N.C. 83, 85, 72 S.E. 2d 33." Moore, J., speaking for the court in *Waters v. Harris,* 250 N.C. 701, 110 S.E. 2d 283.

There was sufficient evidence in the instant case to support the inference that from want of ordinary care on the part of the defendant, its floor was improperly oiled and left in an unsafe condition. Where the slippery substance is placed on or negligently applied to the floor by the proprietor or his servants or employees, the proprietor is liable if injury to an invitee proximately results. In such case, the injured party is under no duty to show that the proprietor had actual or constructive notice of the presence of the slippery substance. One is deemed to have knowledge of his own and his employees' acts. *Waters v. Harris, supra; Copeland v. Phthisic,* 245 N.C. 580, 96 S.E. 2d 697.

In its answer defendant pled contributory negligence on the part of plaintiff, and in its brief contends that plaintiff's evidence disclosed that she was contributorily negligent as a matter of law. We hold that the evidence does not disclose contributory negligence as a matter of law.

The trial court erred in granting defendant's motion for judgment as of involuntary nonsuit, necessitating a

New trial.

MALLARD, C.J., and MORRIS, J., concur.

CHARLES B. SIMMONS, SR. AND WIFE, SYLVIA W. SIMMONS, v. HUGH MORTON, AGNES M. MORTON AND AGNES M. COCKE.

(Filed 22 May 1968.)

1. Principal and Agent § 4—

In an action to enforce against an alleged principal an agreement made by an alleged agent, nonsuit is proper in the absence of proof of the existence of the agency.

2. Frauds, Statute of § 9; Easements § 1—

In an action to restrain defendants from constructing apartment buildings or a shopping center upon certain property in violation of an alleged agreement to use the property solely for residential purposes, the right claimed is a negative easement which is required by the Statute of Frauds,

G.S.22-2, to be in writing, and where the evidence shows the alleged agreement rests in parol, nonsuit is proper.

APPEAL by plaintiffs from *Mintz, J.*, at the November 1967 Civil Session of NEW HANOVER Superior Court.

This is a civil action brought by plaintiffs, husband and wife, to enjoin the defendants from constructing apartment buildings or a shopping center on any portion of an undeveloped tract of land containing approximately sixty acres and owned by the *feme* defendants. Defendant Agnes M. Morton is the mother, and defendant Agnes M. Cocke is the sister of defendant Hugh Morton.

Plaintiffs reside in a home they own in Long Leaf Hills Subdivision, which home they built on a lot they purchased from defendant Hugh Morton and his wife on 14 January 1965. The sixty-acre tract above referred to is triangular in shape and is located in the intersection of Shipyard Boulevard and N. C. Highway No. 132 in New Hanover County. Long Leaf Hills Subdivision is adjacent to the tract, and plaintiffs' lot is located some six hundred feet from the tract.

Plaintiffs contend that defendant Hugh Morton on 14 January 1965, as well as prior to and subsequent to said date, was acting as agent of the *feme* defendants; that at the time plaintiffs purchased their lot, Mrs. Lucy B. Johnson, secretary for defendant Hugh Morton, while in the presence or hearing distance of her employer, made specific representations and promises to the plaintiffs to the effect that the sixty-acre tract would be developed for single-unit residences and would not be developed for commercial purposes. Plaintiffs further contend that they relied upon the representations of Mrs. Johnson and by reason thereof purchased their lot and built their home thereon. Plaintiffs contend that they will suffer irreparable damage if a shopping center or an apartment building is erected on the sixty-acre tract and ask for injunctive relief.

The defendants filed answer in which they denied that Lucy B. Johnson made the representations alleged by plaintiffs, denied any knowledge of any representations made by Mrs. Johnson, denied any authority of Mrs. Johnson to make representations for them, denied any authority of defendant Hugh Morton to make representations affecting the *feme* defendants' sixty-acre tract, and also pleaded the statute of frauds as an affirmative defense.

Plaintiffs' application for a temporary restraining order was denied by Cowper, J. The case was heard on its merits before Mintz, J., and a jury. At the close of the plaintiffs' evidence, the court sustained a motion by defendants for judgment as in case of nonsuit. Plaintiffs appealed.

Aaron Goldberg and James L. Nelson, Attorneys for plaintiff appellants.

Hogue, Hill & Rowe by William L. Hill, II, Attorneys for defendant appellees.

BRITT, J. Although plaintiffs make thirteen assignments of error, their crucial assignment is that the trial court committed error in allowing defendants' motion for judgment as in case of nonsuit. We hold that the trial court properly allowed defendants' motion.

Defendants contend that plaintiffs failed to show agency between Mrs. Lucy B. Johnson and the defendants, particularly the *feme* defendants; they also contend that plaintiffs' attempt to impose a negative easement by oral agreement is in violation of the statute of frauds and is not enforceable.

Plaintiffs attempted to allege two causes of action which are substantially the same, in that they allege an oral agreement or promise by the secretary of the defendant Hugh Morton to place a negative easement on property owned by the *feme* defendants, and seek to enjoin all defendants from erecting an apartment house or shopping center on the sixty acres of land in question.

Plaintiffs failed to carry the burden of proof on the issue of agency. They failed to show that defendant Hugh Morton was the agent of the *feme* defendants; consequently, the acts of an employee of defendant Hugh Morton could not be imputed to the *feme* defendants.

"The plaintiff has the burden of proving that a particular person was at the time acting as a servant or agent of the defendant. An agent's authority to bind his principal cannot be shown by the agent's acts or declarations. This can be shown only by proof that the principal authorized the acts to be done or that, after they were done, he ratified them." Lee, N. C. Law of Agency and Partnership, § 20. One who seeks to enforce against an alleged principal a contract made by an alleged agent has the burden of proving the existence of the agency and the authority of the agent to bind the principal by such contract. *Supply Co. v. Hight,* 268 N.C. 572, 151 S.E. 2d 50; *O'Donnell v. Carr,* 189 N.C. 77, 126 S.E. 112. A family relationship creates no presumption of agency between members of the family. *Supply Co. v. Hight, supra.*

"One who deals with an agent must, to protect himself, ascertain the extent of the agent's authority." Rodman, J., speaking for our Supreme Court in *Nationwide Homes v. Trust Co.,* 262 N.C. 79, 136 S.E. 2d 202.

"The burden of establishing the relation of principal and agent

between defendant and said real estate agent is upon plaintiff. The relation can arise only from a contract between the parties, express or implied. * * * The law will not imply such a contract unless the same is clearly established by the facts." *O'Donnell v. Carr, supra.*

Defendants' motion for judgment as of nonsuit was proper also for that the alleged representations or restrictions were in violation of the statute of frauds.

Many of the legal questions involved here were thoroughly discussed by Varser, J., speaking for our Supreme Court in *Davis v. Robinson,* 189 N.C. 589, 127 S.E. 697. The following excerpts from the opinion are pertinent: "Plaintiffs' prayer for injunctive relief presupposes an easement in favor of their lots and a servitude in the defendants' lots. * * * An easement is an incorporeal hereditament, and is an interest in the servient estate. * * * Negative easements are those where the owner of a servient estate is prohibited from doing something otherwise lawful upon his estate, because it will affect the dominant estate. * * * An easement, being a hereditament, is expressly included within this statute (the statute of frauds). * * * Negative easements are within the Statute of Frauds and cannot be proved by parol." Since its rendition, this decision has been cited many times. See *Hege v. Sellers,* 241 N.C. 240, 84 S.E. 2d 892.

The pertinent portion of our statute of frauds, G.S. 22-2, provides as follows: "All contracts to sell or convey any lands, tenements or *hereditaments,* or any interest in or concerning them, * * * shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." (Emphasis ours).

Plaintiffs' contentions regarding the representations and promises of Mrs. Johnson would tend to establish a negative easement, which, under the decisions of our Supreme Court, clearly comes within the statute of frauds.

In *Weant v. McCanless,* 235 N.C. 384, 70 S.E. 2d 196, Denny, J. (later C.J.), speaking for the court, sets forth the three ways in which the statute of frauds may be taken advantage of. The second method is as follows: "The contract, as alleged, may be denied and the statute pleaded, and in such case if it 'develops on the trial that the contract is in parol, it must be declared invalid.' "

The evidence in the case at bar showed that the alleged contract was in parol; therefore, the Superior Court properly declared it invalid.

In view of the foregoing, we do not deem it necessary to consider the other assignments of error made by plaintiffs.

The judgment of the Superior Court is

Affirmed.

MALLARD, C.J., and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. GEORGE WILLIAMS, JR.

(Filed 22 May 1968.)

1. **Disorderly Conduct and Public Drunkenness § 2—**

The offense of public drunkenness, G.S. 14-335, is within the jurisdiction of a Justice of the Peace.

2. **Same—**

A warrant charging that defendant did "unlawfully and wilfully appear off of his premises in a drunken condition" is insufficient to charge the offense of public drunkenness proscribed by G.S. 14-335, since it fails to charge that defendant was in a public place.

3. **Indictment and Warrant § 9—**

A warrant must contain directly or by proper reference at least a defective statement of the crime charged.

4. **Same—**

A warrant should not be quashed if the essential matters of the offense are set forth therein.

5. **Indictment and Warrant § 12—**

Our courts have authority to amend warrants defective in form, and even in substance, provided the amendment does not change the nature of the offense charged in the original warrant.

APPEAL from *Godwin, S.J.*, October 1967 Criminal Session of the Superior Court of DUPLIN County.

This is a criminal prosecution upon a warrant. The defendant moved to quash the warrant in Superior Court because it did not charge an offense. The motion was denied. The solicitor moved to amend the warrant, the motion was allowed, and the warrant was amended to charge properly the crimes of public drunkenness and unlawful possession of tax paid whiskey with the seal broken. Upon plea of not guilty, the verdict of the jury was guilty of the charge of public drunkenness and not guilty of the charge of possession of whiskey.

From the judgment imposed, the defendant appeals.

Attorney General T. W. Bruton, Deputy Attorney General Harrison Lewis, and James E. Magner, Staff Attorney, for the State.

Mercer and Thigpen by Ella Rose Thigpen for the defendant.

MALLARD, C.J. The defendant was first tried by a Justice of the Peace on a warrant issued by the Justice of the Peace, the pertinent parts thereof reading as follows: "On or about the 6 day of August, 1967, George Williams, Jr. was unlawfully, & wilfully, appear off of his premises in a drunken condition and did have in his possession tax paid whiskey with the seal broken."

The judgment rendered by the Justice of the Peace was: "After hearing the evidence in this case, it is adjudged that the defendant, GEORGE WILLIAMS, JR. PROBABLE CAUSE BEING FOUND, BE BOUND TO GENERAL COUNTY COURT is guilty" There was no other judgment entered by the Justice of the Peace.

The offense of public drunkenness is within the jurisdiction of a Justice of the Peace. G.S. 14-335 reads in part as follows: "If any person shall be found drunk or intoxicated in any public place, he shall be guilty of a misdemeanor and upon conviction or plea of guilty shall be punished by a fine of not more than fifty dollars ($50.00) or by imprisonment for not more than twenty days in the county jail."

Thereafter, in the General County Court of Duplin County the defendant was tried on the same warrant and found "guilty as charged" and the court "pronounced judgment." The record does not otherwise reveal of what he was found guilty or what the judgment was. There is nothing in the record showing that the defendant was tried or sentenced for public drunkenness in the Justice of the Peace court or the General County Court.

The defendant, insofar as this record shows, did not appeal from a judgment rendered by the Justice of the Peace on a public drunkenness charge.

From the verdict and judgment thereon in the county court, defendant appealed to the Superior Court. Before pleading in Superior Court, the defendant moved to quash the warrant for the reason that it did not charge an offense. The motion should have been allowed as to that portion relating to drunkenness. The warrant was fatally defective and void as to the attempted charge of public drunkenness. There are many places a person can be "off of his premises" and not be in a public place. Under the statute drunkenness becomes a crime when, and only when, it is in a public place. The omission to charge "in a public place" was not a mere informality or refinement; it was a failure to charge one of two essential

elements of the crime and a failure to express the charge in a plain, intelligible, and explicit manner. G.S. 15-153. Certainly, the warrant would have been void if it had charged the defendant "was unlawfully and wilfully in a public place" and failed to charge that he was drunk or intoxicated. In like manner, the warrant is void in that it charged that he was drunk but failed to charge that he was in a public place.

There are no facts or circumstances set out in the original warrant to bring the charge within the statutory definition of the crime of being drunk or intoxicated in a public place. A warrant must contain directly or by proper reference at least a defective statement of the crime charged. *State v. McGowan,* 243 N.C. 431, 90 S.E. 2d 703.

Our Supreme Court in *State v. Brown,* 225 N.C. 22, 33 S.E. 2d 121, held:

> "It is well settled by this Court, that the power of the Superior Court to allow amendments to warrants is very comprehensive. (citations omitted.) A warrant cannot be amended so as to charge a different offense. (citations omitted.) However, the Superior Court, under our statute, G.S. 7-149, Rule 12, may allow, within the discretion of the court, an amendment to a warrant both as to form and substance before or after verdict, provided the amended warrant does not change the nature of the offense intended to be charged in the original warrant. (citations omitted.) A warrant may be defective in form and substance and yet contain sufficient information to inform the defendant of the accusation made against him. Such a warrant may be amended."

Our statute, G.S. 7-149, Rule 12, also provides that the warrant shall not be quashed "if the essential matters are set forth therein." In this case the essential matter of being in a public place was not set forth therein, and since the Justice of the Peace, who had jurisdiction of a public drunkenness charge, did not enter judgment on a public drunkenness charge, we hold that the original warrant, under these circumstances, did not contain sufficient information to inform the defendant that he was charged with a violation of G.S. 14-335.

"Our courts have authority to amend warrants defective in form, and even in substance, provided the amendment does not change the nature of the offense charged in the original warrant." 4 Strong, N. C. Index 2d, Indictment and Warrant, § 12, p. 356.

"A warrant and the affidavit upon which it is based will be construed together and will be tested by rules less strict than those ap-

plicable to indictments, but nevertheless, the warrant and the affidavit together must charge facts sufficient to constitute an offense under our criminal law." 4 Strong, N. C. Index 2d, Indictment and Warrant, § 9, p. 350.

In order to constitute a valid charge under a statute, the essential elements of the offense must be set forth in the warrant. "Where a warrant or indictment is fatally defective in failing to charge an essential element of the offense, the defect cannot be cured by amendment." 4 Strong, N. C. Index 2d, Indictment and Warrant, § 12, p. 357.

In view of the foregoing, it is not necessary to discuss the defendant's other assignments of error; however, an interesting question is raised by the defendant, but not decided, as to whether the private parking area of a mercantile establishment is a public place, at night, some hours after the mercantile establishment has closed for the night.

From the record in this case we cannot ascertain what the judgment in the Superior Court was. The record reads, "Judgment was suspended sentence on thirty days." It should be noted that the statute provides a maximum of twenty days imprisonment for the simple offense of being drunk or intoxicated in a public place.

Reversed.

BRITT and MORRIS, JJ., concur.

LINWOOD EARL TOLER, BY HIS NEXT FRIEND, ROBERT G. BOWERS, v. BRINK'S, INC., EUGENE DONALD RHODES, MARVIN LEE RAINES, JR., AND DOROTHY T. RAINES.

(Filed 22 May 1968.)

1. Trial § 13—

It is within the discretion of the trial court to allow the jury to view the scene of an automobile collision.

2. Same—

An instruction permitting the jury to consider information obtained from a jury view as substantive evidence is error, the purpose of the jury view being solely to illustrate the testimony in the case.

3. Automobiles § 90—

An instruction stating a contention of the plaintiff in the language of the reckless driving statute, G.S. 20-140(b), without applying the statute to the evidence in the case fails to meet the requirements of G.S. 1-180 and is prejudicial error.

APPEAL from *Bundy, J.*, October 1967 Regular Civil Session of CRAVEN Superior Court by the defendants, Brink's, Inc., and Eugene Donald Rhodes.

This action was instituted 26 January 1965 to recover damages for personal injuries sustained by the plaintiff in a motor vehicle collision which occurred about 11:15 a.m. on 29 October 1963 on Rural Paved Road #1003 in Craven County about nine miles north of the City of New Bern.

The action was originally instituted against the defendants, Brink's, Inc., Eugene Donald Rhodes, Marvin Lee Raines, Jr., and Dorothy T. Raines. The plaintiff was riding in the right rear seat of a 1963 Chevrolet Impala Sports Coupe owned by the defendant, Dorothy T. Raines, and driven at the time by her son, Marvin Lee Raines, Jr. The Raines' Chevrolet was proceeding in a westerly direction towards Askin. It was raining at the time. On a curve in the road in front of the home of Mrs. Charles Le Fever, the Chevrolet met a GMC armored truck owned by the defendant, Brinks, Inc., and operated at the time by its agent, Eugene Donald Rhodes. The truck was proceeding in an easterly direction towards Aurora. The left front of the Chevrolet and the left front of the armored truck collided near the center of the road resulting in the injuries sustained by the plaintiff.

At the close of the plaintiff's evidence, judgment as of nonsuit was entered as to the defendants, Marvin Lee Raines, Jr., and his mother, Dorothy T. Raines.

The jury answered issues of negligence and damages against the defendants, Brink's, Inc., and Eugene Donald Rhodes. From a judgment entered upon the verdict, these two defendants appealed to this Court.

Kennedy W. Ward & A. D. Ward, Attorneys for plaintiff appellee.

White, Hooten & White by Thomas J. White, Attorneys for defendant appellants.

CAMPBELL, J. Both the plaintiff and the defendants offered evidence as to the collision of the two vehicles. The evidence was conflicting, but we are of the opinion that a jury question was presented. Since the case will go back for a new trial, we refrain from a detailed discussion of the evidence.

In the course of the trial the presiding judge permitted the jury to go to the scene of the collision even though nearly four years had elapsed. This was done in the discretion of the trial court and

was not error. The record discloses, however, that in the charge of the trial court to the jury, the following was stated:

"You should weigh all the evidence in every way, the oral evidence, the physical evidence, and the evidence that you obtained by viewing the premises." Again, in the charge the trial court in connection with stating the contentions of the plaintiff said: "That this was a sharp curve, and you have been permitted to view the roadway and curve." Thus, in two instances in the instructions given by His Honor to the jury, the jury's view of the scene of the collision was treated as substantive evidence, rather than illustrative evidence. This was error.

In North Carolina there is no statutory authority for a jury view. Pursuant to the inherent authority of the court in the search for truth, a jury view is permissible in the discretion of the trial court. The object, however, is merely to present the scene to the jury more vividly than is possible by the description of witnesses. A jury view is to be used with the same effect as pictures, maps, drawings, and other illustrative sources. See *State v. Stewart*, 189 N.C. 340, 127 S.E. 260; Stansbury, N. C. Evidence 2d, § 120; 2 McIntosh, N. C. Practice 2d, § 1491; 53 Am. Jur., Trial, § 451; 88 & 89 C.J.S., Trial, § 47 and § 464.

In the charge to the jury, the trial court also stated:

"Now, they also contend further and in connection with that too that the defendants were driving the car 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. Well, you can see how those two things sort of merge into each other and to be sort of taken into consideration conjunctively."

It is impossible for us to know whether the above quotation is correct and actually occurred. We are bound by the record as we receive it. If the above is a correct report of what occurred, it is error. Our statute, G.S. 1-180, prescribes that the trial court must declare and explain the law arising upon the evidence and a failure to do so constitutes error. *Ryals v. Carolina Contracting Co.*, 219 N.C. 479, 14 S.E. 2d 531; *Lewis v. Watson*, 229 N.C. 20, 47 S.E. 2d 484.

The trial court gave no explanation of the above statement taken from G.S. 20-140(b) and no attempt was made to apply that statement to the evidence in the case. "It is error for a trial court to read a statute to the jury without giving an explanation thereof in connection with the evidence, where such explanation is patently necessary to inform the jury as to the meaning of the statute and as to its bearing on the case." *Lewis v. Watson, supra.*

Other exceptions were taken by the defendants but since they are not apt to arise again, no discussion is deemed necessary.

For the errors pointed out above, we order a

New trial.

BRITT and MORRIS, JJ., concur.

CAROLINA OVERALL CORPORATION v. EAST CAROLINA LINEN SUPPLY, INC.

(Filed 22 May 1968.)

1. Appeal and Error § 6—

An appeal from orders vacating a subpœna *duces tecum* and denying a motion for production of records will ordinarily be dismissed as fragmentary and premature.

2. Process § 5.1; Bill of Discovery § 3—

Order of the trial court vacating a subpœna *duces tecum* is proper where the contemplated use of the subpœna is for the purpose of discovery.

APPEAL from *Parker, J.*, 4 March 1968 Session, Superior Court, NASH County.

Plaintiff and defendant are competitors in the industrial laundry business. On and prior to 11 August 1967 Bill Lowe was employed by plaintiff as a route salesman pursuant to a written contract containing covenants to the effect that Lowe would not engage in competition with the plaintiff for a period of one year following termination of his employment. Plaintiff alleges that Lowe terminated his employment 11 August 1967 and shortly thereafter entered the employment of the defendant. Plaintiff claims that it had service contracts with twelve specified customers at the time Lowe entered the employment of the defendant. Plaintiff further claims that defendant wrongfully induced Lowe to breach his contract with plaintiff for the purpose of using Lowe to solicit for the defendant the patronage of plaintiff's customers, including the twelve specified customers. Plaintiff seeks damages from defendant for loss of patronage and good will, together with net profits it would have earned on the contracts with the specified customers.

Defendant filed answer denying the material allegations of the complaint and set forth several affirmative defenses, including the defense that the contract between plaintiff and Lowe was invalid.

Subsequent to the filing of the complaint and answer, defendant procured an order for the adverse examination of the general manager of plaintiff, pursuant to G.S. 1-568, *et seq.* The defendant at the same time had the Clerk of Superior Court of Nash County issue a subpœna *duces tecum* directed to said general manager to have certain enumerated books and records of plaintiff with him at the time of the adverse examination. Plaintiff moved to vacate the subpœna *duces tecum.* The Clerk issued an order vacating this subpœna and on appeal Judge Parker affirmed the Clerk's order.

Prior to the order vacating the subpœna *duces tecum,* the defendant filed a motion for inspection and production of documents under G.S. 8-89, *et seq.*

On the same date Judge Parker heard the appeal from the Clerk, he heard the motion for the inspection and production of documents. Judge Parker denied the motion for inspection and production of documents with the exception that plaintiff was ordered to produce copies of its alleged contracts with the twelve contract customers referred to in the complaint. Judge Parker further provided that the denial of the motion for production of documents "shall be without prejudice to defendant's right to come again and re-apply for production and inspection of documents specifying in more and greater detail the items sought to be discovered."

The adverse examination has not yet been taken.

From the orders of Judge Parker: (1) sustaining the order of the Clerk vacating the subpœna *duces tecum* and; (2) denying in part the defendant's motion for production of records, this appeal was taken.

Spruill, Trotter & Lane by John R. Jolly, Jr., Attorneys for plaintiff appellee.

John B. Exum, Jr., and Battle, Winslow, Scott & Wiley by Robert M. Wiley, Attorneys for defendant appellant.

CAMPBELL, J. Pending the appeal in this Court, the plaintiff appellee moved to dismiss the appeal as being premature. Since the record and briefs had been filed, we permitted oral argument and reserved our ruling on the motion to dismiss the appeal. We are of the opinion that the motion was proper and that the appeal should be dismissed.

Fragmentary appeals should not be encouraged and appeals should not be permitted from interlocutory orders entered from time to time pending final adjudication on the merits of the case. To permit such appeals would unnecessarily clutter the dockets of the ap-

pellate division and prevent the orderly disposal by that division of matters pending before it. *Buick Co. v. General Motors Corp.*, 251 N.C. 201, 110 S.E. 2d 870; *Cole v. Trust Co.*, 221 N.C. 249, 20 S.E. 2d 54.

We have, nevertheless, considered the questions presented. We think that the order vacating the subpœna *duces tecum* was entered properly. It is obvious that the subpœna *duces tecum* was for the purpose of discovery and that it not a proper use of such a process. For the history and purpose of this process, see *Vaughan v. Broadfoot,* 267 N.C. 691, 149 S.E. 2d 37.

With regard to the motion for inspection and production of documents, we think the order of Judge Parker adequately protected the rights of all parties in this matter and no substantial right of the defendant was prejudiced by this order. Compare *Abbitt v. Gregory,* 196 N.C. 9, 144 S.E. 297.

Appeal dismissed.

BRITT and MORRIS, JJ., concur.

JUAN FORGAY, EMPLOYEE, v. N. C. STATE UNIVERSITY, EMPLOYER, SELF-INSURER AND TOWN OF MADISON, EMPLOYER; HARTFORD ACCIDENT AND INDEMNITY COMPANY, CARRIER.

(Filed 12 June 1968.)

1. Master and Servant § 94—

On appeal from the Industrial Commission review is limited to questions of law, which include whether the record contains any competent evidence to support the findings of fact by the Commission and whether the facts found are sufficient to support the conclusions of law.

2. Same—

Where there is no competent evidence to support a finding of fact by the Commission, the finding of fact must be stricken.

3. Master and Servant § 51— Evidence held insufficient to support Commission's findings of dual employment.

In this action by the injured employee against a university and a municipality for injuries arising out of and in the course of his employment as an administrative assistant to the town under a program whereby prospective college students in need of financial assistance undertake summertime work, the university issuing a check to the employee for his wages, 90 per cent of which was derived from federal funds and 10 per cent from funds deposited by the municipality, the Industrial Commission found that plaintiff was an employee of both the university and the

municipality and prorated the award, 90 per cent against the university and 10 per cent against the town. The university excepted to the Commission's ruling as to its share of the award and appealed. *Held:* The evidence is insufficient to support the Commission's findings of fact that (1) the employee was assigned to the work by the university, (2) the university made application to the program for funds, (3) the university paid 90 per cent of the funds, (4) and that the university had the right to control the employee and to discharge him or to assign him to another position; accordingly, the Commission's conclusion of law that the claimant was an employee of the university must be set aside.

4. Same—

A finding that the university "paid" claimant his wages by check and withheld income and social security taxes therefrom does not constitute a finding that claimant was an employee of the university, especially so when all the evidence before the Commission tends to show that the town prescribed claimant's hours of work, his duties, and the manner of performing his duties.

5. Payment § 1—

The term "to pay" means to satisfy someone for services rendered.

APPEAL by North Carolina State University from an Opinion and Award of the North Carolina Industrial Commission filed 23 January 1968.

Juan Forgay, plaintiff, was accepted in November 1965 by North Carolina State University to begin his college education in the Fall Term of 1966. Later, Forgay made application for a summer job under the PACE program. PACE is the abbreviation for "Plan Assuring College Education."

The PACE program in North Carolina is administered under the North Carolina State Board of Public Welfare, Division of Community Services. The State Board of Public Welfare provides an administrator of the PACE program, and a local coordinator for the program is named for each county in the State. The State Administrator of PACE provides information of the program to high schools, colleges, and public agencies; and in general coordinates the functioning of the program. PACE, through its local coordinators in each county, assists in the placement of students in summer jobs, but it does not hire students or direct the work to be done. PACE does not handle any of the funds for payment of students' wages.

Participating colleges request and receive funds from the United States Office of Health, Education and Welfare under the Higher Education Act, for the payment of students' wages on summer jobs. The college then disburses from these funds 90% of each participating student's wages, and the other 10% from funds deposited with the college for this purpose by the using public agency.

The uncontroverted evidence before the Industrial Commission

disclosed the following with respect to the employment in question. Through his high school guidance counselor, Juan Forgay applied for a summer job under the PACE program. The local coordinator of the PACE program in Rockingham County found Juan Forgay a job with the Town of Madison. This was done on PACE Form #1, with Forgay filling out section 1.1, his high school guidance counselor filling out section 1.2, and the local PACE coordinator filling our section 1.3.

Thereafter, on PACE Form #2, Forgay applied to North Carolina State University to be certified as eligible to participate in the PACE summer program. The qualifications for participation are that the applicant must have been accepted by a college as a student, and the applicant must be in need of financial assistance to enable him to attend college. PACE Form #2 is entitled "Certificate of Eligibility," and Forgay completed section 2.1 thereof in which he asked that he be certified as eligible. Under section 2.2 the admissions officer certified that Forgay had been accepted as a student; and under section 2.3 the student aid officer certified that Forgay was in need of financial assistance.

On page 1 of PACE Form #3 the Town of Madison certified its willingness to put Forgay to work, and certified that it had set aside funds for its 10% share. On page 2 of PACE Form #3 the Town of Madison further signed an "Assurance of Compliance with the Civil Rights Act of 1964." In this assurance the following language appears:

> Town of Madison "AGREES THAT it will comply with title VI of the Civil Rights Act of 1964 (P. L. 88-352) to the end that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under *any program or activity for which the Applicant receives Federal financial assistance either directly or indirectly* and HEBEBY GIVES ASSURANCE THAT it will immediately take any measures necessary to effectuate this agreement." (Emphasis added.)
>
> * * *
>
> "THIS ASSURANCE is given in consideration of and for *the purpose of obtaining either directly or indirectly Federal grants to be in the form of college students employed* in the Work-Study program as provided for in the Higher Education Act (Title IV, Part C). The Applicant *recognizes and agrees that such Federal financial assistance will be extended* in reliance on the representations and agreements made in this assurance,

and that the United States shall have the right to seek judicial enforcement of this assurance. This assurance is binding on the Applicant, its successors, transferees, and assignee, and the person or persons whose signatures appear below are authorized to sign this assurance on behalf of the Applicant." (Emphasis added.)

The "Certificate of Assumption of Responsibility by Agencies or Organizations" which was executed by the Town of Madison on PACE Form #3 contains the following language:

> "This is to certify that this agency (or organization) has set aside $90.00 as matching funds and to provide *the employer's share* in the payment of employment benefits. This is *to provide employment for* Juan Forgay a student at State College as a *(sic)* Administrative Aide in Town of Madison in Rockingham County." (Emphasis added.)

The placement of Juan Forgay to work as an administrative aide for the Town of Madison was accomplished by the local PACE coordinator and the Town. His work was to begin 13 June 1966. The Town of Madison was to deposit with North Carolina State University 10% of Forgay's wages, and the University was to issue its check to Forgay for his total wages; 90% coming from the Federal funds allotted, and 10% from the funds deposited by the Town of Madison.

The assignment of the duties and hours of work of Forgay was the function of the Town of Madison, and it was the recipient of the value of whatever services Forgay rendered in his job. The Town of Madison kept the records of Forgay's work and reported to the University the hours worked.

Forgay sustained injury arising out of and in the course of his employment on 15 June 1966. The Industrial Commission found that Forgay was an employee of both the Town of Madison and North Carolina State University and prorated the award, 90% against North Carolina State University and 10% against the Town of Madison. The University appealed.

T. W. Bruton, Attorney General by Mrs. Christine Y. Denson, Staff Attorney, attorneys for defendant appellant, North Carolina State University.

Adams, Kleemeier, Hagan and Hannah by Robert G. Baynes, attorneys for defendant appellee, Hartford Accident and Indemnity Company, Compensation Carrier for the Town of Madison.

BROCK, J. Neither the North Carolina State University nor the compensation carrier for the Town of Madison dispute the fact that Juan Forgay is entitled to an award by the Industrial Commission. The controversy centers upon the question of who should bear the cost of the award. The Town of Madison contends that Forgay was an employee of both it and the University, and that the award should be prorated as was done by the Industrial Commission. The University contends that Forgay was not an employee of the University.

On appeal from the Industrial Commission, review is limited to questions of law. These questions of law include whether the record contains any competent evidence to support the findings of fact by the Commission, and whether the facts found are sufficient to support the conclusions of law. *Moore v. Electric Co.*, 259 N.C. 735, 131 S.E. 2d 356. It is well settled that if there is *any* competent evidence upon which the Commission can base its findings they must be upheld. But it is equally correct that the Commission's findings must be supported by *some* competent evidence. *Petree v. Power Co.*, 268 N.C. 419, 150 S.E. 2d 749. And where there is no competent evidence to support a finding of fact by the Commission, the finding of fact must be stricken. *McRae v. Wall*, 260 N.C. 576, 133 S.E. 2d 220.

The University assigns as error:

> 1.(a) The portion of Finding of Fact #5 which reads: "Plaintiff was assigned by the N. C. State University to work for the Town of Madison as Administrative Assistant."

In the transcript of the evidence before the Industrial Commission we find the following testimony by Juan Forgay given under cross-examination.

> Q. "Were you contacted then about the employment at the University about the employment?
>
> A. "I did. It was all through my counselor. Except the very last, I received from the University, I had been accepted and to go to work the day I started.
>
> Q. "Did they tell you who you were to work for?
>
> A. "Yes, for Mr. Little.
>
> Q. "From the University you got this communication?
>
> A. "I believe so. I'm not sure, a little over a year ago. It was from Raleigh.
>
> Q. "Did the University ever tell you what job you were to do for the Town?
>
> A. "They just said I was an administrative aide.

Q. "You do recall, refresh your recollection, receiving a letter from State — North Carolina State University telling you when to start work?

A. "Yes.

Q. "And letters also told you for whom?

A. "Yes."

All of the other evidence in the record is to the effect that PACE, through its local coordinator in Rockingham County, arranged for Forgay's work with the Town of Madison. And also that Mr. Benjamine H. Cromer, the local PACE coordinator, notified Forgay by letter dated June 2, 1966, of his employment, as well as when and to whom he should report for work. Other than Forgay's indefinite statements, there is no evidence that the University even knew of Forgay's employment until after his injury.

Nevertheless, taking Forgay's quoted testimony at full value, it would at best support a finding that the University notified him that he had been given a job by the Town of Madison, and notified him when and to whom he should report for work. We hold that the evidence does not support a finding that he was *assigned to work* by the University. The University appellant's assignment of error 1.(a) is sustained.

The University assigns as error:

1.(b) The portion of Finding of Fact #7 which reads: "N. C. State University made application for funds from PACE."

All of the evidence in the transcript before the Industrial Commission discloses that PACE does not handle funds for the employment of students under the program. All of the evidence discloses that participating colleges make their request for funds to the United States Department of Health, Education, and Welfare, and that the funds are allotted by that U. S. Department to the participating college. All of the evidence discloses that PACE administration in North Carolina is provided by the North Carolina State Board of Public Welfare, Division of Community Services. There is no evidence in the transcript that the University made application to PACE for funds. The University appellant's assignment of error 1.(b) is sustained.

The University assigns as error:

1.(c) The portion of Finding of Fact #8 which reads: "North Carolina State University paying ninety per cent."

All of the evidence in the transcript before the Industrial Commission discloses that the University disbursed to Forgay 100% of

his salary. It further discloses that 90% was disbursed by the University from funds allocated by the U. S. Department of Health, Education and Welfare, and that 10% was disbursed by the University from funds deposited with it by the Town of Madison. The University appellant's assignment of error 1.(c) is sustained.

The University assigns as error:

> 1.(d) The portion of Finding of Fact #9 which reads: "N. C. State University paid the plaintiff his wages and paid withholdings for Social Security and income tax. N. C. State University had the right to discharge the plaintiff or assign him to another position, and had the right of control."

All of the evidence tends to show that the University did in fact pay Forgay his wages. According to Webster's Third New International Dictionary (1968) to pay means "to satisfy (someone) for services rendered . . ." This is obviously the sense in which the Commission used the word "paid" in its finding of fact. Also, the University withheld income tax and the employee's contribution to Social Security taxes from Forgay's wages, and remitted them to the appropriate Revenue Departments; the employer's share of Social Security taxes on Forgay's wages was deposited with the University by the Town of Madison in addition to the 10% of wages. However, a finding that Forgay was *paid* by the University is far from finding, under these circumstances, that he was an employee of the University.

The finding that the University had the right of control is contrary to all of the evidence in the transcript before the Commission. All of the evidence tends to show that the agents of the Town of Madison prescribed Forgay's hours of work, his duties, and manner of performing his duties.

There is evidence to support a finding that the University could cause Forgay's employment to be terminated if it found he became no longer qualified for the program, *i.e.:* dropped out of college, did not maintain satisfactory grades, or other reasons not to be qualified to participate in the program. This is merely the reverse of the University certifying to PACE that he was eligible in the first place. There is no evidence in the transcript before the Commission to support a finding that the University had the right to discharge Forgay, or that it had the right to assign him to another position. Insofar as the University appellant's assignments of error 1.(d) is addressed to the portion of Finding of Fact #9 which reads: "N. C. State University had the right to discharge the plaintiff or assign him to another position, and had the right of control," the assignment of error is sustained.

Having determined that the foregoing Findings of Fact are not supported by competent evidence, it follows that they must be stricken. Without those findings of fact, the conclusion of law by the Commission that "[p]laintiff was on June 15, 1966, an employee of the North Carolina State University . . .," and the award of 90% of compensation which is based thereon, can find no support, and both must be set aside.

The award of compensation to Juan Forgay, based upon the finding and conclusion that he was an employee of the Town of Madison is unaffected by this decision.

This cause is remanded to the North Carolina Industrial Commission for further proceedings not inconsistent herewith.

Modified and remanded.

MALLARD, C.J., and PARKER, J., concur.

GOLDIE COBB, WIFE, MARY R. ASKEW, MOTHER, ALEX COBB, DECEASED EMPLOYEE, v. EASTERN CLEARING & GRADING, INC., EMPLOYER; BITUMINOUS CASUALTY COMPORATION, CARRIER.

(Filed 12 June 1968.)

1. Master and Servant § 69—

Where decedent was regularly employed by defendant for only four months prior to the accident causing his death and his wages fluctuated extensively during the period of his employment, the Industrial Commission properly computed decedent's average weekly wage in accordance with the average weekly amount earned by a person of the same grade and character employed in the same class of employment in the same locality. G.S. 97-2(5).

2. Master and Servant §§ 76, 93—

Findings of fact by the Industrial Commission that the deceased employee was not the father of the minor claimants, being supported by competent evidence, are conclusive on appeal even though some incompetent evidence on that issue may have been admitted.

3. Master and Servant § 88—

A claim for compensation for a dependent under 18 years of age must be prosecuted in the dependent's name by a general guardian or other legal representative.

4. Same; Infants § 5—

In an action by a widow and her children seeking recovery under the Workmen's Compensation Act as dependents of a deceased employee, the paternity and dependency of the children being at issue in the suit, it is

error for the hearing commissioner to appoint the widow as next friend of the minor children, the interest of the widow in the suit being opposed to that of the children since her benefits will be reduced by an award to the children.

APPEAL by defendants from *Bundy, J.*, October 1967 Session of Superior Court of CRAVEN.

This is a civil action arising under the North Carolina Workmen's Compensation Act. Plaintiffs seek recovery as dependents of Alex Cobb, employee. It was stipulated at the first hearing before the deputy commissioner that Alex Cobb sustained a fatal injury by accident arising out of and in the course of his employment. Testimony with respect to dependency and with respect to wages of the deceased employee was taken at the first hearing. At the second hearing additional testimony as to the dependency was taken and the deputy hearing commissioner entered an order appointing Goldie Cobb as next friend of her children Michael and Zina Cobb. The deputy commissioner after both hearings, found as facts that "Alex Cobb, the decedent employee, was not the father of either of these children nor did he support them"; that "Alex Cobb, the decedent employee, and his wife, Goldie Bazemore Cobb, lived separate and apart continuously since August of 1955"; that "Alex Cobb . . . is the father of no children"; that "the decedent employee's average weekly wage was $65.31"; that "Goldie Bazemore Cobb, wife of decedent employee, and Mary R. Askew, mother of the decedent employee, are entitled to one-half each of the compensation due in this case". He awarded Goldie Bazemore Cobb compensation at the rate of $37.50 per week for a period of 154.666 weeks beginning 4 November 1964, and made a like award to Mary R. Askew, mother of the employee, having concluded that G.S. 97-2(5) is applicable and having used the wage chart introduced without objection at the second hearing for "a person in the same grade and character employed in the same class of employment in the same locality or community".

Defendants appealed to the Full Commission. The Full Commission affirmed the deputy commissioner with the exception that conclusions of law with respect to the amount of compensation and the award itself was amended to order compensation paid to each of Goldie Bazemore Cobb and Mary R. Askew at the rate of $18.75 per week for a period of 309.332 weeks. Defendants appealed to the Superior Court. From judgment overruling each of defendants' exceptions and assignments of error, defendants appealed.

Marshall & Williams by A. Dumay Gorham, Jr., for defendant appellants.

Stuart A. Curtis for plaintiff appellees.

MORRIS, J. Defendants bring up 13 assignments of error. All of them, however, present three questions for determination: (1) whether there is any competent evidence to support the findings of fact of the hearing commissioner that the decedent employee, Alex Cobb, was not the father of either Michael (Bazemore) Cobb or Zina Cobb; (2) whether the proper provision of N.C.G.S. 97-2(5) was applied in determining the average weekly wage of the decedent employee; and (3) whether the hearing commissioner erred in appointing Goldie Bazemore Cobb, widow, the next friend of Zina Cobb and Michael Cobb, minors.

Assignments of error 4, 7, 8, 9, 10, 12 and 13 relate to the second question. Alex Cobb was employed by defendant Eastern Clearing & Grading, Inc. about the middle of July 1964, and worked continuously until his death on 4 November 1964, with the exception of those days when the work could not be done because of high water. This was, of course, a period of time less than 52 weeks.

G.S. 97-2(5) defines average weekly wages as:

> ". . . the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury . . . divided by fifty-two; but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such fifty-two weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

> But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury."

The first method of determining average weekly wage is obviously not applicable in this situation. Defendant concedes that the second method is not the proper method to use because of the fluctuation of the employee's wages during the period of employment.

The conclusions of law made by the hearing commissioner included the following:

> "3. The decedent employee's average weekly wage was $65.31. G.S. 97-2(5), provides if *(sic)* in part, '. . . Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community."

By proper exceptions and assignments of error, defendants challenged the quoted conclusion of law contending that the fourth method should be used under the principles set out in *Joyner v. Oil Co.*, 266 N.C. 519, 146 S.E. 2d 447. We do not think *Joyner* is controlling here. There, the employee was regularly employed by another company but was employed as a part time truck driver by an oil company. During the winter months and the tobacco curing season, the oil company's regular drivers could not handle the deliveries necessary, and a part time relief driver was employed. The commissioner had used the second method. The Court held that the use of this method did not obtain results fair and just to both parties because it gave plaintiff the advantage of wages earned in the peak tobacco curing season without taking into account the slack periods in which the oil company employed no relief drivers. The Court characterized the employment as "inherently part-time and intermittent".

Among the findings of fact made by the hearing commissioner was the following:

> "7. Decedent employee had worked only approximately four months with the defendant employer and his earnings during

such period was $766.84. The earnings of a fellow employee, Horace Hester, who worked over a fifty-two week period employed in the same class of employment in the same locality or community was $65.31 per week. The yearly earnings of such fellow employee being $2,855.80. (The decedent employee's average weekly wage was $65.31) and he was a full time employee of the defendant employer."

Defendant by proper exception and assignments of error challenged the portion in parenthesis. No exception was taken to the balance of the finding of fact. The unchallenged portion is supported by competent evidence and we are bound by it. *Munford v. Construction Co.*, 203 N.C. 247, 165 S.E. 696.

The decedent employee was regularly employed, ready and available for work every work day. The evidence discloses that work stoppages and lost time resulted from high water and rainy weather, beyond the control of either employer or employee. In *Munford v. Construction Co., supra,* the decedent had been employed 3 months when he was injured. Although when he was first employed, his employment was not regular, he was later assigned a truck and placed on regular duty. The Court upheld an award based on the average weekly amount earned by a person of the same grade and character employed in the same class of employment, to wit, a full time truck driver. Here, the hearing commissioner has made an award based on the average weekly amount earned by a person of the same grade and character employed in the same class of employment, to wit, a full time chain saw employee engaged in clearing drainage projects in eastern North Carolina.

Upon this record, we are constrained to hold that the hearing commissioner's use of method three was authorized and does not obtain results unfair or unjust to either party. Defendant's assignments of error 4, 7, 8, 9 and 10, 12 and 13, as they relate to the question of determination of average weekly wage, are overruled.

Defendant's assignments of error 1, 2, 3, 5, 6, 10, 12 and 13 relate to the issue of dependency. Defendant contends that there is no competent evidence to support the findings of fact that Alex Cobb was not the father of either Michael (Bazemore) Cobb or Zina Cobb.

Without discussing the competency or admissibility of the testimony of Goldie Cobb, widow and mother of the children, we find that there is other competent evidence to support the challenged findings of fact. The mother of the deceased employee testified that her son had been living with her in her house since he and his wife separated in 1955 until the time of his death; that after 1955 he

didn't see his wife, didn't live with her, and didn't resume the marital relation; that the first child was born in 1957; that she didn't know anything about the child until sometime after his birth; that he wasn't named Cobb; that she didn't know anything about the second child until after her son's death; that he never claimed either of the children; that Alex and Goldie Cobb didn't have any children. If the findings of fact are supported by any competent evidence, we are bound by them, even though some incompetent evidence was also admitted at the hearing. *Penland v. Coal Co.*, 246 N. C. 26, 97 S.E. 2d 432.

Upon this record, assignments of error 1, 2, 3, 5, 6 and so much of 10, 12 and 13 as relate to the issue of whether Alex Cobb was not the father of the children, are overruled.

Defendant's assignment of error 11 relates to the appointment of Goldie Bazemore Cobb as next friend of Michael (Bazemore) Cobb and Zina Cobb.

G.S. 97-39 provides that the widow and all children of a deceased employee "shall be conclusively presumed to be dependents of deceased and shall be entitled to receive the benefits of this article for the full periods specified herein."

Plaintiff suggests that the appointment of a next friend is not necessary and cites *Lineberry v. Mebane,* 218 N.C. 737, 738, 12 S.E. 2d 252, where the Court said:

> "A proceeding before the Industrial Commission for compensation is not, strictly speaking, an action. Many of the prerequisites of a lawsuit are not required in a proceeding before the Commission. Thus it is that an infant may prosecute his claim directly without the appointment of a next friend or guardian, as claimant is here undertaking to do."

In that case, however, claimant was over 18 years of age. He was *sui juris* for purposes of the Workmen's Compensation Act. Until then he may prosecute his claim only when represented by general guardian or other legal representative. *McGill v. Freight,* 245 N.C. 469, 96 S.E. 2d 438. In *McGill,* the Court held that the minor dependent was the real party in interest and the proceedings "must be" prosecuted in her name by her general guardian. The minors here are under 18 years of age and have no general guardian. Whether they are dependents and, therefore, entitled to an award is at issue. The hearing commissioner was correct in appointing a next friend.

We think, however, that he was in error in appointing their mother, the widow of the deceased employee. Obviously, if the children were found to be entitled to benefits, the widow's award would be reduced. If they received no award, the mother and next

friend would receive a larger award. There is an obvious conflict of interest. If the testimony of Goldie Cobb, mother, widow and next friend, were incompetent and inadmissible as to whether Alex Cobb was the father of the children, it would be the duty of the next friend to interpose objection. The anomaly of this situation is readily apparent. "The Court will never make a decree, when one of the parties sues by a next friend and that next friend has, or may have, an interest in the suit, opposed to that of the infant. It will require another next friend to be appointed to attend the cause in behalf of the infant." *Butler v. Winston,* 223 N.C. 421, 27 S.E. 2d 124.

It may well be that a next friend not having conflicting interests could present no further competent evidence to establish paternity or dependency nor prevent admission of evidence sufficient to rebut any presumptions to which the minors may be entitled. Nevertheless, this we cannot presume. Assignment of error 11 is sustained.

This cause is remanded to the Superior Court to the end that it enter a judgment returning the case to the Industrial Commission and directing that the order appointing Goldie Cobb as next friend be vacated; that another next friend be appointed to prosecute the claim of Michael (Bazemore) Cobb and Zina Cobb; that if such next friend should, within a reasonable time, not exceeding 60 days of his appointment, choose to petition for the reopening of this matter upon the question of dependency, the Commission shall grant such petition.

Error and remanded.

CAMPBELL and BRITT, JJ., concur.

ACADEMY OF DANCE ARTS, INC., v. J. T. BATES, L. A. REYNOLDS COMPANY, INC., J. A. CUTRELL, T/A J. RAY PAVING COMPANY, AND INDEPENDENT INVESTORS, INC.

(Filed 12 June 1968.)

1. Appeal and Error § 45—

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. Court of Appeals Rule No. 28.

2. Trespass § 6—

In an action in trespass, testimony to the effect that plaintiff's plans for the construction of a building on its land were delayed as a result

of defendant's acts in placing obstructions on the land, and that the delay resulting therefrom increased the cost of the building by $10,000, *is held* properly admitted in the absence of objection to the testimony relating to the increase in the cost of construction.

3. Appeal and Error § 48—

When evidence is admitted over objection, but the same evidence has been theretofore or is thereafter admitted without objection, the benefit of the objection is ordinarily lost.

4. Same—

Unsolicited and unresponsive testimony of plaintiff's witness to the effect that defendant spoke to her in an insulting manner over the telephone, *is held* not sufficiently prejudicial to warrant a new trial.

5. Same—

Evidence of the contents of letters exchanged between plaintiff's counsel and counsel for a codefendant which related solely to plaintiff's action against the codefendant, *is held* properly admitted where the court sustains the objection as to the defendant and clearly restricts the jury's consideration of the letters to the codefendant.

6. Trespass § 8—

In an action in trespass, evidence that a contractor dumped dirt and broken material onto plaintiff's alleyway, thereby obstructing plaintiff's use thereof, and that the contractor had dumped the material at defendant's direction and in the place where he thought defendant's property was located, *held* sufficient to support allegations relating to punitive damages.

7. Trespass § 11—

In an action in trespass wherein plaintiff's rights in an alleyway were established in his favor, judgment requiring defendant to remove dirt, concrete and other obstructions placed in the alleyway at his direction *is held* fully warranted under the pleadings, evidence and verdict in the case.

APPEAL by defendant Bates from judgment of *Johnston, J.*, entered at the 27 November 1967 Civil Session of FORSYTH Superior Court.

This is a civil action originally instituted by plaintiff against J. T. Bates (Bates), L. A. Reynolds Company, Inc. (Reynolds), and J. A. Cutrell, trading as J. Ray Paving Company (Ray).

In its complaint filed 10 May 1965, grounded on trespass on plaintiff's land in the city of Winston-Salem, plaintiff alleges: That it is the owner of a lot located for the most part inside of a city block; the main portion of the lot adjoins the property of Bates on the south for approximately 175 feet; the western side of the lot is approximately 109 feet and the north side is approximately 175 feet; the east side of the main portion of the lot is approximately 109 feet with a 25-foot strip extending 125 feet northwardly to Beach Street; the southern 20 feet of plaintiff's lot is burdened by

a private alleyway which extends eastwardly and westwardly from plaintiff's lot; westwardly, it extends approximately 210 feet to Miller Street; certain property east and west of plaintiff may use the alleyway, but Bates has no right to use it; plaintiff has the right to use the alleyway westwardly to Miller Street, thereby affording plaintiff's inside lot with an outlet to Miller Street on the west.

The complaint further alleges that Bates' property extends westwardly to Miller Street immediately south of the alleyway; that at the time plaintiff purchased its lot, the property now owned by Bates was owned by a predecessor in title and was considerably higher than plaintiff's property; that without plaintiff's consent and over its protests, Bates, Reynolds and Ray trespassed upon plaintiff's property by piling large mounds of dirt, junk, tree stumps, cement slabs, and other debris on the alleyway, not only on the portion of the alleyway on plaintiff's property but on the portion extending from it to Miller Street, completely obstructing said alleyway; that plaintiff requested said defendants to cease and desist from blocking and obstructing the alleyway and trespassing on plaintiff's property, and to remove obstructions placed thereon, but defendants failed and refused to do so. Plaintiff alleged irreparable damage because of the continuing trespass, that it has been wrongfully prevented from the utilization and enjoyment of its property, and prayed for an injunction permanently enjoining defendants from obstructing said alleyway and requiring them to remove all obstructions therefrom, and for monetary judgment in the sum of $10,000.

Reynolds filed answer alleging that all dirt which it placed on plaintiff's property was placed there at the direction of Bates. In his answer, Bates denied the material allegations of the complaint and alleged a counterclaim against plaintiff for $10,000 for failure to provide his lot with lateral support; he also asked that plaintiff be required to construct a retaining wall sufficient to retain his property.

By proper order, Independent Investors, Inc. (Investors) was made an additional party defendant on 25 October 1966. By way of amendment to its complaint, plaintiff alleged that Investors had erected on the plaintiff's alleyway, without plaintiff's consent, a large concrete structure which obstructed the alleyway.

Pursuant to appropriate order, dated 23 August 1967, plaintiff further amended its complaint alleging additional dumping of dirt and debris on its alleyway by one Sutcliffe at the direction of Bates; that the additional obstruction by Bates constituted an "intentional, malicious, willful and wanton disregard of rights of plain-

tiff" by Bates and asked that plaintiff be awarded $25,000 punitive damages.

The cause was tried before a jury which rendered verdict in favor of plaintiff against Bates for $10,000 actual and $2,000 punitive damages, and a verdict of $1.00 actual damages against Investors. Judgments of nonsuit were entered as to defendants Reynolds and Ray and on Bates' counterclaim against plaintiff.

From judgment ordering Bates to pay plaintiff $12,000 and ordering Bates and Investors to remove obstructions on the alleyway, Bates appealed.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter, attorneys for plaintiff appellee.

Hayes & Hayes by W. Warren Sparrow, Attorneys for defendant appellant Bates.

BRITT, J. Although appellant noted more than fifty exceptions in the trial of this case, his counsel has appropriately brought forward in his brief only the assignments of error on which he relies in this Court. "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." Court of Appeals Rule 28.

In his brief, appellant's counsel presents his assignments of error in the form of six questions. We will discuss each of them.

(1) "In a trespass action, is evidence of plans to construct a building at some unspecified future date competent to prove damages to land?"

Well-recognized principles of law in trespass cases are succinctly set forth by Barnhill, J. (later C.J.), in *Lee v. Stewart,* 218 N.C. 287, 10 S.E. 2d 804. "An invasion of the close of another . . . constitutes a trespass. * * * Where a trespass is shown the party aggrieved is entitled at least to nominal damages. * * *" In an action in trespass, "the defendant is liable for all damages which proximately resulted from his illegal act. In law he is required to contemplate all damages which proximately resulted from his wrongful act whether or not produced intentionally or through negligence. 'It is wholly immaterial whether the defendant in committing the trespass actually contemplated this, or any other species of damage, to the plaintiff.' *Johnson v. R. R.,* 140 N.C. 574." The evidence complained of in the assignments of error under this question related primarily to the testimony of Mrs. Vinni Frederick, president of plaintiff corporation, and of R. B. Deal, president of R. B. Deal Construction Company.

Through their testimony, plaintiff sought to prove that in 1963 and about the time appellant began his alleged trespassing on plaintiff's property, plaintiff had plans to construct a building on its lot as a home for its dance school but delayed its plans because of the trespassing. Plaintiff had submitted the plans for the building to several contractors, and Deal was the low bidder.

Appellant's counsel objected to several questions asked Mrs. Frederick and Mr. Deal relating to the plans and Mr. Deal's low bid. However, the record discloses that without objection Mrs. Frederick testified that she accepted a low bid from Deal; and Deal testified without objection that on 11 June 1963, he submitted a bid to plaintiff for the proposed building, that he was ready to begin work, that his bid was $50,987, and that due to the increase in cost of labor and materials, the same building on the date of the trial would cost $10,710 more.

The well-established rule is that when evidence is admitted over objection, but the same evidence has been theretofore or is thereafter admitted without objection, the benefit of the objection is ordinarily lost. Stansbury, N. C. Evidence 2d, § 30, citing *Shelton v. R. R.*, 193 N.C. 670, 139 S.E. 232. See also *Smith v. Simpson*, 260 N.C. 601, 133 S.E. 2d 474.

The assignments of error relating to the first question are overruled.

(2) "Is the testimony concerning a telephone conversation between plaintiff and defendant incompetent and prejudicial to defendant where the statement of plaintiff's witness is: 'He (defendant) spoke of it in such a manner as to be insulting to me personally?' "

We have carefully considered the transcript of testimony relative to the statement complained of and the context in which it was used. The statement was not responsive to a question submitted to Mrs. Frederick but was a voluntary addition to an answer given by her. We do not consider the statement sufficiently prejudicial to warrant a new trial; therefore, the assignment of error relating to it is overruled.

(3) "Is a statement by plaintiff, 'at the time my husband was alive, and he said that he did not want me to talk to Mr. Bates again,' incompetent and prejudicial to defendant?"

Again, we have carefully considered the transcript of evidence as it relates to this statement made by Mrs. Frederick on redirect examination. Considering the context in which it was made, we do not consider it sufficiently prejudicial to warrant a new trial.

(4) "May letters exchanged between counsel for plaintiff and

counsel for co-defendant be read to the jury by plaintiff's counsel without foundation for their introduction or without any witnesses testifying as to their genuineness or as to the context in which they were exchanged?"

The copies of letters complained of were introduced by plaintiff against Investors and related entirely to plaintiff's action against Investors. Appellant's counsel objected to their introduction, and the trial judge sustained the objection as to Bates and instructed the jury not to consider the letters as against Bates. Because of the clear instruction by the trial judge, we hold that this assignment of error on the part of Bates is without merit.

(5) "Where the evidence is: (a) dirt and debris were dumped by mistake on plaintiff's land; and (b) plaintiff would not permit it to be removed immediately after the mistake had been discovered; is a judgment for punitive damages improper?"

Plaintiff instituted this action on 10 May 1965. The evidence complained of under this question was given by Mr. Sutcliffe to the effect that some time in June, 1967, appellant saw him at the American Oil Station at the corner of Miller and Cloverdale Streets (obviously in sight of the alleyway in question) and asked Mr. Sutcliffe to dump some surface dirt and broken pieces of concrete "on his property." The witness testified: "We were standing down at the American Station and we didn't bother to walk up there, but he pointed up the hill, off his pavement." Other testimony was introduced to show that appellant's lot was paved up to the edge of the alleyway, and Mr. Sutcliffe testified that he dumped the dirt and concrete at the place where "I thought he told me to go." While he was dumping the second load, Mrs. Frederick approached him and he did not dump any further dirt or concrete on the alleyway.

Following this occurrence, plaintiff amended its complaint asking for punitive damages. The evidence introduced was sufficient to support the allegation. "In looking into the books we find the rule in this action to be that the jury are not restricted in their assessment of damages to the amount of the mere pecuniary loss sustained by the plaintiff, but may award damages in respect to the malicious conduct of the defendant and the decree *(sic)* of insult with which the trespass was committed. The plaintiff is at liberty to give in evidence the circumstances which accompany and give character to the trespass." Connor, J., in *Brame v. Clark,* 148 N.C. 364, 62 S.E. 418.

"If a plaintiff would recover compensatory damages for a trespass to realty, he must allege facts showing actual damage; and if he would recover punitive damages for such a trespass, he must

allege circumstances of aggravation authorizing punitive damages." Ervin, J., in *Matthews v. Forrest,* 235 N.C. 281, 69 S.E. 2d 553.

(6) "Is a judgment to compel defendant to remove obstructions from an alley that extends beyond the plaintiff's boundary improper in an action for trespass to land where the evidence discloses that the alley has never been open for vehicular traffic and could not be opened without changing the natural slope of the earth by considerable excavation?"

Section (9) of the judgment provides: "That the defendant J. T. Bates shall remove all dirt, stones, concrete slabs, tree trunks, and other obstructions from the 20-foot alleyway extending from the eastern edge of the plaintiff's property westwardly to Miller Street, said removal to be fully completed within sixty (60) days from the date of this Judgment."

We hold that this section of the judgment is fully warranted under the pleadings, evidence, and issues answered by the jury. Plaintiff's rights in the alleyway extending westwardly from her property to Miller Street were established. We do not construe section (9) of the judgment to require that appellant perform any excavating of the natural earth, only that he remove obstructions therefrom. Under section (12) of the judgment, the Superior Court retained jurisdiction of the cause for such orders as may be necessary to enforce compliance with the judgment; in the event of disagreement as to details of the removal of obstructions, the Superior Court, upon motion in the cause, is available to settle the dispute.

We have carefully considered the assignments of error brought forward in, and the questions raised by, appellant's brief and find no prejudicial error. The judgment of the Superior Court is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. WILLARD HORACE COLSON.

(Filed 12 June 1968.)

1. Constitutional Law § 21; Searches and Seizures § 1—

The constitutional guaranty against unreasonable searches and seizures does not apply where incriminating articles are revealed by the voluntary act of defendant or are in plain view of the officers, no search being necessary for their discovery.

2. Criminal Law § 84— Defendant's bloody underclothing held lawfully seized.

During a general conversation with police officers at the police station after having been questioned about his wife's death, defendant, who had been drinking, offered to show the officers a scar on his stomach, and in so doing revealed blood on his undershirt. At the officers' request defendant then exhibited his undershorts which also contained bloodstains. The officers seized the clothing without a search warrant and without having arrested defendant. *Held:* Defendant's underclothing was properly admitted into evidence, the record failing to show that defendant was intoxicated to such an extent that he did not intelligently and voluntarily reveal his bloody underclothing to the officers, but conceding defendant's intoxication the bloody clothing was lawfully seized by the officers since it was in plain view.

3. Criminal Law § 99—

The questions asked witnesses by the court in this case *are held* to be solely for the purpose of clarification of the witness' testimony and do not constitute an expression of opinion by the court on the evidence.

4. Coroners; Criminal Law § 111—

In a prosecution for homicide, refusal of the court to instruct the jury on the statutory duties of coroners set forth in G.S. 152-7 is proper, such duties not being at issue in the case.

5. Criminal Law § 106—

To withstand a motion to nonsuit it is not required that the evidence exclude every reasonable hypothesis other than that of defendant's guilt, but the case should be submitted to the jury if there is substantial evidence of defendant's guilt of all material elements of the offense charged, this rule applying whether the evidence is circumstantial, direct, or both.

6. Homicide § 21—

Evidence of the State tending to show that defendant's wife was stabbed to death with a butcher knife in the bedroom of their home, that defendant had been in the bedroom on the night in question, that blood of the deceased's type was found on defendant's underclothing, and that defendant, without prompting, had asked an officer if his wife had been stabbed with a butcher knife, *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of second degree murder or manslaughter.

APPEAL by defendant from *Cohoon, J.*, November 1967 Session of PASQUOTANK Superior Court.

Criminal prosecution on an indictment for first-degree murder. At the opening of the trial the Solicitor announced he would not try the defendant for first-degree murder, but for second-degree murder or manslaughter, as the evidence might justify.

The State offered evidence that at approximately 12:30 a.m. on 4 August 1967 the police went to defendant's home in Elizabeth City in response to a telephone call from defendant's son. Upon being admitted to the house by the son, the officers found the body of the

defendant's wife sitting on a settee in the living room and slumped over with her head on the armrest. She was dead and her body was cold. Examination revealed a wound in her chest. The Coroner, who examined the body the following morning, testified that in his opinion the cause of death was the chest wound, which penetrated the heart and large vessels leading to the lungs. The officers made a search of the house and found a butcher knife approximately 12 inches long on the counter in the kitchen. There was blood on the blade of the knife. In the bedroom they found blood spots on the bed clothing, sheets, and rugs.

At approximately 1:30 a.m., as the covered body of the deceased was being placed in a hearse in front of the house, the defendant walked up and asked the Chief of Police: "Chief, what's wrong? Has she had a heart attack?" To this the Police Chief answered: "No, she did not have a heart attack; she has been stabbed." The defendant then said: "What with, a butcher knife?" At the time of this conversation defendant appeared to be intoxicated. Following the conversation the Police Chief asked the defendant and his son if they would accompany him to the police station, which they did voluntarily.

At the police station the defendant was given the *Miranda* warning, following which he gave the police a statement in which he said that he and his son had arrived at the house about 5 o'clock on the preceding afternoon, that his wife was at the house and had been drinking, that an argument between defendant and his wife ensued, that defendant left the house about 6 o'clock, at which time his wife was lying sprawled out on the settee. Defendant stated he had then gone to the liquor store and had purchased a pint of liquor, following which he just rode around and drank. Defendant identified the butcher knife which had been found in the kitchen of his home as his, but expressly denied that he had ever cut his wife or that he knew who had done it. Following the giving of this statement and during a general conversation at the police station, defendant offered to show the police officers a scar on his stomach. When he pulled his shirt open, the officers observed blood on his undershirt. They then asked him if they might see the rest of his underclothes, at which time blood was also observed on his undershorts. Defendant gave no explanation to the officers or to his son as to how he got the blood on his underclothes.

The State offered the testimony of a blood-typing specialist from the FBI who testified he had examined blood samples taken from the body of the deceased and had determined the blood of the deceased to be group "AB". He had examined a blood specimen of the

defendant and determined the defendant's blood to be group "O". This witness then testified that he had made examination of the blood spots on the deceased's garments, on the sheets in the bedroom, and the blood on the butcher knife, and these were all found to be group "AB". Likewise he had examined the blood on the underclothing worn by defendant and this was also found to be group "AB", the same as that of the deceased.

The defendant remained at the police station from the time he arrived there at approximately 1:30 a.m. on 4 August 1967 until about 9:30 a.m. the following morning, when he accompanied the police officers back to his home. Upon making a further search, the officers found an empty Vodka bottle under a chest of drawers in the bedroom. An employee of the County ABC Board testified that the defendant had come into the store between 7:15 and 8:00 p.m. on the evening of 3 August 1967 and witness had sold him a pint of Vodka. This witness identified the bottle found in the bedroom as being a bottle sold from his register on 3 August 1967.

At the close of the State's evidence, defendant moved for nonsuit which was denied. The jury returned a verdict of guilty of manslaughter. From a judgment of imprisonment thereon, defendant appealed, assigning as error the court's refusal to grant defendant's motion of nonsuit and making certain other assignments of error as noted in the opinion.

T. W. Bruton, Attorney General, by Bernard A. Harrell, Assistant Attorney General, for the State.

Russell E. Twiford, O. C. Abbott, and John S. Kisiday, for defendant appellant.

PARKER, J. Defendant's first assignment of error relates to the admission into evidence of clothing worn by defendant on the night of his wife's death. Defendant contends that these articles of clothing were removed from his person by the police officers without a search warrant, at a time when he was highly intoxicated, and prior to his arrest. For these reasons, defendant contends the articles could not legally be admitted into evidence or exhibited to the jury. In support of his contention, defendant cites the following from 47 Am. Jur., Searches and Seizures, § 53, p. 533:

> "The constitutional guaranties against all unreasonable searches or seizures secures every citizen against a search of his person not plainly authorized by some law. A search of the person, however, without a warrant, in connection with a lawful arrest, and the taking from the arrested person the instru-

ments found in his possession which were used in connection with the crime is not an unreasonable search or an illegal seizure. No search of the person or seizure of any article found thereon can be made on mere suspicion that the person searched is violating the law, or without a search warrant, unless and until the alleged offender is in custody under a warrant of arrest or shall be lawfully arrested without a warrant as authorized by law."

Defendant contends that at the time his bloody underclothing was first observed by the police and his clothing was taken from him, he was in the police station only for purpose of questioning and had not yet been placed under arrest. Therefore, he contends, the search of his person and the seizure of his clothing could not have been made as an incident to his arrest. But even so, in this case the bloody underclothing was not discovered by the police officers as a result of any search being made by them of defendant's person. Rather, the defendant voluntarily exhibited his underclothing to them while, for whatever reasons of his own, he was engaged in showing them scars upon his body. When the incriminating article is in plain view of the officers or is revealed by the voluntary act of the defendant, no search is necessary and the constitutional guaranty does not apply. *State v. Kinley,* 270 N.C. 296, 154 S.E. 2d 95.

Defendant contends, however, that his act in revealing his underclothing to the officers was not voluntary, because he was too intoxicated at the time to exercise a free volition. But even if this be true, drunkenness provides the drinker with no constitutional cloak of privacy not available to his sober brothers. Incriminating articles which are plainly in view of the police may be observed by them. They would be derelict in their duties if they failed to do so. And it makes no difference that the articles are disclosed to view by the irrational motives of a drunk, rather than by the calculated actions of his sober brother. In either case, nothing in the Constitution or in our laws relating to searches and seizures requires that the police close their eyes and refuse to see what is plainly in sight.

Furthermore, the record before us simply does not support defendant's contention that his act in disclosing his underclothing to the police was other than intelligently and voluntarily committed. This occurred after he had accompanied the police officers to the police station, after he had been given the *Miranda* warnings, and after he had voluntarily given a lengthy statement which he later permitted to be introduced without objection at his trial. Examination of that statement shows conclusively that the defendant was not so intoxicated at the time he gave it but that he could answer

questions coherently and intelligently. Nothing in the record would indicate that when he later showed the officers his underclothing he had become any more intoxicated or any less capable of voluntary and intelligent action. There was no error in allowing introduction in evidence of the incriminating articles.

Defendant's second assignment of error relates to certain questions asked of witnesses by the trial judge during the course of the trial. "A trial judge has undoubted power to interrogate a witness for the purpose of clarifying matters material to the issues. . . . He should exercise such power with caution, however, lest his questions, or his manner of asking them, reveal to the jury his opinion on the facts in evidence and thus throw the weight of his high office to the one side or the other." *In Re Will of Bartlett*, 235 N.C. 489, 70 S.E. 2d 482.

The first questions asked by the judge to which the defendant points as constituting an expression of opinion by the court were three questions directed to the police officer who was testifying concerning the second search he had made of defendant's home, at which time the Vodka bottle had been found under the chest of drawers in the bedroom. These questions merely clarified that the police officer had not looked under the chest when he had first searched the premises on the preceding night and therefore he was simply in no position to say whether the bottle was or was not there at the time of the first search. These brief questions and the answers elicited served to clarify the testimony of the witness and were certainly in no way prejudicial to the defendant.

The only other questions asked by the court to which defendant now takes exception were directed to Dr. Weeks, the Coroner, as follows:

> "Q. In connection with what you have previously been asked, do you have an opinion as to the maximum distance a person could have walked with a wound such as you found inflicted on the person of the deceased?
>
> "A. It was my opinion, Judge, that she would not have walked. I think there may have been some agonal involuntary movement after such a wound, but as far as coordinated purposeful movements, certainly in my opinion most unlikely.
>
> "Q. If you will look at that butcher knife on the table.
>
> "A. Can I pick this up?"
>
> "Q. Yes. Do you have an opinion satisfactory to yourself as to whether or not the wound which you found on the body

of Mrs. Colson could have been made by an instrument of that kind and character?

"A. Yes, sir, I do.

"Q. What is your opinion?

"A. I think it could have."

Previous to the asking of these questions by the court, the witness had testified on direct examination from the Solicitor, and had been cross-examined by counsel for the defendant, as to the length of time a person who had received a wound such as he found on the body of the deceased could have lived after receiving such a wound. He had also testified without objection from the defendant that in his opinion such a person would not have been able to walk. The brief questions directed to him by the court, while certainly pertinent to the case, served to clarify his previous testimony. These very limited and brief questions asked by the judge did not, in our opinion, lead the jury to believe that the court was expressing an opinion as to the defendant's guilt. There was not here such repeated or prolonged questioning of witnesses by the court as the Supreme Court has found to be objectionable in other cases. See, *State v. Lea*, 259 N.C. 398, 130 S.E. 2d 688.

Defendant next assigns as error the trial court's failure to instruct the jury on the statutory duties of Coroners set forth in G.S. 152-7, as the counsel for defense had requested. These statutory duties were not at issue in this case. It was not error for the court to refuse to instruct the jury concerning them.

Defendant finally contends that the trial court committed error in refusing to grant his motion of nonsuit. Defendant points out that the evidence introduced by the State was all circumstantial, and he contends that even taken in the light most favorable to the State the evidence merely raises a suspicion as to the defendant's guilt and fails to exclude every other reasonable hypothesis. However, to withstand a motion of nonsuit in a criminal case it is not required that the evidence exclude every reasonable hypothesis other than that of defendant's guilt. It is required that there be substantial evidence of all material elements of the offense, and it is immaterial whether the substantial evidence is circumstantial or direct or both. As was said by Higgins, J., in *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431:

"To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of the facts. Substantial evidence

> of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury."

In this case there was substantial evidence of all the material elements of the crime with which defendant was charged.

The death of deceased and the cause of her death, the puncture wound in her chest, were established by unchallenged evidence. A butcher knife was found in the kitchen, stained with blood of the blood type of the deceased. The size and depth of the wound on the deceased's body which caused her death was the type of wound which would have been made by stabbing with the butcher knife. It is a reasonable inference that this knife was the murder weapon. There was evidence defendant had been arguing with his wife on the night in question. Blood of the type of the deceased was found in the bedroom, a reasonable inference being that this was the place where she was stabbed. A Vodka bottle which defendant had purchased was found in the bedroom under a chest of drawers, the reasonable inference being that defendant himself had returned to his home and entered the bedroom. Blood of the type of the deceased was found on the defendant's underclothing, the reasonable inference being that defendant was not only at home, but was very near his wife at the time she was stabbed. Defendant, without any prompting, asked the Police Chief if his wife had been stabbed with a butcher knife. When all facts, and each permissible inference from each fact in evidence, are put together, there is certainly substantial evidence of all material elements of the offense sufficient to withstand the motion of nonsuit. It was for the jury to determine whether the evidence established defendant's guilt beyond a reasonable doubt. It was not error for the court to submit the case to the jury.

Defendant has assigned as error certain portions of the judge's charge to the jury. Examination of the charge as a whole reveals that it was clear, correct, and without error. Out of abundance of precaution, defendant's counsel has also noted a large number of other exceptions in the record. However, these are taken as abandoned by him, since they are not set out in appellant's brief, nor is any reason or argument stated or authority cited in support of them. Rule 28; *Rules of Practice in the Court of Appeals of North Carolina.*

In the trial of this case we find

No error.

MALLARD, C.J., and BROCK, J., concur.

O. G. THOMPSON & SONS, INC., v. KOURY HOSIERY MILLS, INC., AND C. B. SMITH TRADING AS SMITH ROOFING COMPANY, INDIVIDUALLY, AND C. B. SMITH ROOFING COMPANY, INC., ADDITIONAL DEFENDANTS.

(Filed 12 June 1968.)

1. Pleadings § 18— Plaintiff's cross-action in tort held misjoinder of parties and causes.

In an action by a general contractor against the owner of a hosiery mill to recover the unpaid balance under a contract for the construction of an addition to the mill, the defendant in its counterclaim alleged that plaintiff contracted to protect the property and operations of the defendant during the construction and that plaintiff negligently failed to protect the property from a rainstorm, thereby entitling defendant to offset its damages against the contract price. Plaintiff thereafter asserted by reply a cross-action against its roofing subcontractor for negligence in failing to make the roof watertight. *Held:* Defendant's demurrer to plaintiff's cross-action against the subcontractor for misjoinder of parties and causes is properly sustained, since defendant's counterclaim arises out of the contract upon which plaintiff brings the action, while plaintiff's cross-action against the additional defendant is a separate and distinct cause of action to which the original defendant is not privy.

2. Pleadings § 8—

Where the contract between a general contractor and the owner of property includes the contractor's agreement to take all necessary precautions to protect the owner's property during the course of construction, the agreement becomes a necessary and integral part of the contract, and allegations of the owner in a counterclaim that it was damaged by the contractor's failure to protect its property from the elements state a cause of action *ex contractu* and not in tort.

APPEAL by plaintiff from *Carr, J.*, 13 November 1967 Civil Session of Superior Court of ALAMANCE.

This is a civil action to recover an amount allegedly due plaintiff, a general contractor, representing the unpaid balance under a contract for the construction of an addition to the Koury Hosiery Mills, Inc. plant in Burlington. Koury filed answer containing a counterclaim and offset based upon allegations that it was agreed that Koury would continue its manufacturing operations and administrative work and the additional construction would be so designed and performed as not to interfere therewith, plaintiff agreeing to take all necessary precautions to protect defendant's property during construction; that personal property and supplies of Koury which were stored in its office area were damaged during the course of construction; that the damage resulted from water getting into the area after a rainstorm; that plaintiff "negligently and in breach of its contract with the defendant, failed to take proper action to protect the exposed properties of the defendant from the elements";

that the damage to Koury's property "was caused and brought about solely by the negligent acts of the plaintiff which were in direct breach of its contract with this defendant in connection with the design and construction of the additions to its plant and office".

Plaintiff filed a reply in which it asserted a cross action, based upon primary-secondary liability against C. B. Smith, Trading as C. B. Smith Roofing Company, Individually, and C. B. Smith Roofing Company, Inc. (hereinafter called additional defendants), the subcontractor of plaintiff for all roofing work necessary to the construction. The cross action alleged, in substance, that the subcontractor was an independent contractor; that prior to the rainstorm from which water entered the office space, the subcontractor's workmen left the job site when they knew, or in the exercise of ordinary care, should have known that at that stage of construction the joinder of the roof over the addition was not such as to render the roof watertight along the line of joinder; that the equipment necessary to make it watertight was available at the job site but the subcontractor's workmen left and did not return until after the rainstorm had occurred. The cross action further alleged in the alternative that if the plaintiff were found to be negligent in any manner with respect to the entry of the water and if Koury were found to have been damaged thereby, that the negligence of the subcontractor (additional defendants) contributed to and was one of the proximate causes thereof and plaintiff would be entitled to contribution from the additional defendants.

The original defendant, Koury, filed a demurrer to the cross action and also a motion to strike portions of plaintiff's further reply and cross action. The additional defendants also filed a motion to strike portions of the cross action.

Upon hearing, the court sustained the demurrer to the cross action and pursuant to this ruling, no determination was made of the motions to strike. Plaintiff demurred *ore tenus* to the counterclaim and offset contained in original defendant's answer. This demurrer was overruled. From the order sustaining the original defendant's demurrer to cross action asserted by the plaintiff against the additional defendants, plaintiff appealed.

Allen and Allen; Jordan, Wright, Henson and Nichols; and William B. Rector, Jr. by William B. Rector, Jr., for plaintiff appellant.

Sanders & Holt by W. Clary Holt and R. Chase Raiford for defendant Koury Hosiery Mills, Inc., appellee.

MORRIS, J. The sole question presented by this appeal is one of interpretation of pleadings. The plaintiff contends that the orig-

inal defendant's counterclaim and offset sounds in tort, and it is, therefore, permissible to implead the additional defendants upon a primary-secondary liability consideration or, alternatively, for contribution as a joint tort feasor. The original defendant, on the other hand, contends that the cause of action stated in the counterclaim and setoff asserted by it is in contract; and, therefore, there is a defect of parties and causes of action since the additional defendants were under no contractual obligation with the original defendant, and the matters contained in the cross action pertained solely to matters and things existing between the plaintiff and additional defendants; that there is no connection whatsoever with the relief sought by the plaintiff against the additional defendants and the original defendant; that the controversy between the said parties does not involve the controversy between the plaintiff and the original defendant as alleged in the pleadings between said parties.

Plaintiff alleges a contract between it and the original defendant, a balance due thereon, demand therefor, failure to pay, and that "no portion or part thereof is subject to any setoff or counterclaim". The complaint also alleges that defendant "without justification, withheld from the amount due the plaintiff pursuant to said contract" the balance allegedly due and sued for in this action. The original defendant, by answer, admitted the contract but denied that construction was completed in all respects as agreed, denied that any sum was withheld without justification, denied that any balance was due, denied the allegation that no portion of the balance due was subject to setoff or counterclaim and, in its further answer, counterclaim and offset, averred that the contract between the parties included an agreement that defendant would continue its manufacturing operations and administrative work in the existing plant and office and that the plaintiff would take all necessary precautions to protect the existing properties and operations of the original defendant during the construction. The original defendant additionally averred that plaintiff knew there were supplies in the existing facilities; that although notified by defendant that these supplies had been left exposed when there was imminent probability of rain, plaintiff failed to take necessary precautions as it agreed to do and defendant's supplies and properties were damaged by water; that the damage resulted from plaintiff's negligent breach of the contract and defendant is entitled to offset its damages against the contract price; that defendant had tendered a check to plaintiff for the balance due less its damage and by reason of the payment and offset it was not indebted to plaintiff.

The counterclaim sounds in contract and not in tort. Here, the

contract between the parties included the agreement of the contractor to take all necessary precautions to protect the property of the owner while the addition was being constructed. This agreement was a necessary and integral part of the contract because the owner intended to continue its operations in its existing facilities while the addition was being constructed and the contractor agreed to perform the construction so as not to interfere with this continued operation. This is not the situation in *Peele v. Hartsell,* 258 N.C. 680, 129 S.E. 2d 97, relied on by plaintiff. There the complaint alleged that defendant contracted to move their house trailer some 82 miles for a consideration of $30.00; that it was implied in the contract with defendant that defendant would use due care in moving the trailer so as not to damage it in the performance of the contract. The complaint then set forth a series of alleged negligent acts of defendant in moving the trailer; *i.e.,* attempted to move the trailer in a circle over soft earth when it could have been backed over solid ground; that he should have known that it could not be moved in safety over such wet, mushy ground; that as a result it became partially buried in mud; that defendant then further was negligent in pulling the trailer out of the mud at an angle with a wrecker. The opinion of the Court by Justice Sharp, in stating that the cross action was in tort and not in contract, quoted from *Jackson v. Central Torpedo Co.,* 117 Okla. 245, 246 Pac. 426:

> " 'If the transaction complained of had its origin in a contract which placed the parties in such a relation that, in attempting to perform the promised service, the tort was committed, then the breach of the contract is not the gravamen of the suit. The contract in such case is mere inducement, creating the state of things which furnishes the occasion of the tort, and in all such cases the remedy is an action on the case. For illustration, take the contract of a carpenter to repair a house, — the implication of his contract is that he will bring to the service reasonable skill, good faith, and diligence. If he fails to do the work, or leaves the house incomplete, the only remedy against him is *ex contractu;* but suppose he, by want of care or skill, destroys or wastes material, or makes the repairs so unskillfully as to damage other portions of the house; this is tort, for which the contract only furnished the occasion. *Mobile L. Ins. Co. v. Randall,* 74 Ala. 170.' "

Here, the plaintiff, as a part of the contract, specifically agreed to use all necessary precaution to protect the existing properties of original defendant during construction of the addition. Possible dam-

age to these properties by reason of the construction of the addition was within the contemplation of the parties at the time of the making of the contract.

The counterclaim and offset of the original defendant is based upon the same contract upon which the plaintiff brings the action. However, the cross action of the plaintiff against the additional defendants is based upon an entirely different contract between them in which the original defendant has no interest and to which it is not privy. There is, therefore, a misjoinder of parties and causes. The two causes of action are separate and distinct and set up against different parties. *Rose v. Warehouse Co.*, 182 N.C. 107, 108 S.E. 389; *Schnepp v. Richardson*, 222 N.C. 228, 22 S.E. 2d 555.

An issue as to primary and secondary liability does not arise in this case nor is G.S. 1-240, permitting the bringing in for contribution of a joint tort feasor, applicable. *Gaither Corp. v. Skinner*, 238 N.C. 254, 77 S.E. 2d 659; *Durham v. Engineering Co.*, 255 N.C. 98, 120 S.E. 2d 564.

The ruling of the court below sustaining original defendants demurrer to plaintiff's cross action is

Affirmed.

CAMPBELL and PARKER, JJ., concur.

WILLIAM B. BYNUM v. ONSLOW COUNTY.

(Filed 12 June 1968.)

1. Pleadings § 12—

In ruling upon a demurrer the court may not consider matters extrinsic to the pleading even though the parties stipulate and agree that such matters may be considered.

2. Negligence § 20—

An allegation that defendant "negligently operated" a fog machine so that the wind carried DDT into plaintiff's fields and damaged his crops fails to state a cause of action based upon negligence, the facts constituting the negligence not being particularly alleged.

3. Eminent Domain § 2; Counties § 9—

Where defendant county, acting in a governmental capacity, sprayed chemicals for the purpose of controlling mosquitoes, some of the chemicals drifting onto plaintiff's land and damaging his crops, there has been no taking of plaintiff's property for which plaintiff may maintain an action for compensation without the county's consent, the crop damage re-

sulting from a single tortious act and no permanent servitude having been imposed on plaintiff's property.

APPEAL by plaintiff from *Copeland, S.J.*, 23 October 1967 Civil Session of ONSLOW Superior Court.

Plaintiff's complaint alleged: The plaintiff is owner and operator of a dairy farm in Onslow County. On 8 August 1960 the defendant County through its agents and employees operated a DDT fog machine along White Oak River Road on which plaintiff's dairy is located. On that date plaintiff had corn growing in a field adjoining the road. The corn was ready to be cut for silage. The DDT fog put out by defendant's machine was carried by the wind into and over the field of plaintiff's silage corn, rendering the same unfit for dairy feed, and thereby plaintiff was damaged.

Paragraphs 6, 7, 8 and 9 of the complaint are as follows:

"6. That the DDT fog put out by the defendant's machine was carried by the wind into and over the field of silage corn, rendering the same unfit for dairy feed; and this plaintiff was forced to go into the open market and purchase feed to replace that damaged as alleged herein.

"7. That the defendant knew or should have known that the plaintiff operated a dairy on White Oak River Road or Rural Road 1331, and that, as a dairy farmer, he grew corn for silage; and the defendant knew or should have known that a field of corn sprayed with solution such as was sprayed by the fog machine would render a field of corn unfit for silage.

"8. That the plaintiff is informed, believes and upon such information and belief alleges that the defendant through its agents and employees had full knowledge of or should have known the facts alleged in the preceding, and that the defendant, through its agents and employees, negligently operated the fog machine in a manner that the wind carried the fog deep into this plaintiff's fields causing the damage hereinafter alleged.

"9. That the plaintiff is further informed, believes and so alleges that actions of the defendant, through its agents and employees, amounted to a taking of this plaintiff's property for which this plaintiff alleges he is entitled to recover."

Plaintiff seeks to recover of defendant the sum of $2,693.17 as damages.

Defendant filed answer denying the material allegations of the complaint. By amendment to its answer defendant specifically pleaded

governmental immunity from liability and that such immunity had not been waived by defendant by securing liability insurance pursuant to G.S. 153-9(44). The parties also entered into stipulations wherein it was agreed that on the date alleged in the complaint plaintiff was the owner and operator of the dairy farm; that on said date Onslow County through its employees caused DDT to be sprayed on two fields of corn which plaintiff had raised for silage; that at that time Onslow County was acting in its governmental capacity; that the corn was eventually harvested or disposed of; and "that the plaintiff is trying this case on the theory of a taking and not upon the theory of negligence."

At the hearing of the case defendant demurred *ore tenus* to plaintiff's complaint. From the judgment sustaining the demurrer and allowing plaintiff 30 days within which to amend his complaint, plaintiff appealed.

Turner and Harrison by Fred W. Harrison, attorneys for plaintiff appellant.

E. W. Summersill and James R. Strickland, attorneys for defendant appellee.

PARKER, J. The parties have entered into certain stipulations, including a stipulation that plaintiff is "trying this case on the theory of taking and not upon the theory of negligence." However, in ruling upon a demurrer to a pleading, the court may not consider matters extrinsic to the pleading, even though the parties stipulate and agree that such matters may be considered. *Lane v. Griswold*, 273 N.C. 1, 159 S.E. 2d 338. We therefore first consider the sufficiency of plaintiff's complaint to allege a cause of action based upon negligence.

The only allegation of negligence contained in the complaint is in paragraph 8, as follows:

> ". . . that the defendant, through its agents and employees, negligently operated the fog machine in a manner that the wind carried the fog deep into this plaintiff's fields causing the damage hereinafter alleged."

This is a bare conclusion of law. No facts are alleged setting forth in what manner the defendant's agents and employees were negligent in operation of the fog machine. "In an action or defense based upon negligence, it is not sufficient to allege the mere happening of the event through the negligence of the party and calling it negligence. The facts constituting the negligence should be alleged in par-

ticular." 1 McIntosh, N. C. Practice 2d, § 989. Quite apart from the defense of governmental immunity, the complaint fails to state any facts sufficient to constitute a cause of action based upon negligence.

Plaintiff contends that his complaint states a good cause of action on the theory that he has alleged facts which show a taking of his property by the defendant County for which he has a constitutional right to be compensated. In his brief he recognizes that the defendant County had the right to use DDT spray in an effort to control mosquitoes within its boundaries and that this is a proper governmental function. He contends that when the County in exercise of that function performs acts which damaged his property or reduced its value, there occurred an "inverse condemnation" of his property for which he had a right to seek redress in the courts. In support of this contention he cites the following language from *Charlotte v. Spratt,* 263 N.C. 656, 140 S.E. 2d 341:

> "The legal doctrine indicated by the term, 'inverse condemnation,' is well established in this jurisdiction. Where private property is *taken* for a public purpose by a municipality or other agency having the power of eminent domain under circumstances such that no procedure provided by statute affords an applicable or adequate remedy, the owner, in the exercise of his constitutional rights, may maintain *an action* to obtain just compensation therefor."

Examples of "inverse condemnation" actions in which the property owner was held to be entitled to compensation for the taking of his property may be found in *Portsmouth Harbor Land and Hotel Co. v. United States,* 260 U.S. 327, 43 S. Ct. 135, 67 L. ed. 287 (erection and maintenance of a United States fort and a battery thereon and firing guns over petitioner's land); *United States v. Causby,* 328 U.S. 256, 66 S. Ct. 1062, 90 L. ed. 1206 (frequent low level flights over plaintiff's land of U. S. government planes engaged in landing at and leaving a government airport); *McKinney v. High Point,* 237 N.C. 66, 74 S.E. 2d 440 (erection and maintenance of a City water storage tank on property nearby to plaintiff's residence); *Eller v. Board of Education,* 242 N.C. 584, 89 S.E. 2d 144 (construction and maintenance on school property of a septic tank which caused sewage to seep onto plaintiff's adjacent land); *Insurance Co. v. Blythe Brothers Co.,* 260 N.C. 69, 131 S.E. 2d 900 (discharge of numerous explosions upon rock stratum in close proximity to plaintiff's dwelling house incident to construction of a City sewerage system).

In all of these cases the acts of the sovereign in exercise of its governmental powers resulted in the imposing of some more or less permanent servitude upon plaintiffs' property sufficient for the court to find that there had been a taking of a property interest from the citizen by the sovereign. The acquisition by the sovereign of such an interest, and not the mere incidental damage to the citizen's property by the tortious acts of sovereign's agents, is required before there is a compensable taking of property. Admittedly the line between the two types of situations may not always be precise. As was said by the court in *Harris v. United States,* 205 F. 2d 765:

> "A compensable taking under the federal constitution, like the phrase 'just compensation' is not capable of precise definition. And the adjudicated cases have steered a rather uneven course between a tortious act for which the sovereign is immune except insofar as it has expressly consented to be liable, and those acts amounting to an imposition of a servitude for which the constitution implies a promise to justly compensate. Generally it is held that a single destructive act without a deliberate intent to assert or acquire a proprietary interest or dominion is tortious and within the rule of immunity."

We think that the principles expressed in the *Harris* case are controlling here. In that case, as in the case before us, plaintiff's crops were damaged by the drifting onto his lands of chemicals being sprayed by the government's agents in the exercise of proper governmental functions. The court affirmed the District Court's holding that inasmuch as there had been only one spraying operation in the area and there was no anticipated spraying of such nature in the foreseeable future, the act complained of resulted in no taking of plaintiff's property such as to require payment of compensation. The court said:

> "But we do not understand that a single isolated and unintentional act of the United States resulting in damage or destruction of personal property amounts to a taking in a constitutional sense. It is, we think, rather a tortious act for which the government is only consensually liable.
>
> "We agree with the trial court that the single act of the spraying operation fell short of a taking within the meaning of the Fifth Amendment. If the result leaves a wrong by the sovereign without a judicial remedy, the deficiency lies in the limited scope of the government's tort liability. It does not justify the extension of the contractual liability of the government beyond its intended scope."

In cases involving similar facts other courts have also denied recovery. *Columbia Basin Orchard v. United States,* 132 F. Supp. 707; *St. Francis Drainage District v. Austin,* 227 Ark. 167, 296 S.W. 2d 668; *Neff v. Imperial Irrigation District,* 142 Cal. App. 2d 755, 299 P. 2d 359; *Angelle v. State,* 212 La. 1069, 34 So. 2d 321.

The case of *Rhyne v. Mount Holly,* 251 N.C. 521, 112 S.E. 2d 40, relied on by the plaintiff, is distinguishable from the case before us and is not here controlling. In that case the damages to the plaintiff resulted from a direct physical invasion of his land by the City's agents, who brought a bulldozer thereon and scraped away substantially all plants growing thereon, including a large number of oak trees. The court, at page 527, said:

> "The test of liability is whether, notwithstanding its acts are governmental in nature and for a lawful public purpose, the municipality's acts amount to a partial taking of private property. If so, just compensation must be paid. Where, as here, the acts complained of consist of the physical destruction of trees on plaintiff's property, there can be no doubt but that a partial taking of plaintiff's property then occurred."

In the case before us there was no entry upon plaintiff's land and no taking of physical control of his property.

The judgment of the trial court is affirmed with leave to the plaintiff to amend his complaint within 30 days after the certification of this opinion if he feels so advised.

Affirmed.

CAMPBELL and BROCK, JJ., concur.

ETHEL SAUNDERS BUTLER v. EUGENE STOKES BUTLER.

(Filed 12 June 1968.)

1. Divorce and Alimony § 16— Evidence held sufficient for jury in action for alimony without divorce based upon indignities to the person.

In an action for alimony without divorce pursuant to G.S. 50-16 [now repealed], evidence of the wife that during the week that she and defendant husband lived together after their marriage he repeatedly requested that she assure him that she would be true and faithful to him and that she reiterate her marriage vows, that he repeatedly told plaintiff to talk

to no one without his consent and that if she wanted to go to the store he would go with her or send someone, that defendant locked the door and would not allow her to leave, that defendant would allow her to watch only certain television programs, that defendant frequently told plaintiff about unfaithful women being shot and showed guns to her, that the last night she lived with defendant he had her repeat her marriage vows at least every hour, that plaintiff performed general housekeeping during the week of the marriage, and that she was not unfaithful and did not quarrel with defendant, *is held* sufficient to be submitted to the jury on the issue of whether defendant offered such indignities to the person of plaintiff so as to render her condition intolerable and her life burdensome.

2. Same—

An action for alimony without divorce under former G.S. 50-16 based upon indignities to the person of the plaintiff may be instituted as soon as the grounds have occurred, the period of time during which the indignities must have continued and persisted not being fixed by any specific test, it only being necessary that they have been repeated and continued for such time as to render the injured party's condition intolerable and burdensome.

APPEAL by plaintiff from *Johnston, J.*, 4 December 1967 Civil Session of FORSYTH County Superior Court.

This action for alimony without divorce was commenced by the plaintiff on 30 March 1966. Alias summons was served on defendant 24 April 1966. Defendant filed answer 23 May 1966. Apparently, no motion for alimony *pendente lite* was made by plaintiff, and on 3 July 1967 the defendant moved and was later allowed to amend his answer so as to set up a cross action for divorce on the grounds that the parties had lived separate and apart from each other for more than one year. Upon the call of the case for trial, the parties stipulated, among other things, that "the plaintiff's cause of action is bottomed on one for alimony without divorce as alleged in the plaintiff's complaint, and that the defendant's action is one for an absolute divorce as alleged in the cross action."

From a judgment of nonsuit as to plaintiff's cause of action, an adverse jury verdict and judgment of absolute divorce on defendant's cross action, the plaintiff appeals.

W. Scott Buck for plaintiff appellant.

Gwyn & Gwyn by Julius J. Gwyn for defendant appellee.

MALLARD, C.J. This case was brought and is decided under the provisions of G.S. 50-16. This statute was repealed, effective 1 October 1967, by Chapter 1152 of the 1967 Session Laws. This repealing act was ratified 6 July 1967 and provides that it does not apply to pending litigation.

The pertinent parts of the controlling statute provide that if any husband shall separate himself from his wife and fail to provide her with the necessary subsistence according to his means and conditions in life and "be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board, the wife may institute an action in the superior court of the county in which the cause of action arose to have a reasonable subsistence and counsel fees allotted and paid or secured to her from the estate or earnings of her husband, or she may set up such cause of action as a cross action in any suit for divorce, either absolute or from bed and board; and the husband may seek a decree of divorce, either absolute or from bed and board, in any action brought by his wife under this section." G.S. 50-16.

Plaintiff alleges two causes constituting grounds for divorce from bed and board which are, as set out in G.S. 50-7, "if either party abandons his or her family" or "offers such indignities to the person of the other as to render his or her condition intolerable and life burdensome."

In a lengthy and detailed complaint plaintiff alleges that the defendant by his conduct turned the plaintiff out of doors and drove her away from his home. However, in her brief she contends that her cause of action "stands or falls" upon the allegation and evidence relating to the question of whether the defendant offered such indignities to her person so as to render her condition intolerable and her life burdensome. The plaintiff has limited the question on appeal to a determination of whether the trial judge erred in entering a nonsuit of her action.

> "When a wife bases her action for alimony without divorce upon one of the grounds listed in the statute pertaining to a divorce from bed and board, she must 'meet the requisite' of N. C. Gen. Stat. § 50-7 and the decisions that have interpreted it. For example, if she alleges cruel treatment or indignities, she not only must setout with particularity the acts which her husband has committed and upon which she relies, but also must allege, and consequently offer proof, that such acts were without adequate provocation on her part." *2 Lee, North Carolina Family Law,* § 141 (3rd ed. 1963).

The following is a summary of the evidence except when quoted. Plaintiff, who was 54 years of age, and defendant, who was about 65 years of age, were married on Friday, 28 January 1966. Plaintiff had been married twice before, and defendant had been married to plaintiff's sister for many years prior to her death in the summer of 1965. Plaintiff and defendant had not seen each other or written

to each other after defendant's wife's death until after Christmas in 1965 when plaintiff and another sister of hers went to visit the defendant in his home. Defendant had just had an operation to remove a cataract from his eye, and he was experiencing some difficulties there in his home. He and an afflicted son, Tony, were living together. The defendant and his first wife, plaintiff's deceased sister, had eleven children, all of whom were living at that time.

Immediately after plaintiff and defendant were married, they went to the defendant's home in Caswell County. When they arrived, she found that her dead sister's clothes, flowers and other personal effects were still in the house.

On Saturday, the day after the wedding, there came a severe snow storm and more snow fell the following week. Her husband did not want her to go outside, and she didn't go outside; "it was too bad out."

On Monday defendant's children came and took their mother's clothes out. Some of the defendant's children were in and out of the house during the day, but in the late afternoon after they all went home, the defendant locked the door and repeatedly requested plaintiff to assure him she would be true and faithful to him. He asked her not to talk to people unless he told her to, and warned her to lock the door and not let anybody in except the family when he was away. He told her he wanted her to do her shopping in Reidsville instead of Burlington and that if she wanted something from the grocery store, he would go with her or would send somebody. Beginning on her wedding day and every day during the ensuing week, he repeated the foregoing to her. They sat up sometimes until twelve o'clock and would watch television programs that he wanted to see, but he did not approve of her watching television except certain programs.

He asked her frequently to repeat her marriage vows. On the day of their marriage he asked to see some rings she had bought for herself. She gave them to him, and he kept them until Thursday. He told her that a man had given her the rings. He asked about her fur coat and did not believe her when she said she bought it.

Plaintiff rearranged chairs and moved some dishes, and he put them back where they had been. The plaintiff testified:

> "On Wednesday night. *(sic)* Mr. Butler didn't feel good and I did all I knew to do for him, what he said. Then Thursday evening late, I told him I thought I would go home and I was just upset and I had a sore throat and I wanted to go home and I wanted a doctor and I wanted to think it over; that there was something wrong with our marriage. He didn't agree with me,

but I asked could I have the car to go home. He said no, I couldn't. So I called my daughter and she wanted to come and get me. I told her no, I would stay till Friday. So I talked to her a while, and then he kept me awake all night long. I didn't sleep any Thursday night. He wanted me to say my marriage vows. And even if I dozed a little bit, he'd call me. He'd ask me where something was. He'd tell me, now, I knew my marriage vows and I knew that I was supposed to be a faithful and loving wife and why was I going. I told him I couldn't live like that; that something was happening to us; that he didn't understand me and I didn't think he really loved me. He said he did. And we just continuously went that way all night long. Then he complained with his heart hurting. He wanted me to put some salve on him, which I did. He wanted medicine. He took different medicines, all kinds. I didn't know his medicine. He wanted me to get some of his wife's *(sic)* medicine and give him. I wouldn't do it; I told him he shouldn't take it, that something might happen to him, and I didn't give him that medicine. Throughout Thursday night, I repeated some portion of my marriage vows at least every hour. . . .

My reasons for not going back were that I couldn't go through the mental torture no more. Just every night as quick as he would lock that door he'd just have to go through just every thing over and over about I married him and I was supposed to be faithful, and he'd tell me about how women would get shot in the face for not being faithful and he knew that the men got off free, and he showed me guns and all of that stuff. I didn't want to go back and go through that any more.

In the course of my telephone conversation with him on Sunday night I said something to him then about coming and talking with me about the situation, but he wouldn't listen to me. He talked continuously about my duty was to come back to him."

Plaintiff's evidence also tended to show that she performed general housekeeping work during the week of the marriage, that she was not unfaithful, and that she did not quarrel with the defendant. And the defendant did not quarrel with her; he just told her what to do.

On Friday morning, 4 February 1966, she returned to Walkertown with her son-in-law, and she has not been in good health since. From 4 February 1966 she and the defendant have lived separate and apart from each other.

In 1 Lee, North Carolina Family Law, § 82 (3rd ed. 1963), we find the following:

"The period of time during which the indignities must have continued and persisted is not fixed by any specific test. They must be repeated and continued for such time as to render the injured party's 'condition intolerable and burdensome.' The ground of 'indignities to the person' is not directed at isolated instances, but at a course of conduct that is repeated and continued for some time. . . .

In an action for alimony without divorce under N. C. Gen. Stat. § 50-16, which, among other things, may be based upon a cause which constitutes a ground for divorce from bed and board, the plaintiff is not required to set forth in her complaint that the facts have existed for at least six months prior to the filing of the complaint, as is required under N. C. Gen. Stat. § 50-8 in an action for divorce. The plaintiff can properly institute such action as soon as the grounds have occurred or are discovered. The verification of the complaint is the same as in ordinary civil actions."

We hold in this case that the evidence taken as true and in the light most favorable to the plaintiff is sufficient to require the submission to the jury the question of whether the conduct of the defendant was such that it resulted in the offering of indignities to the person of the plaintiff so as to render her condition intolerable and life burdensome. The judgment of compulsory nonsuit is reversed.

In view of this disposition of the plaintiff's case, the verdict of the jury on the issues submitted and the judgment for absolute divorce signed herein are set aside and the cause is remanded for a new trial on all of the issues necessary to settle the controversies arising on the pleadings.

New trial.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. JUNIOR McDOWELL AND JACK ROGER HARRISON AND RAEFORD LEE HILL.

(Filed 12 June 1968.)

1. Burglary and Unlawful Breakings § 3—

In bills of indictment charging a violation of G.S. 14-54, the use by the solicitor of an identifying address for the premises broken into or entered is noted with approval.

2. Criminal Law § 107—

A fatal variance between the indictment and the proof is properly raised by a motion for judgment as of nonsuit.

3. Burglary and Unlawful Breakings § 2—

G.S. 14-54 condemns three separate offenses: a person shall be guilty of a felony if, with intent to commit a felony or other infamous crime therein, (1) he shall break or enter the dwellinghouse of another otherwise than by a burglarious breaking; (2) he shall break or enter any storehouse, shop, warehouse, bankinghouse, countinghouse, or other building where any merchandise, chattel, etc. shall be; or (3) he shall break or enter any uninhabited house.

4. Indictment and Warrant § 9—

The State must charge the offense it intends to prove, since it is upon the offense charged that a defendant must predicate his plea of former jeopardy.

5. Indictment and Warrant § 17—

It is the settled rule that the evidence in a criminal case must correspond with the allegations of the indictment which are essential and material to charge the offense.

6. Burglary and Unlawful Breakings § 3—

There is a fatal variance between pleading and proof where the indictment alleges the felonious breaking or entering of a certain storehouse, shop, warehouse, etc., occupied by a named person, and the evidence tends to show a breaking or entering of the dwelling house of a named person, the offense alleged in the indictment being separate and distinct from the offense raised by the evidence. G.S. 14-54.

APPEAL by defendants from *Gambill, J.*, 13 November 1967 Session, DAVIDSON Superior Court.

The defendant McDowell was charged in a bill of indictment (case # 13,524) as follows:

"STATE OF NORTH CAROLINA
DAVIDSON COUNTY

SUPERIOR COURT
NOVEMBER 6TH MIXED TERM, A. D. 1967.

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Junior McDowell, late of the County of Davidson, on the 29th day of August, 1967, with force and arms, at and in the County aforesaid, a certain storehouse, shop, warehouse, banking house, countinghouse and building, occupied by one Joel and Juanita Loflin, Route 2, Box 170K, Denton, North Carolina, wherein merchandise, chattels, money, valuable securities were, and were being kept, unlawfully, willfully and feloniously did break or enter, with intent the merchandise, chattels, money, valuable securities of the said Joel and Juanita Loflin, then and there

being found, to steal, take and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

CHARLES T. KIVETT, Solicitor."

The defendant Harrison was charged in a bill of indictment (case # 13,525) identical in wording except for defendant's name.

The cases were consolidated for trial in the Superior Court, and consolidated for purposes of this appeal. Each defendant is represented by separate court-appointed counsel, but they properly consolidated the Record.

The evidence for the State tended to show a breaking or entering the dwelling house of Joel and Juanita Loflin at the address given in the bills of indictment.

At the close of the State's evidence each defendant moved for judgment of nonsuit, which motions were denied. At the close of all the evidence each defendant renewed his motion for judgment of nonsuit, and to the denials of their motions each defendant excepts and assigns error.

The jury returned verdicts of guilty as charged as to each defendant, and from judgments of imprisonment the defendants appealed.

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

William H. Steed for defendant appellant Junior McDowell.

Barnes and Grimes by Beamer Barnes, for defendant appellant Jack Roger Harrison.

BROCK, J. At the outset we note with favor that in the bills of indictment the solicitor used an identifying address for the premises in question. *State v. Sellers,* 273 N.C. 641, 161 S.E. 2d 15; *State v. Burgess,* 1 N.C. App. 142, 160 S.E. 2d 105.

The defendants contend there was a fatal variance between the proof and the charges in the bills of indictment. A fatal variance between the indictment and the proof is properly raised by a motion for judgment as of nonsuit. 2 Strong, N. C. Index 2d, Criminal Law, § 107, p. 660. The defendants assert that they were charged with the second offense described in G.S. 14-54, and that the State's evidence tended to prove guilt of the first offense described in G.S. 14-54. The statute reads as follows:

"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 . . ."

The State contends that the use of the words "or other building" contained in the second portion of the statute makes that portion sufficiently broad to include a dwelling house. However, we note that, upon another assignment of error in this case, the State contends it was not required to offer evidence of "any merchandise, chattel, money, valuable security or other personal property" in the building as provided in the second portion of the statute because the State proved that it was a "dwelling." These two arguments seem to us to lend credence to defendants' arguments that the first and second portions of the statute describe two separate and distinct offenses.

In *State v. Mumford*, 227 N.C. 132, 41 S.E. 2d 201, Justice Barnhill, later Chief Justice, traced the origin of G.S. 14-54 and points out the various amendments thereto. In 1883 the statute was amended so as to include, in all material respects, the first portion as it now appears. In *State v. Mumford*, Justice Barnhill stated: "Thus from the beginning, in respect to a dwelling, it is the entering otherwise than by a burglarious breaking, with intent to commit a felony, that constitutes the offense condemned by the Act." It seems clear that the portion of the statute dealing with a *dwelling house* is distinct from the portion dealing with *any storehouse, shop, etc., where any merchandise, etc., shall be;* and that both are distinct from the portion dealing with *any uninhabited house.*

We construe G.S. 14-54 to condemn three separate felonies as follows: (1) If any person, with intent to commit a felony or other infamous crime therein, shall break or enter the dwelling house of another otherwise than by a burglarious breaking, he shall be guilty of a felony, *State v. Slade*, 264 N.C. 70, 140 S.E. 2d 723; (2) If any person, with intent to commit a felony or other infamous crime therein, shall break or enter any storehouse, shop, warehouse, bankinghouse, countinghouse or other building where any merchandise, chattel, money, valuable security or other personal property shall be, he shall be guilty of a felony; (3) If any person, with intent to commit a felony or other infamous crime therein, shall break or enter any uninhabited house, he shall be guilty of a felony.

The State further urges that the defendants were not misled in the preparation of their defense because there is no evidence to show there were any other structures at the address given in the

bills of indictment. Of course, the fact that the evidence does not disclose there were other structures does not exclude the possibility that there in fact were others. But, be that as it may, the State must charge the offense it intends to prove; it is upon the offense charged that a defendant must predicate his plea of former jeopardy. It is the settled rule that the evidence in a criminal case must correspond with the allegations of the indictment which are essential and material to charge the offense. This rule is based upon the requirements that the accused shall be definitely informed as to the charges against him, and that he may be protected against another prosecution for the same offense. 27 Am. Jur., Indictments and Information, § 177, p. 722.

If these convictions were allowed to stand upon these bills of indictment, the defendants could not successfully plead former jeopardy if later charged in bills of indictment with the offense of breaking or entering the *dwelling house* of Joel and Juanita Loflin, as provided in the first portion of G.S. 14-54. The defendants' motions for judgments as of nonsuit upon the grounds of a fatal variance between the offenses charged and the proof should have been allowed.

This disposition makes unnecessary a discussion of the remaining assignments of error.

The State, if it elects, may try the defendants upon bills of indictment properly charging the defendants with the offense as condemned by the first portion of G.S. 14-54.

Reversed.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. STEVEN DOUGLAS BENTLEY.

(Filed 12 June 1968.)

1. Criminal Law § 76—

Findings of fact by the trial court upon the *voir dire* as to the voluntariness of defendant's statements are conclusive on appeal if supported by competent evidence; whether such facts support the conclusions of the court as to voluntariness is a question of law reviewable on appeal.

2. Same; Criminal Law § 162—

Defendant's contention that he was prejudiced in that the jury was permitted to view a police waiver form signed by him acknowledging that he was advised of his rights is not considered by the Court of Ap-

peals, the record not indicating that the jury was given the document and defendant failing properly to present the question by objection and exception duly entered in the record.

3. Criminal Law § 97—

There is no abuse of discretion where the trial judge, prior to arguments of counsel to the jury, permits the State to recall a witness for the purpose of introducing additional evidence.

4. Criminal Law § 102—

In a prosecution for uttering a forged check, a remark by the solicitor in his argument to the jury that "the defendant was out there robbing" the prosecuting witness *is held* a mere *lapsus linguæ* and is not, under the facts of the case, so grossly unfair as to mislead and prejudice the jury.

5. Constitutional Law § 32; Criminal Law § 21—

The failure to grant defendant's request for counsel at his preliminary hearing did not deprive him of any constitutional right.

APPEAL by defendant from *Snepp, J.*, at 23 October 1967, Schedule "C" Criminal Session of MECKLENBURG.

This is a criminal action prosecuted on two separate bills of indictment charging the defendant with (1) felonious breaking and entering of the premises of Carolox Company, Inc., and the felonious larceny of certain property from the premises, etc.; and (2) uttering a forged instrument drawn on the Carolox Company, Inc., Davidson Road, Davidson, North Carolina, made payable to Jerry F. Abernathy in the sum of $48.15.

The defendant, through his court-appointed counsel, entered pleas of not guilty to both bills of indictment and the trial proceeded before a jury.

The facts necessary for a determination of this case are: The Carolox Company, Inc., a manufacturer of heavy machine tools and electronic equipment, located on Griffith Street in Davidson, North Carolina, was broken into on the night of 23 May 1967. When the building was opened the following morning, personnel in charge found that there were certain items missing from the business office. Among the missing items was approximately $15.00 in cash that had been kept in a lock box. Also missing were 412 unsigned payroll checks and 423 general account checks drawn on the account of the Carolox Company, Inc. Approximately three months later, on 4 August 1967, a check identified as one of the missing payroll checks was negotiated by the defendant to Mr. Carl S. Mundy, who owned and operated a retail grocery business in Mecklenburg County. At the time this check was negotiated, it bore the signatures of Mr. G. S. Beard and Mr. Harold T. Cavanaugh, neither of whom are employees of the Carolox Company,

Inc. The check was made payable to Jerry F. Abernathy and endorsed in his name by the defendant.

At the conclusion of the evidence for the State the court granted defendant's motion of nonsuit on the charges of felonious breaking and entering and larceny, but denied the motion as to uttering a forged instrument. Defendant was subsequently found guilty by the jury of uttering a forged instrument. He was sentenced to imprisonment under the jurisdiction of the State Department of Corrections for not less than five nor more than seven years.

From the judgment entered, defendant appealed.

T. W. Bruton, Attorney General by Bernard A. Harrell, Assistant Attorney General, for the State.

Don Davis for defendant appellant.

MORRIS, J. Defendant assigns as error the court's ruling that his out-of-court statements to police officers at the police station were voluntarily made.

The record discloses that when the State attempted to introduce a standard police waiver form signed by the defendant acknowledging that he had been properly advised of his constitutional rights before interrogation, objection was made by defendant's counsel. Counsel then requested that the voluntariness of defendant's statements be determined on *voir dire*. The trial judge excused the jury and heard evidence bearing directly on the question of whether the defendant's statements to the police were voluntary. At the conclusion of this evidence he found the following facts: That defendant had been fully advised of his constitutional rights; that statements made to the police were freely and voluntarily made after he had been warned of his rights to remain silent, the fact that any statement might be used against him, his right to counsel and that the State would appoint counsel if he could not afford one, and of his right to discontinue giving information at any point without presence of counsel.

The findings of fact by the trial court upon the *voir dire* as to the voluntariness of defendant's statements are conclusive on review if supported by competent evidence. *State v. Childs*, 269 N.C. 307, 152 S.E. 2d 453. Whether such facts support the conclusions of the court as to voluntariness is a question of law reviewable on appeal. *State v. Fuqua*, 269 N.C. 223, 152 S.E. 2d 68. The trial court properly excused the jury and heard evidence on *voir dire* as to whether defendant's statements were voluntary, giving defendant opportunity to testify and offer evidence. We have carefully reviewed the

testimony taken on *voir dire* and find that there was ample competent evidence to support the findings of fact made by the trial judge and we further find that these findings of fact support the conclusion of the court that defendant's statements were voluntarily made.

Defendant contends that the jury was permitted to view the waiver form and that this was prejudicial error. There is nothing in the record to indicate that the jury was handed this document. No objection or exception was made. This Court will not consider questions not properly presented by objection in the record and exceptions duly entered. This assignment of error is overruled.

Defendant's assignment of error no. 2 is taken to the action of the trial judge in allowing the State to recall Sergeant Lewis E. Robinson of the Mecklenburg County Police Department to give additional evidence after he had previously testified. Defendant contends that this action was so highly irregular and prejudicial to him as to require a new trial.

This Court stated in *State v. Brown,* 1 N.C. App. 145, 160 S.E. 2d 508, that the trial judge has wide discretionary power with respect to the introduction of further evidence at the trial. In *Brown, supra,* the question involved the introduction of additional evidence after both the State and the defendant had concluded their arguments to the jury. There, we held the trial judge acted within the limits of his discretion in allowing the evidence to be introduced. We see no abuse of discretion in the instant case wherein the trial judge before arguments of counsel to the jury, permitted the recalling of the same witness.

Defendant's assignment of error no. 3 is taken to the argument of the solicitor to the jury when he said, "The defendant Bentley was out there robbing Mr. Mundy . . ."

> "Arguments to a jury should be fair and based on the evidence or on that which may be properly inferred from the case. This is said in 88 C.J.S. Trial § 169, at 337-38: 'However, the liberty of argument must not degenerate into license, and the trial judge should not permit counsel in his argument to indulge in vulgarities; he should, therefore, refrain from abusive, vituperative, and opprobrious language, or from indulging in invectives, or from making any statements or reflections which have no place in argument but are only calculated to cause prejudice.'" *State v. Miller,* 271 N.C. 646, 157 S.E. 2d 335.

We feel, however, that under the facts of this case the remark by the solicitor in his argument as above quoted was not so grossly unfair as to mislead and prejudice the jury. The general tenor of the

trial reflects that this was merely a "slip of the tongue" and not such unfairness as to warrant a new trial.

Defendant assigns as error the failure of the court to appoint counsel to represent him at his preliminary hearing.

Parker, C.J., in an exhaustive opinion, held in the case of *Gasque v. State,* 271 N.C. 323, 156 S.E. 2d 740, that a preliminary hearing is not prerequisite to the finding of an indictment in this State nor a critical stage of the proceeding, and a defendant may waive the hearing and consent to be bound over to the superior court to await grand jury action without forfeiting any defense or right available to him; therefore, the denial of defendant's request for counsel at the hearing does not deprive defendant of any constitutional right. We cannot see how the facts of this case come outside the rule set out in *Gasque, supra.* This assignment of error is overruled.

All other assignments of error have been carefully considered and are overruled. The evidence offered by the State is amply sufficient to support the verdict. In the trial below we find

No error.

CAMPBELL and BRITT, JJ., concur.

EDNA C. HEDGECOCK v. HUBERT GRAY FRYE, T/A M & H DISTRIBUTORS, AND MARYLAND CASUALTY COMPANY.

(Filed 12 June 1968.)

1. Master and Servant § 91—

An agreement for the payment of compensation, when approved by the Industrial Commission, is as binding on the parties as an order, decision or award of the Commission. G.S. 97-87.

2. Same; Master and Servant § 82—

The Industrial Commission has the inherent authority to appoint deputies with the same power to enter awards as is possessed by members of the Commission, G.S. 97-79, and such authority does not require that any particular title be conferred upon the deputy nor does it require that his title include the word "deputy."

3. Master and Servant §§ 74, 91—

Approval by the Chief Claims Examiner of the Industrial Commission of an agreement to pay compensation to a claimant is binding upon claimant as an award of the Commission, and the claimant is thereafter barred from pursuing a claim for change of condition more than twelve months after the last payment of compensation pursuant to her award under the agreement. G.S. 97-47.

HEDGECOCK *v.* FRYE.

APPEAL by plaintiff (claimant) from an Order of the Full Commission of the North Carolina Industrial Commission entered 10 January 1968.

Claimant was injured by accident arising out of and in the course of her employment on 19 October 1965. This injury was diagnosed by her doctor as acute low back sprain. On 1 November 1965, claimant and defendant entered into an Agreement for Compensation for Disability in accordance with G.S. 97-17. The I. C. Form 21 (Agreement for Compensation for Disability) was forwarded to the Commission and was approved for the Commission on 3 November 1965 by Mr. James R. Mitchell, Chief Claims Examiner. Claimant was paid compensation under this agreement from 20 October 1965 to 24 November 1965. Upon receipt of the last payment on or about 23 November 1965, claimant also received Industrial Commission Form No. 28B advising her that it was the last payment.

Claimant returned to work with the same employer and worked regularly until 9 December 1966, at which time she experienced an onset of pain in her back. She returned to the care of the same doctor who had treated her for the 1965 injury, and on 17 February 1967 her difficulty was diagnosed as a disc lesion. Claimant was hospitalized on 20 March 1967 and underwent surgery on 21 March 1967. She returned to work on 1 July 1967, but was able to work at her occupation for only two weeks. Claimant filed a request for hearing on 19 May 1967.

Hearing was conducted before Honorable William F. Marshall, Jr., Commissioner, in Winston-Salem on 18 September 1967.

The Hearing Commissioner found that claimant was not injured by accident arising out of and in the course of her employment on 9 December 1966. The Hearing Commissioner further found that plaintiff's request for a "change of condition" hearing under G.S. 97-47 was made more than one year from the last payment under the award for the 19 October 1965 injury; and that claimant is barred from further claim under the 19 October 1965 injury by the one year limitation contained in G.S. 97-47.

Upon appeal to the Full Commission the opinion and award of the Hearing Commissioner were affirmed. Claimant appealed.

Hatfield, Allman and Hall by C. Edwin Allman, Jr., for plaintiff (claimant) appellant.

Deal, Hutchins and Minor by Richard Tyndall, for defendant appellees.

BROCK, J. In her appeal to the Full Commission, the claimant made three assignments of error as follows:

> "1. The Hearing Commission erred in failing to find that claimant's hospitalization, surgery and 10% permanent partial back disability and temporary total disability incident to said hospitalization, surgery and recuperation was caused by the accident on October 19, 1965.
>
> "2. The Hearing Commission erred in his conclusions of law that claimant's claim was approved by the Industrial Commission on November 5, 1965 (OUR NOTE: This should be November 3, 1965), and that claimant's only remedy was to reopen for changed condition pursuant to G.S. 97-47.
>
> "3. The Hearing Commission erred in finding that claimant's hospitalization, surgery and back disability was caused by the 'incident' on December 9, 1966."

Along with her exceptions to the action of the Full Commission in overruling claimant's exceptions and assignments of error, and in adopting as its own the findings of fact, conclusions of law, and award of the Hearing Commissioner, the claimant brings forward the same assignments of error to this Court.

Unless claimant's second assignment of error is sustained, her first assignment will be immaterial. For, if her claim for the 19 October 1965 accident was approved by the Commission and the last payment was made thereunder on 23 November 1965, her request for hearing filed 19 May 1967, more than twelve months from the date of the last payment of compensation, would come too late for a "change of condition" claim under G.S. 97-47. Therefore we will proceed to a consideration of claimant's second assignment of error.

Concerning the 19 October 1965 accident the parties stipulated that an agreement for compensation was entered into on 1 November 1965, and was approved by Mr. James Mitchell, Chief Claims Examiner of the North Carolina Industrial Commission on 3 November 1965.

An agreement for the payment of compensation when approved by the Commission is as binding on the parties as an order, decision or award of the Commission unappealed from or an award of the Commission affirmed upon appeal. G.S. 97-87; *Tucker v. Lowdermilk,* 233 N.C. 185, 63 S.E. 2d 109. The claimant asserts however that the statute requires the agreement to be approved by the Commission, and that approval by the Chief Claims Examiner does not fulfill this requirement. Claimant asserts, therefore, that there has

been no award by the Commission and therefore the twelve months limitation of G.S. 97-47 is not applicable.

The Commission may appoint deputies with the same power to enter awards as is possessed by the members of the Commission. G.S. 97-79. By its affirmance of the award in this case it is obvious that the Commission recognized its appointment of the Chief Claims Examiner as its deputy for this purpose. The authority to appoint a deputy does not require that any particular title be conferred upon the deputy, nor does it require that his title must include the word "deputy." It is inherent in the statute that the Commission has the discretion to appoint deputies for such purposes as are appropriate for the conduct of its business.

Claimant cites *White v. Boat Corp.*, 261 N.C. 495, 135 S.E. 2d 216, in support of her argument that the agreement must be approved by a member of the Commission. In holding such an agreement binding in that case the Supreme Court said: "The Commission stamped its approval of the agreement on January 12, 1962." The record on appeal in *White v. Boat Corp.* reveals that the agreement for compensation was approved for the Commission by Mr. J. R. Mitchell, the same Chief Claims Examiner who approved the agreement in the case now before us.

The Commission had the authority to appoint a Chief Claims Examiner as its deputy to act for it in approval or disapproval of agreements for compensation. The Chief Claims Examiner approved claimant's agreement on 3 November 1965, and the agreement thereby became binding as an award of the Commission. The last payment under the award was received by the claimant on 23 November 1965, more than twelve months before she filed her request for hearing on 19 May 1967. Under the plain terms of G.S. 97-47 claimant is barred from pursuing a claim for change of condition more than twelve months after the last payment of compensation pursuant to her award under the agreement. If the time limitation under this statute is considered too short, it must be changed by the Legislature and not by the Courts. Claimant's first and second assignment of error are overruled.

It is not clear from claimant's third assignment of error whether she complains that the Commission failed to find that she sustained her injury from accident on 19 October 1965; or whether she complains that the Commission failed to find that she sustained her injury from accident on 9 December 1966. Nevertheless, in her brief, claimant treats this assignment of error as though made to the failure of the Commission to find that she sustained her injury from accident arising out of and in the course of her employment on 19 Oc-

tober 1965. Since it is thus treated by the claimant, it constitutes a repetition of her first assignment of error. We have already ruled upon the first and therefore claimant's third assignment of error is likewise overruled.

Affirmed.

MALLARD, C.J., and PARKER, J., concur.

JOSEPH P. MITCHELL, B/N/F, LOUISE W. MITCHELL v. GUILFORD COUNTY BOARD OF EDUCATION

AND

CARL V. MITCHELL v. GUILFORD COUNTY BOARD OF EDUCATION.

(Filed 12 June 1968.)

1. Master and Servant § 82; Schools § 11—

The Industrial Commission has jurisdiction to hear and determine tort claims against any county board of education arising as a result of any alleged negligent act or omission of the driver of a public school bus in the course of his employment when the salary of such driver is paid from the State Nine Months School Fund. G.S. 143-300.1.

2. Master and Servant § 93—

Findings of fact by the Industrial Commission are conclusive on appeal if there is any competent evidence to support them. G.S. 143-293.

3. Schools § 11— Evidence held sufficient to sustain conclusion that school bus driver was negligent in striking child.

The Commission's findings that the driver of a school bus approached the minor plaintiff and approximately fifty other children at a speed of 10 miles per hour upon an icy pavement, that the unsupervised students were coming toward the bus as he was pulling up to the spot where the children customarily came on board, and that the plaintiff, an 11-year-old boy, slipped on the icy sidewalk, slid towards the bus and that the rear wheels of the bus went across his legs, *held* sufficient to sustain the conclusion that the driver was negligent in failing to determine that plaintiff and the other children would not be placed in danger by the movement of the bus.

4. Negligence § 16—

An 11-year-old child is presumed to be incapable of contributory negligence.

APPEAL by defendant in each case from order of North Carolina Industrial Commission of 9 January 1968.

These cases originated before the North Carolina Industrial Commission and were consolidated for hearing, decision and appeal.

Commissioner Shuford first heard them, and upon appeal they were heard by the full Commission. From the order of the full Commission dated 9 January 1968 affirming Commissioner Shuford's award to the plaintiffs in a sum less than the maximum provided in G.S. 143-291, defendant, Guilford County Board of Education, appeals.

Block, Meyland & Lloyd by Thomas J. Bolch for plaintiff appellees.

T. W. Bruton, Attorney General, and Richard N. League, Staff Attorney, for defendant appellant.

MALLARD, C.J. The plaintiff in each case institutes this action against the defendant pursuant to G.S. 143-300.1 which provides, among other things, that the North Carolina Industrial Commission has jurisdiction to hear and determine tort claims against any county board of education arising as a result of any alleged negligent act or omission of the driver of a public school bus, in the course of his employment, when the salary of such driver is paid from the State Nine Months School Fund.

Plaintiff Joseph P. Mitchell is the minor son of the plaintiff Carl V. Mitchell. Both plaintiffs seek to recover damages resulting from the alleged negligence of Stephen Johnson Ingle in the operation of a school bus as an employee of the Guilford County Board of Education while on the grounds of the Bessemer Junior High School, Greensboro, North Carolina, and while Joseph P. Mitchell was preparing to board the bus. Plaintiff Joseph P. Mitchell seeks to recover for pain and suffering and permanent physical disabilities. Plaintiff Carl V. Mitchell seeks to recover for hospital, ambulance and medical bills incurred by him for treatment of the injuries sustained by his minor son, Joseph P. Mitchell.

Defendant denies the material allegations of the plaintiffs, and for a further answer and defense to the cause of action of each plaintiff, alleges that Joseph P. Mitchell was contributorily negligent in his failure to exercise due care in approaching the school bus when the condition of the driveway was clearly icy and he could reasonably foresee that he might slip and be injured.

The findings of fact by the Industrial Commission are conclusive if there is any competent evidence to support them. G.S. 143-293.

There was ample evidence to support the findings of fact as to the damages sustained by the plaintiffs. The parties stipulated that the accident giving rise to the claims of the plaintiffs occurred at the Bessemer Junior High School in Greensboro on 21 January 1965

at about 4:00 P.M. and that Stephen Johnson Ingle was at such time an employee of the defendant and engaged in the course of his employment. The hearing Commissioner found and concluded that as such employee, Stephen Johnson Ingle negligently operated the school bus at the time and place of the accident. This was adopted and approved by the full Commission. The hearing Commissioner, among other things, made findings of fact, which were adopted and approved by the full Commission, that:

"1. On 21 January 1965, the minor plaintiff was 11 years old and in the seventh grade at the Bessemer Junior High School in Greensboro. There was a roadway in front of the school building which was used by school buses to load children in order to transport them to their homes. There was a walkway next to the roadway which was used by the children to walk to the school buses as they were being loaded.

2. It was cold at about 4:00 P.M. on 21 January 1965 and there was ice on both the roadway and the walkway in front of the school building. The minor plaintiff and other children therefore waited in the building until someone called out the number of the bus which they were to board in order to be transported to their homes. When such announcement was made the minor plaintiff and about 50 fellow students left the school building and went onto the sidewalk which was icy and upon which other children had fallen. The minor plaintiff and the other children walked in a group towards the place where they expected the school bus to stop for the purpose of allowing them to board it. There were usually teachers or monitors present to supervise the loading of the children onto the school buses. However, on the occasion here involved there was no one present to assist or supervise the children in the loading even though the sidewalk and roadway were icy and slippery.

3. Despite the absence of any teachers or anyone else to supervise the children, the school bus which the minor plaintiff was to board was driven, without sounding its horn or other warning device, on the roadway towards and by the children walking on the walkway towards the bus loading point. Such bus was driven on the icy pavement at a speed of about 10 miles per hour and to a point within five feet of where the group of approximately 50 children was located. * * *

4. As the school bus was being so driven past the place where the children were walking, the minor plaintiff slipped on the

icy walkway and slid towards the bus. His legs went under the bus and the rear wheels went across his legs.

5. The above-named school bus driver, by driving the school bus without warning and at approximately 10 miles per hour towards and by the group of approximately 50 unsupervised children despite the icy conditions which were existing, failed to do that which and did other than a reasonably prudent person would have done under the same or similar circumstances. * * *"

We hold that the facts found by the hearing Commissioner and adopted and affirmed by the full Commission are supported by competent evidence and that they are sufficient to support the action of the full Commission in adopting and affirming the findings and the conclusions of law reached by the hearing Commissioner, that the driver of the bus was negligent and that such negligence was the proximate cause of the accident and damages sustained by plaintiffs. *Brown v. Board of Education,* 269 N.C. 667, 153 S.E. 2d 335.

The bus driver in this case had stopped his bus behind another bus while it loaded and moved away. After the other bus moved, the driver started his bus forward from its stopped position while the minor plaintiff and approximately fifty other children were either by the side of it or approaching it from the door of the school building. The driver testified that there was ice on the street and on the sidewalk and that the students were coming toward the bus as he was pulling up. It was the duty of the bus driver either to keep the bus where it was or before moving it forward under these circumstances, in the exercise of the high degree of caution in order to meet the standard of care required, to determine that the minor plaintiff and the other children by the side of or approaching the bus would not be placed in positions of danger by the movement of the bus. This he failed to do, and this was negligence. *Greene v. Board of Education,* 237 N.C. 336, 75 S.E. 2d 129.

The plaintiff Joseph P. Mitchell was eleven years old. He is presumed to be incapable of contributory negligence. *Brown v. Board of Education, supra.* There is no finding of and no evidence of contributory negligence in the record.

Commissioner William F. Marshall, Jr., dissented from the order of the full Commission, but no reasons therefor are stated in the record.

The order of the Industrial Commission is

Affirmed.

BROCK and PARKER, JJ., concur.

MINNIE P. POLLOCK v. SOUND CHEVROLET CO., INC., AND McLEAN TRUCKING COMPANY.

(Filed 12 June, 1968.)

1. Automobiles §§ 71, 73— Evidence is sufficient to support finding of defendant's negligence in towing operation.

Plaintiff's evidence was to the effect that defendant's tractor-trailer unit was mired in sand on the west side of a paved roadway and that the codefendant's wrecker was standing, unattended and with no lights showing, in the east, *i.e.*, plaintiff's, lane of travel, that two cables extended from the wrecker across the roadway to the tractor-trailer unit, that the cables were difficult to see because of their color and distance above the asphalt road, and that as plaintiff attempted to drive her convertible automobile at a speed of 10 miles per hour to the left of and around the wrecker the cables came through the windshield of the car, causing her to receive injuries. *Held:* Evidence of defendant's negligence was sufficient to be submitted to the jury, and the evidence was insufficient to support a finding of contributory negligence by the plaintiff as a matter of law.

2. Negligence § 26—

Nonsuit on the issue of contributory negligence should be denied when opposing inferences are permissible from plaintiff's proof.

3. Automobiles § 100—

Uncontradicted testimony of defendant's employee that he obtained permission to call upon the codefendant's wrecker service to assist him in getting his truck unstuck from sand and that he gave the codefendant's employee instructions and directions as to the removal of the truck, *is held* to establish that the wrecker service was not an independent contractor.

APPEAL by plaintiff from *Bowman, S.J.*, 19 October 1967 Session of CARTERET Superior Court.

Plaintiff complains that she was injured by the actionable negligence of the defendants on 13 July 1964 and seeks to recover therefor. Plaintiff alleged that she was operating an automobile in a careful and prudent manner northwardly on a roadway known as Transit Shed One Street located in that area and maintained by the North Carolina State Ports Authority in Morehead City. That one of defendant McLean's tractor-trailer units was mired in the sand on the west side of and near said street, and defendants' employees were attempting to release it from its position in the sand. Assisting in this was the Chevrolet truck of the defendant Sound Chevrolet Co., Inc., referred to by the witnesses as a "wrecker" and described as having a sort of crane arrangement on the back of it with cables "on a winch and on rolling arrangements where these cables could be pulled out." In doing so, the defendants had stretched a steel cable across this road about three and one-half feet above the road extending from the Chevrolet truck, situated on the "east side" of the street, to the tractor-trailer unit on the west side of the

street. Plaintiff further alleged that the defendants were actionably negligent in "a) that the defendants stretched a cable across a busy thoroughfare which was not readily visible to approaching traffic; b) that they failed to have flares or warnings on either side of said cable to give warning of its presence to approaching traffic; c) that they failed to have persons, watchmen, or other signalmen to give notice of the presence of said cable."

The defendants deny in separate answers the material allegations of the complaint, and as a further answer and defense each alleges contributory negligence on the part of the plaintiff, alleging in substance that she was operating a vehicle on the roadway at a speed greater than was reasonable and prudent under the circumstances; that she failed to keep a proper lookout; that she failed to keep the vehicle she was driving under control; and that she failed to apply brakes or stop it to avoid striking the cables when in the exercise of due care she should have.

At the close of plaintiff's evidence, the court granted defendants' motion for nonsuit. From the judgment dismissing the action, the plaintiff appealed.

Wheatly & Bennett by C. R. Wheatly, Jr., Attorneys for plaintiff appellant.

Barden, Stith, McCotter & Sugg by L. A. Stith, Attorneys for defendant appellee Sound Chevrolet Co., Inc.

Spry, Hamrick & Doughton by Harvey Hamilton, Jr., Attorneys for defendant appellee McLean Trucking Company.

MALLARD, C.J. Plaintiff's only assignment of error is that the court erred in allowing defendants' motion for nonsuit at the conclusion of plaintiff's evidence.

This involves two questions. Was there sufficient evidence favorable to plaintiff to go to the jury? If so, was the plaintiff guilty of contributory negligence as a matter of law? We hold that the answer to the first question is "yes," and the answer to the second question is "no." *Montford v. Gilbhaar,* 265 N.C. 389, 144 S.E. 2d 31.

The evidence, taken in the light most favorable to the plaintiff, tends to show that on 13 July 1964 an employee of the defendant Sound Chevrolet Co., Inc., was assisting an employee of the defendant McLean Trucking Company in removing one of the tractor-trailer units of the McLean Trucking Company from its mired or stuck position in the sand on the premises maintained by the North Carolina State Ports Authority in the Town of Morehead City.

The tractor-trailer had become stuck in the sand where it had

been driven for the purpose of unloading it. The wrecker of the defendant Sound Chevrolet Co., Inc., was standing unattended, with no lights showing, in plaintiff's lane of travel on an asphalt roadway or street with two cables, each about three-fourths of an inch in diameter, extending across the remaining fifteen feet of the roadway from it to the mired tractor-trailer, thus completely blocking the roadway. These cables were greasy and black-looking and were about three and one-half or four feet above the road. There were no flares or other warnings of the presence of the cables across the roadway.

The plaintiff was operating a Chevrolet convertible northwardly on this roadway and while traveling in second gear at a speed of approximately ten miles per hour struck the cables as she pulled the automobile to her left to go around the wrecker. The cable came across the hood of the automobile and through the windshield causing her to receive injuries. In our opinion the plaintiff's evidence of negligence was sufficient to be submitted to the jury.

As to the contributory negligence of plaintiff, we hold that it is a jury question whether plaintiff operated the Chevrolet automobile at a speed greater than was reasonable and prudent under the circumstances, failed to keep it under proper control, or failed to maintain a reasonable lookout and should have seen the cables under the conditions existing. "Nonsuit on the issue of contributory negligence should be denied when opposing inferences are permissible from plaintiff's proof." *Montford v. Gilbhaar, supra;* 3 Strong, N. C. Index, Negligence, § 26.

McLean's driver testified that he "obtained permission to contact Sound Chevrolet for wrecker service *to assist* in getting the truck unstuck," that "they sent one of their wreckers over there *to help* get the tractor-trailer unstuck," that he "told the wrecker operator how to connect the cables," and that he gave directions to the driver of the wrecker. In view of the uncontradicted testimony, the contentions of the defendant McLean Trucking Company that its employee had nothing to do with the removal of the tractor-trailer from the sand and that the Sound Chevrolet Co., Inc., was an independent contractor employed to remove the tractor-trailer from the sand are without merit.

The judgment of nonsuit is

Reversed.

BROCK and PARKER, JJ., concur.

PAUL HALL, EMPLOYEE, v. W. A. DAVIS MILLING CO., EMPLOYER, AND LUMBERMENS MUTUAL CASUALTY COMPANY, CARRIER.

(Filed 12 June 1968.)

1. Master and Servant § 93—

Upon appeal from an award of the Industrial Commission, the Superior Court has the discretionary power to grant an appellant's motion to remand the cause to the Industrial Commission for rehearing on the ground of newly discovered evidence when it appears by affidavit that such evidence will be presented upon a new hearing, that it is competent, relevant, material and probably true, that due diligence was used to procure the evidence at the hearing, that the evidence is not cumulative and does not tend only to contradict, impeach or discredit a witness who has testified, and that it is of such a nature that a different result will probably be reached upon a new hearing.

2. Same— Order remanding cause to Industrial Commission for rehearing on ground of newly discovered evidence held proper.

In an action under the Compensation Act plaintiff-employee, unrepresented by counsel, testified and advised the hearing commissioner of the presence of two eyewitnesses to the occurrence. Defendant's counsel advised the commissioner that defendant would stipulate that their testimony would corroborate plaintiff and the witnesses were not called, the hearing commissioner failing to advise plaintiff that he could call the witnesses to testify. Upon appeal to the Full Commission from an order denying compensation, plaintiff filed a motion supported by affidavits of the two eyewitnesses that additional evidence be taken, which was denied. *Held:* Upon appeal to the Superior Court, the findings of fact upon supporting evidence were sufficient to sustain the court's order remanding the cause to the Industrial Commission for a rehearing on the ground of newly discovered evidence for the purpose of taking the testimony of the two eyewitnesses.

APPEAL by defendants from *Crissman, J.*, 23 October 1967 Session GUILFORD County Superior Court (High Point Division).

This is an action under the Workmen's Compensation Act to recover benefits which plaintiff contends are due him under the Act.

Initial hearing was held before Deputy Commissioner Thomas on 11 October 1966. Plaintiff appeared at the hearing without legal counsel, and defendants were represented by the same counsel who represent them on this appeal. Plaintiff testified and informed the Hearing Commissioner that two of his fellow employees who were eyewitnesses to the occurrence were present at the hearing. Counsel for defendants advised the Hearing Commissioner that defendants would stipulate that the evidence of the two witnesses would corroborate plaintiff, and they did not testify.

In his opinion and award, the Deputy Commissioner made findings of fact and conclusions of law to the effect that plaintiff was

not injured as the result of an accident within the meaning of G.S. 97-2(6) and denied compensation.

Plaintiff employed counsel and appealed to the Full Commission. Plaintiff's counsel moved that the Full Commission take additional evidence on appeal and filed affidavits from the two fellow employees aforementioned. The Full Commission denied plaintiff's motion to take additional testimony and adopted as its own the findings of fact, conclusions of law, and award of the Deputy Commissioner.

From the opinion and award of the Full Commission, the plaintiff on 4 May 1967 appealed to the Superior Court.

The appeal came on for hearing before Judge Crissman at the 23 October 1967 Session of the Superior Court of Guilford County, High Point Division. Judge Crissman entered an order in which he reviewed prior proceedings in the case and found certain facts, including the following:

> THE COURT FINDS AS FACTS that prior to the case being called by the Full Commission, plaintiff filed a motion for further hearing on newly discovered evidence, said newly discovered evidence being in the form of sworn filed affidavits of two eye-witnesses, Stanley Willis and William Joyce, to the effect that just as plaintiff and Stanley Willis had tossed one of the 100 pound bags up on the very top of the stack, about eight feet high, that one of the 100 pound bags of feed started falling or sliding down and plaintiff reached up to catch it and the bag fell down completely into his arms, thereby injuring plaintiff's back. These two eye-witnesses were present at the original hearing on October 11, 1966, but were not called to testify. The plaintiff was not represented by counsel at this hearing.
>
> THE COURT FURTHER FINDS AS FACTS that it appears that these two witnesses will give the evidence; that it is probably true as shown by the sworn affidavits; that it is competent, material and relevant and not merely cumulative since both were eye-witnesses to the facts surrounding the injury; that due diligence has been used to get the evidence since both eye-witnesses were present in the courtroom and ready and willing to testify at the original hearing before Deputy Commissioner Thomas on October 11, 1966; and that the evidence is of such a nature that in another trial a different verdict would probably be reached.

After reciting that the court is of the opinion that the ends of justice would be met by vacating the opinions and awards of Dep-

uty Commissioner Thomas and of the Full Commission and reinstating the case to the docket of the Industrial Commission for purpose of taking the testimony of Stanley Willis and William Joyce relative to the question of accidental injury, Judge Crissman, in his discretion, ordered that said opinions and awards be vacated and that the case be remanded to the Industrial Commission for the purpose of hearing said testimony and making findings of fact, conclusions of law, and an award.

Defendants made numerous exceptions to said order and appealed to this Court.

Bencini & Wyatt by Frank Burkhead Wyatt, Attorneys for plaintiff appellee.

Haworth, Riggs, Kuhn & Haworth by William B. Haworth, Attorneys for defendant appellants.

BRITT, J. The principal question for decision is whether, under the facts presented, Judge Crissman had authority to grant plaintiff's motion for a rehearing by the Industrial Commission on the grounds of newly discovered evidence. We hold that he had such authority.

In *McCulloh v. Catawba College,* 266 N.C. 513, 146 S.E. 2d 467, Sharp, J., speaking for the Supreme Court, said:

> After an appeal from an award of the Industrial Commission has been duly docketed in the Superior Court, the judge "has the power *in a proper case* to order a rehearing of the proceeding by the Industrial Commission on the ground of newly discovered evidence, and to that end to remand the proceeding to the Commission." *Byrd v. Lumber Co.,* 207 N.C. 253, 255, 176 S.E. 572, 573. (Italics ours.) *Accord, Moore v. Stone Co.,* 251 N.C. 69 ,110 S.E. 2d 459. The burden is upon the applicant for such a rehearing to rebut the presumption that the award is correct and that there has been a lack of due diligence. He makes out "a proper case" for the granting of a new hearing upon the ground of newly discovered evidence only when it appears by affidavit:
>
> "(1) That the witness will give the newly discovered evidence; (2) that it is probably true; (3) that it is competent, material, and relevant; (4) that due diligence has been used and the means employed, or that there has been no laches, in procuring the testimony at the trial; (5) that it is not merely cumulative; (6) that it does not tend only to contradict a former witness or to impeach or discredit him; (7) that it is of such

a nature as to show that on another trial a different result will probably be reached and that the right will prevail." *Johnson v. R. R.*, 163 N.C. 431, 453, 79 S.E. 690, 699.

In his order, Judge Crissman, in effect, found facts sufficient to bring plaintiff within the requirements set out in *McCulloh, supra.* The record is sufficient to support his findings and conclusions.

It is a fundamental rule that the Workmen's Compensation Act should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation. *Hall v. Chevrolet Co.*, 263 N.C. 569, 139 S.E. 2d 857, citing *Johnson v. Hosiery Co.*, 199 N.C. 38, 40, 153 S.E. 591, 593.

The record discloses that the plaintiff-employee, prior to the hearing before the Deputy Commissioner, consulted Mr. Davis, president of his employer, as to the advisability of employing counsel. Having been advised by Mr. Davis that he did not need a lawyer, plaintiff, evidently an uneducated person, went into the hearing without the benefit of legal counsel. Defendants were represented by able counsel, and although plaintiff advised the Deputy Commissioner of the presence of the two eyewitnesses to the occurrence, the record indicates that the Deputy Commissioner did not advise the plaintiff that he could call said witnesses to the witness stand, nor did the Deputy Commissioner see fit to have the witnesses testify.

We recognize that the Industrial Commission is the sole trier of the facts, but the ends of justice in the instant case require, and we so hold, that the opinions and awards of Deputy Commissioner Thomas and the Full Commission, entered in this cause, be vacated to the end that a new hearing be held by the Industrial Commission as set forth in Judge Crissman's order.

We observe that Judge Crissman's order requires that the opinions and awards of Deputy Commissioner Thomas and of the Full Commission *relating only to the question of accidental injury* be vacated; this would not accomplish the purpose intended by the order. Therefore, the order is modified by eliminating the words "relating only to the question of accidental injury" in paragraph (A) and the words "only as to the question of accidental injury" in paragraph (B).

Subject to the modifications aforesaid, the order appealed from is affirmed.

Modified and affirmed.

CAMPBELL and MORRIS, JJ., concur.

G. M. BATTLEY v. SEABOARD AIRLINE RAILWAY COMPANY, A CORPORATION.

(Filed 12 June 1968.)

1. Master and Servant § 35—

An employer's duty under the Federal Employers' Liability Act is the same as at common law to use reasonable care in furnishing employees with a safe place to work and safe tools and appliances.

2. Same—

Under the construction given the Act by the federal courts, an employer is not an insurer of the safety of his employees; the basis of liability under the Act is negligence on the part of the employer which constitutes in whole or in part the cause of the injury.

3. Master and Servant § 37—

In order to recover under the Federal Employers' Liability Act plaintiff must show something more than a fortuitous injury.

4. Negligence § 21—

In an action for the recovery of damages for injuries allegedly resulting from actionable negligence, the plaintiff must show (1) that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff, and (2) that such negligent breach of duty was the proximate cause of the injury.

5. Master and Servant § 37—

In an action for damages against a railroad company under the Federal Employers' Liability Act, allegations of the plaintiff, an engineer, that he was injured while attempting to enter the cab of his train in that defendant had placed a watercooler in the doorway of the cab which caused the floor of the cab to be constantly wet or slippery, and that the fireman was away from his place of duty and was blocking the entrance of the cab, *are held* insufficient to state a cause of action, and defendant's demurrer was properly sustained.

APPEAL by plaintiff from judgment of *McConnell, J.*, entered at the 19 March 1968 Session of RICHMOND Superior Court.

This is a civil action brought by plaintiff-employee against the defendant-employer to recover damages for injuries sustained by plaintiff during the course of his employment.

In his amended complaint, plaintiff alleges that defendant is subject to the Federal Employers' Liability Act regarding injury of its employees; that plaintiff was injured on 18 June 1963 while serving as engineer on defendant's train no. 4; that on the occasion of plaintiff's injury, the train had stopped at Moncure, N. C., and while it was stopped, plaintiff climbed down from the cab of the engine to the ground to check on an air leak under the motor; that while plaintiff was making said inspection, he received a signal to leave the station at once; that in climbing up the ladder to enter the cab, he was injured.

Plaintiff's contentions of negligence are summarized in paragraph IX of his amended complaint which reads as follows:

> "IX. That the direct sole proximate cause of the injury to the plaintiff was the defendant in placing a water cooler in the passage way which had to be used by the plaintiff and in the fact that the fireman was away from his place of duty when he knew that he should be on the left-hand side of the cab as an order was given to move out at once. That the floor was wet and slippery and when the plaintiff was going to his place of duty as fast as possible he was met with this emergency which was brought about by the negligence of the said railroad company and a fellow employee as hereinbefore more particularly set forth."

Plaintiff alleges that when he slipped and fell backward, he made an effort to save himself by grabbing the ladder and as he fell some 10 or 12 feet, ligaments were torn in one of his arms and shoulder.

Defendant filed demurrer to the amended complaint, contending that it does not set forth facts sufficient to constitute a cause of action. From judgment sustaining the demurrer, plaintiff appealed.

Seawell, Van Camp & Morgan by William J. Morgan, Attorneys for plaintiff appellant.

Henry & Henry by Everett L. Henry, Attorneys for defendant appellee.

BRITT, J. Plaintiff alleges that this action is subject to the Federal Employers' Liability Act (hereinafter referred to as the Act). The employer's duty under this Act (45 U.S.C. § 51) is the same as at common law, to use reasonable care in furnishing employees with a safe place to work and safe tools and appliances. *Cordova v. A. T. & S. F. Ry. Co.*, 18 Cal. Rptr. 144, 198 C.A. 2d 161.

The basis of liability under the Act is negligence proximately producing injury. The plaintiff must show something more than a fortuitous injury. *Camp v. R. R.*, 232 N.C. 487, 61 S.E. 2d 358.

In an action for the recovery of damages for injuries allegedly resulting from actionable negligence, the plaintiff must show: First, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff, under the circumstances in which they were placed; and, second, that such negligent breach of duty was the proximate cause of the injury — a cause that produced the result in continuous sequence

and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed. *Baker v. R. R.*, 232 N.C. 523, 61 S.E. 2d 621.

Under the construction given the Act by the federal courts, an employer is not an insurer of the safety of his employees; the basis of liability under the Act is negligence on the part of the employer which constitutes in whole or in part the cause of the injury. 5 Strong, N. C. Index 2d, Master and Servant, § 36. *Bennett v. R. R.*, 245 N.C. 261, 96 S.E. 2d 31.

"In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. * * * Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred." Parker, J. (now C.J.), in *Bennett v. R. R., supra,* quoting from *Tennant v. R. R. Co.*, 321 U.S. 29, 88 L. Ed. 520.

In his amended complaint, plaintiff alleges four acts or omissions of negligence on the part of the defendant. We discuss each of them briefly:

(1) He alleges that defendant "put a water cooler and set it up in the doorway into the cab." Plaintiff fails to allege any facts which show in what manner this caused his injury.

(2) He alleges that the fireman "blocked the entrance of the cab"; plaintiff fails to allege any facts showing how this caused his injury.

(3) He alleges that the fireman "was at a position where he had no business to be" and should have been at his position on the left-hand side of the cab. Plaintiff alleges no facts showing how this caused his injury.

(4) Plaintiff alleges that the water cooler caused the floor of the cab to be constantly wet or slippery and as the plaintiff "pulled into the cab his feet slipped on the water and he was caused to fall backward some 10 to 12 feet to the ground." Inasmuch as the employer's duty to his employee under the Act is the same as at common law and the employer is not an insurer of the safety of his employees, the rule governing the duty of a store owner to his patron would be applicable.

In *Hinson v. Cato's Inc.*, 271 N.C. 738, 157 S.E. 2d 537, our Supreme Court stated:

"A store owner does not insure his patrons against slipping or

falling upon the floor. * * * To hold the owner liable, the injured person must show: (1) that the owner negligently created the condition causing the injury, or (2) that it negligently failed to correct the condition after notice, either expressed or implied, of its existence."

Plaintiff failed to allege who placed the water on the floor of the cab or that if the wetness had existed for any period of time that defendant had failed to correct the condition after notice.

We hold that defendant's demurrer to the amended complaint was properly sustained and the judgment of the Superior Court is Affirmed.

CAMPBELL and MORRIS, JJ., concur.

IN THE MATTER OF THE SALE OF LAND OF PAUL AVERY WARRICK AND WIFE, SHIRLEY G. WARRICK, UNDER FORECLOSURE BY JOSEPH B. CHAMBLISS, SUBSTITUTE TRUSTEE.

(Filed 12 June 1968.)

1. Appeal and Error § 42—

When the evidence is not in the record it will be presumed that there was sufficient evidence to support the findings of fact necessary to support the court's judgment.

2. Appeal and Error § 28—

Where there is no request for findings of fact it will be presumed that the court on proper evidence found facts sufficient to support its judgment.

3. Appeal and Error § 42—

Matters discussed in the brief which are outside the record will not be considered on appeal.

4. Same—

The Court of Appeals can judicially know only what appears of record.

APPEAL by respondents Paul Avery Warrick and wife, Shirley G. Warrick, from *Cowper, J.*, 29 December 1967 in Chambers in WAYNE Superior Court.

Joseph B. Chambliss alleged that he was acting under the provisions of G.S. 45-21.29(k) as substitute trustee under a deed of trust executed by Paul Avery Warrick and wife, Shirley G. Warrick, to R. E. McDaniel, Trustee, dated 5 August 1962, recorded in

Wayne County Registry, and filed an "application" in the Superior Court of Wayne County addressed to the Clerk of the Superior Court.

In this application he alleges, among other things, that the property described therein lies in Brogden Township, Wayne County, North Carolina, and "that Joseph B. Chambliss was the duly appointed substitute trustee under a deed of trust from Paul Avery Warrick and wife, Shirley G. Warrick, to R. E. McDaniel, Trustee, dated the 5th day of August, 1962, and recorded in Book 569 at page 519 in the Office of the Register of Deeds of Wayne County, North Carolina.

"That said substitute trustee by virtue of the default in the payment of the indebtedness secured by said deed of trust, having been called upon by the holder of said instrument to foreclose said deed of trust did, after due advertisement as required by law, offer said land described in said instrument for sale, through his authorized agent, at the courthouse door in Wayne County, North Carolina, on the 22nd day of July, 1964, when and where Certain-Teed Products Corporation became the last and highest bidder at said sale. That report of said sale was made to Clerk of Superior Court and said bid remained open for more than ten days and no advance bid was offered, whereupon the substitute trustee executed a deed of said premises to the purchaser and the same was duly recorded in the Office of the Register of Deeds of Wayne County after confirmation of said sale. * * * That the undersigned, Joseph B. Chambliss, Substitute Trustee, is informed and believes, and therefore alleges, that the said Paul Avery Warrick and wife, Shirley G. Warrick, were in possession of the property at the time of the sale, and after demand duly made, have failed to vacate and deliver up said premises to the purchaser and it is therefore necessary for Writ of Assistance to issue from this Court to place the purchaser in possession of the property sold as aforesaid.

"That said purchaser has paid the purchase price bid by crediting the noteholder with the sum of $1,000.00, less the costs of the proceedings as shown on the report filed in the Office of the Clerk of Superior Court of Wayne County, North Carolina."

Whereupon, the petitioner prays: "That the Clerk of Superior Court of Wayne County issue a Writ of Assistance to place the purchaser in possession of the property sold as aforesaid after ten days' notice duly given to Paul Avery Warrick and wife, Shirley G. Warrick, and for such other and further relief as to the Court may seem just and proper."

The respondents filed answer to the petition denying each allegation thereof and specifically alleging:

"A. There is no authority of record for the First Commercial Acceptance Corporation to act as attorney in fact for the holder of the deed of trust and note thereby secured.

B. The substitution of the trustee fails to comply with the provisions of G.S. 45-10.

C. The acknowledgment of the purported attorney in fact of the appointment of the substitute trustee fails to comply with the provisions of G.S. 47-43."

Respondents were directed in a notice dated 25 July 1967, issued by the Clerk of Superior Court of Wayne County, to appear before him on 10 August 1967 "and show cause why, if any there be, a writ of assistance should not issue."

At the hearing the writ of assistance was issued, and the respondents appealed to the Superior Court. The Superior Court found that the issuance of the writ of assistance by the Clerk of Superior Court of Wayne County was proper. Respondents appealed to this Court.

Hubert B. Hulse for respondent appellants.
Henson P. Barnes for petitioner appellee.

MALLARD, C.J. Respondents assign as error the finding by the Superior Court that the writ of assistance issued by the Clerk of the Superior Court of Wayne County should be affirmed and contend that the signing of the judgment allowing the writ constitutes error.

G.S. 45-21.29(k), prior to its amendment by Chapter 979, Session Laws of 1967, controls the disposition of this case. Prior to its amendment, it provided that in proper cases the Clerk of the Superior Court of the county within which a foreclosure sale is held has the authority to issue a writ of assistance. Application for the writ may be made by the mortgagee, the trustee named in such deed of trust, any substitute trustee, or the purchaser of the property, provided he has paid the purchase price.

The evidence in this case is not before us, and when the evidence is not in the record, it will be presumed that there was sufficient evidence to support the findings of fact necessary to support the judgment. 1 Strong, N. C. Index 2d, Appeal & Error, §§ 28 and 42.

The judgment of Judge Cowper in the Superior Court finds "as a fact that the writ of assistance issued by the Clerk of the Superior Court of Wayne County, North Carolina, should be affirmed."

Respondents except to this "finding of fact," but since the evidence is not before us, we must assume that there was competent

evidence heard by the court to so find. The judgment of Judge Cowper recites that he heard evidence.

The respondents did not object to the finding by the Clerk of the Superior Court. When he found that the respondents were in the wrongful possession of the premises described in the pleadings, they only excepted and objected to the entry of the order directing the writ of assistance to issue.

There was no request for findings of fact, and where there is no request for such findings, it will be presumed that the Court, on proper evidence, found facts sufficient to support its judgment. 1 Strong, N. C. Index 2d, Appeal and Error, § 28.

Respondents argue in their brief what "the record in this case fails to show," but they did not see fit to include in this record what the evidence revealed so that we might determine from the record whether the petitioner applicant made out his case as alleged. Respondents contend that he did not, but the Clerk of the Superior Court and the Judge of Superior Court have both found that he did. On the record before us, we find that the issuance of the writ of assistance was proper.

Both parties in their briefs have discussed matters outside of the record. In 1 Strong, N. C. Index 2d, Appeal & Error, § 42, we find that matters discussed in the brief outside the record will not be considered. In this same section of Strong's Index we find also that the Supreme Court can judicially know only what appears of record. We hold that the same rule also applies to this Court.

Affirmed.

BRITT and MORRIS, JJ., concur.

THOMAS A. SALMONS, EMPLOYEE, PLAINTIFF, v. E. L. TROGDEN LUMBER COMPANY, EMPLOYER, CITIZENS CASUALTY COMPANY, CARRIER, DEFENDANTS.

(Filed 12 June 1968.)

Master and Servant § 96—

Where an attorney has an agreement for a fee or compensation with a claimant under the Workmen's Compensation Act and files a copy or memorandum of the agreement with the hearing officer or the Commission prior to the conclusion of the hearing, the hearing officer or the Commission must approve the agreement if it is found to be reasonable, or if the agreement is unreasonable, must state the reasons for the finding and allow a reasonable fee.

APPEAL from North Carolina Industrial Commission.

On 15 January 1968 the full Commission adopted and affirmed an order dated 1 November 1967 by Chairman J. W. Bean wherein the plaintiff's motion to reopen the case and fix an attorney's fee was denied "for the reason that the time for appeal or reopening the case has run."

From this order the plaintiff noted an appeal to this Court.

Actually, the controversy does not involve the plaintiff but involves the attorney's fee of Ottway Burton, attorney for plaintiff.

The facts, which are not in dispute, reveal:

29 April 1964 plaintiff was injured.

6 November 1964 plaintiff was released by the doctor.

10 November 1964 last payment was made and report of compensation and medical paid was filed on 17 November 1964.

Up to this time the plaintiff employee, Salmons, had not been represented by an attorney. Being unable to arrive at a satisfactory settlement, plaintiff employee retained an attorney to represent his interests.

15 January 1965 plaintiff employee, Salmons, retained Ottway Burton and agreed with him in writing that his fee should be one-third of the recovery subsequent to that date. Immediately, on 15 January 1965, request was made to the North Carolina Industrial Commission for a hearing because of inability to agree on compensation, and according to the record filed with us this was accompanied by the fee agreement.

21 July 1966 a release, settlement, and clincher agreement providing for lump sum payment of $2,000 to plaintiff was entered into by all parties and sent to the Commission for approval.

29 July 1966 Commissioner Shuford entered an order approving the compromise settlement agreement, and, in this order, a counsel fee in the amount of $300 was approved. The reasonableness or unreasonableness of the fee agreement was not passed upon.

10 August 1966 plaintiff employee, Salmons, wrote Commissioner Shuford:

> "You have approved $300.00 for counsel fee for Outtway *(sic)* Burton in this case. He thinks he should receive a third of the $2,000.00 which would be $666.00. He said he would contact you about this matter. I am allowing him to hold an additional $366.00 in a trust fund until I have an aproval *(sic)* or disaproval *(sic)* on the matter from you. Personaly *(sic)* I feel like the $300.00 is enough. I would like to have this settled as soon as possiable *(sic)*."

2 November 1966 Secretary Stephenson of the Industrial Commission wrote:

"Dear Mr. Burton:

Plaintiff in the above case has written this office and has contacted us by telephone, stating you are holding in a trust account $366.00 in addition to the fee of $300.00 approved for you pending an application to this office to increase your fee. Since we have heard nothing from you after entry of the Order of July 29, please advise."

22 August 1967 Ottway Burton filed a motion requesting that the order of 29 July 1966 be changed to approve a counsel fee in the amount of $666.66 rather than the $300 originally approved.

25 August 1967 Chairman Bean wrote Mr. Burton and acknowledged receipt of the motion for the change of attorney's fee and advised that he had discussed the matter with the other members of the Commission and it was their opinion that the Statute of Limitations had run in the matter and that the order of 29 July 1966 had become final. 1 November 1967 J. W. Bean, Chairman, entered a formal order denying the motion to reopen the case, for the reason that the time for appeal or reopening the case had run.

8 November 1967 Mr. Burton appealed to the full Commission.

15 January 1968 the full Commission entered an order adopting the order of Chairman Bean and from this action on the part of the full Commission, the present appeal was taken.

Ottway Burton, Attorney for plaintiff appellant.
No counsel, contra.

CAMPBELL, J. There has been no determination as to the reasonableness or unreasonableness of the fee claimed in this matter. The only question involved is whether the order entered by the full Commission under date of 15 January 1968 was proper under the facts of this case.

G.S. 97-90(c) provides: "If an attorney has an agreement for fee or compensation under this article, he shall file a copy or memorandum thereof with the hearing officer or Commission prior to the conclusion of the hearing. If the agreement is not considered unreasonable, the hearing officer or Commission shall approve it at the time of rendering decision. If the agreement is found to be unreasonable by the hearing officer or Commission, the reasons therefor shall be given and what is considered to be a reasonable fee allowed. If within five (5) days after receipt of notice of such fee allow-

ance, the attorney shall file notice of appeal to the full Commission, the full Commission shall hear the matter and determine whether or not the attorney's agreement as to a fee or the fee allowed is unreasonable."

In this case Mr. Burton had an agreement for fee, and he complied with the statutory requirement and filed same with either the hearing officer or the Commission prior to the conclusion of the hearing. The order approving compromise settlement agreement was entered by Commissioner Shuford 29 July 1966, and in that order a counsel fee in the amount of $300 was approved. The provisions of the statute were not followed. "If the agreement is not considered unreasonable, the hearing officer or Commission shall approve it at the time of rendering decision. If the agreement is found to be unreasonable by the hearing officer or Commission, the reasons therefor shall be given and what is considered to be a reasonable fee allowed."

Mr. Burton is entitled to have the statute complied with and the reasonableness or unreasonableness of his fee agreement determined.

Remanded to Commission.

BRITT and MORRIS, JJ., concur.

IN THE MATTER OF THE CUSTODY OF SARAH KIMBERLY ROSS AND JAMES CLARK ROSS, MINORS.

(Filed 12 June 1968.)

1. Divorce and Alimony § 24—

Where the court finds that both the father and mother are fit and proper persons to have custody of the children of the marriage and that the best interests of the children require that custody be awarded to the father, such award will be upheld when supported by competent evidence.

2. Divorce and Alimony § 22—

When parents are divorced, children of the marriage become wards of the court and their welfare is the determining factor in custody proceedings.

APPEAL from *Shaw, J.*, from order entered 29 January 1968 as amended 12 February 1968 in Chambers upon a motion in a pending cause for custody of minor children.

This cause originated by a petition for *habeas corpus* filed 10

June 1964 by James Ervin Ross as petitioner seeking the custody of his two children, Sarah Kimberly Ross and James Clark Ross, from their mother Nancy Chapman Ross as respondent.

The petitioner James Ervin Ross will be referred to as "father" and the respondent Nancy Chapman Ross will be referred to as "mother".

A chronological review of the case history is as follows:

7 April 1955 father and mother were married.

25 February 1961 Sarah Kimberly Ross was born to this union.

16 May 1962 James Clark Ross was born to this union.

19 November 1962 father and mother separated and entered into a formal separation agreement, wherein mother was given custody of the two children subject to visitation privileges by father.

4 June 1964 father commenced this *habeas corpus* proceeding for the custody of the two children.

4 June 1964 Judge Gwyn ordered the mother to have the children in court on 15 June 1964 and show cause as to why the children should not be taken from her and placed with father.

16 June 1964 Judge Gambill ordered Rockingham County Welfare Department to make an investigation of the home environment and continued the cause, leaving the custody as provided for in the separation agreement pending further hearings.

6 August 1964 father and mother divorced.

8 August 1964 mother married John Kincaid.

21 October 1964 Judge Johnston, upon affidavits filed on behalf of father and mother, entered an order finding as a fact that father was a fit and proper person to have the care, custody, supervision and control of the two children, and that their best interests required that their care, custody, supervision and control be awarded to the father. This order gave the mother visitation rights to be mutually agreed upon and retained the cause for further orders as circumstances might require.

30 November 1964 Judge McLaughlin entered a consent order definitely fixing the visitation privileges of mother.

6 August 1965 mother moved in the cause for a modification of the previous order and for full custody and control of the children.

21 September 1965 Judge McConnell entered a consent order leaving the children with the father, pursuant to the order of Judge Johnston of 21 October 1964, and fixed specific visitation privileges of the mother in the State of Florida and required mother and her new husband Kincaid to give a bond of $2,500 conditioned upon compliance with the order. In this order all previous affidavits were expunged from the records.

This order was consented to by all parties and their attorneys of record as well as by the new husband John Kincaid.

24 September 1966 father married Pauline Martin.

13 September 1967 mother filed a new motion to vacate, modify or amend the consent order of Judge McConnell of 21 September 1965. In this motion she alleged that there had been a substantial change of conditions since the last order and then set forth in detail some eleven allegations of various changes.

After extensive hearings on two or more occasions where evidence was offered by affidavits and by witnesses, Judge Shaw entered the present order. Judge Shaw made extensive findings of fact and concluded that the best interests of the children require that their general supervision, care, custody and control continue to be entrusted to the father and that the rights of visitation to the mother and maternal grandparents be modified "to promote the continued education of the said children in Rockingham County without interruption or undue disturbance."

From this order and the refusal of Judge Shaw to sign the order tendered by the mother, the mother appeals.

Arthur Vann, Attorney for respondent appellant.

Gwyn & Gwyn by Julius J. Gwyn, Attorneys for petitioner appellee.

CAMPBELL, J. The attorney for mother appellant in his brief sets out sixteen questions as being involved. Nothing would be gained by enumerating the sixteen questions and answering each in detail.

The evidence in the case is voluminous and sharply conflicting and reveals considerable bitterness on the part of both father and mother. A recital of the evidence would serve no useful purpose.

"The question of custody is one addressed to the trial court. When the court finds that both parties are fit and proper persons to have custody of the children involved, as it did here, and then finds that it is to the best interest of the children for the father to have custody of said children, such holding will be upheld when it is supported by competent evidence." *Hinkle v. Hinkle,* 266 N.C. 189, 196, 146 S.E. 2d 73.

When parents separate and later are divorced, "(t)he children of the marriage become the wards of the court and their welfare is the determining factor in custody proceedings." *Stanback v. Stanback,* 266 N.C. 72, 75, 145 S.E. 2d 332.

In this case there was ample evidence to support the facts found

by Judge Shaw, and no error has been made to appear either in his findings of fact or his conclusions.

Affirmed.

BRITT and MORRIS, JJ., concur.

DR. W. L. McLEOD v. LEE RICHARDSON McLEOD.

(Filed 12 June 1968.)

1. Divorce and Alimony §§ 13, 16; Abatement and Revival § 8—

After institution by the wife of an action for alimony without divorce under G.S. 50-16, the husband instituted an action for absolute divorce on the ground of one year's separation. *Held:* The wife's plea in abatement in the husband's action is properly denied since a judgment on the merits in the wife's action will not act as a bar to the husband's action for absolute divorce.

2. Divorce and Alimony § 16—

Under G.S. 50-16.1 *et seq.* [effective October 1, 1967] a wife, if she is the dependent spouse, may file a cross-action in the husband's suit for absolute divorce and thereby protect her right to alimony.

3. Venue § 8—

A motion to remove the case to another county for the convenience of witnesses is addressed to the discretion of the trial court.

APPEAL by defendant from *McConnell, J.*, at the 29 January 1968 Civil Session of STANLY County Superior Court.

On 22 November 1966, after approximately ten months of marriage, the parties separated. There was one child of the marriage. On 28 November 1966 the wife instituted an action in Mecklenburg County under G.S. 50-16 for alimony without divorce. On 19 December 1966 the husband answered, and on 25 January 1967, an order for alimony *pendente lite* was entered.

On 24 November 1967 the husband instituted this action for absolute divorce in Stanly County on the ground of one year separation. On 29 December 1967 the wife made a motion to dismiss this action or in the alternative, to remove it to Mecklenburg County. On 24 February 1967 Judge McConnell entered an order denying the motion in its entirety. From this order the defendant wife appeals.

Brown, Brown & Brown by Richard L. Brown, Jr. and Richard Lane Brown, III, for plaintiff appellee.

Sanders, Walker & London by Robert G. Sanders and Larry Thomas Black for defendant appellant.

CAMPBELL, J. This case has been presented to the Court by attorneys as a case which turns on whether the pendency of a prior action in Mecklenburg for alimony without divorce between the same parties abates the action in Stanley County for absolute divorce. The appellant relies on *Cameron v. Cameron,* 235 N.C. 82, 68 S.E. 2d 796. The appellee relies on *Fullwood v. Fullwood,* 270 N.C. 421, 154 S.E. 2d 473.

The *Cameron* case holds that the pendency of an action for *divorce from bed and board* on the ground of abandonment abates an action for absolute divorce. The test that determines when such a suit will abate the second action was stated in that case as follows:

> "* * * the pendency of the prior action abates the subsequent action when, and only when, these two conditions concur: (1) The plaintiff in the second action can obtain the same relief by a counterclaim or cross demand in the prior action pending against him; and (2) a judgment on the merits in favor of the opposing party in the prior action will operate as a bar to the plaintiff's prosecution of the subsequent action."

In arriving at the conclusion that in the *Cameron* case "a judgment on the merits in favor of the opposing party in the prior action will operate as a bar to the plaintiff's prosecution of the subsequent action," Judge Ervin said the wife in her prior action must prove that her husband has wilfully abandoned her. "Consequently, the wife may defeat the husband's action for an absolute divorce under G.S. 50-6 by showing as an affirmative defense that the separation of the parties has been occasioned by the act of the husband in wilfully abandoning her. * * * It follows that a judgment on the merits in favor of Mrs. Cameron in the prior action in Sampson County will operate as a bar to Cameron's prosecution of the subsequent action in New Hanover County. Such judgment will necessarily adjudicate that Cameron has wilfully abandoned Mrs. Cameron."

In the instant case, a judgment on the merits in the alimony without divorce action will not act as a bar to the action for absolute divorce on the ground of one year separation. Thus, the *Cameron* case is not controlling here.

The *Fullwood* case, *supra,* is more like the instant case in that the first pending action, there as here, was a proceeding under G.S. 50-16, namely: an action for alimony without a divorce. The Court

held in that case that the prior pending action would not abate a subsequent action for an absolute divorce on the ground of one year separation.

In the instant case, the wife contends that she will be irreparably damaged because she cannot protect her right to alimony in the absolute divorce action; and if she loses in her race to obtain her judgment in her pending action for alimony without a divorce before her husband obtains an absolute divorce, she will be deprived of her alimony. G.S. 50-16 has been amended, and the amendment became effective 1 October 1967, which was prior to the institution of the instant case in Stanly County. Under the amendment the wife, if she is the dependent spouse, may set up a cross action in the husband's suit for absolute divorce in Stanly County and, thus, protect her right to alimony without being dependent upon a race to obtain a court judgment.

The motion to move the case to Mecklenburg County for the convenience of witnesses was addressed to the discretion of the trial court. The wife has not shown any abuse of the trial court's discretion.

The wife appellant has failed to show any error in the order entered by the trial tribunal. It is

Affirmed.

BRITT and MORRIS, JJ., concur.

ANDREW CROSBY v. FANNIE W. CROSBY.

(Filed 12 June 1968.)

Appeal and Error § 41—

Where appellant caused to be filed with the clerk a stenographic transcript of the evidence in the trial tribunal, the failure to provide an appendix to the brief setting forth "in succinct language with respect to those witnesses whose testimony is deemed to be pertinent to the questions raised on appeal, what he says the testimony of such witness tends to establish with citation to the page of the stenographic transcript in support thereof" subjects the appeal to dismissal by the Court of Appeals *ex mero motu*. Court of Appeals Rule No. 19(d)(2).

APPEAL by defendant from order of *Johnston, J.*, dated 8 March 1968, FORSYTH Superior Court.

This case began as a civil action for absolute divorce on ground

of one year's separation. Defendant answered the divorce complaint and prayed that plaintiff be required to provide support for their minor child until the child reaches twenty-one years of age. It appears that the child is now twenty years of age and a student in college.

Judgment in the divorce action was filed on 3 January 1966, granting plaintiff absolute divorce; an order was entered on 6 January 1966 requiring plaintiff to pay $25.00 per week for the support and maintenance of the child until she becomes twenty-one.

Following motions filed by plaintiff and defendant, Judge Johnston entered an order, dated 21 July 1967, which had the effect of relieving plaintiff of further payments. Defendant appealed from said order to the Supreme Court and by opinion set forth in 272 N.C. 235, filed 13 December 1967, the Supreme Court found error and remanded the cause to the Superior Court of Forsyth County.

On 4 January 1968, an order in conformity with the Supreme Court opinion was filed in the Forsyth Superior Court by Judge Martin vacating Judge Johnston's order of 21 July 1967. On 19 January 1968, defendant filed a motion asking for entry of an order requiring plaintiff to appear and show cause, if any he had, why he should not be punished for contempt of court.

The motion was heard by Judge Johnston at the 12 February 1968 Session of Forsyth Superior Court, following which he entered an order finding that plaintiff's failure to pay $25.00 per week had not been in willful disobedience of the orders of the court and that plaintiff was not in contempt of the orders of the court. From said order, defendant appealed to this Court.

Hayes & Hayes by W. Warren Sparrow, Attorneys for plaintiff appellee.

Randolph & Drum by Clyde C. Randolph, Jr., Attorneys for defendant appellant.

BRITT, J. In her appeal to this Court, defendant failed to comply with Rule 19(d)(2). Rule 19 relates to the record on appeal. Subsection (d) is entitled "Evidence — How Stated" and provides that the evidence in the record on appeal shall be in one of the two following methods:

(1) [In narrative form as required for many years by Rule 19(4) of the Supreme Court of North Carolina.]

(2) As an alternative to the above method (as a part of the record on appeal but not to be reproduced), the appellant shall cause the complete stenographic transcript of the evidence in

the trial tribunal, as agreed to by the opposite party or as settled by the trial tribunal as the case may be, to be filed with the clerk of this Court and *then the appellant in an appendix to his brief shall set forth in succinct language with respect to those witnesses whose testimony is deemed to be pertinent to the questions raised on appeal, what he says the testimony of such witness tends to establish with citation to the page of the stenographic transcript in support thereof. The opposite party in case of disagreement as to any portion of the appendix in appellant's brief may set forth in an appendix to his brief in succinct language what he says the testimony of a witness establishes with citation to the page of the stenographic transcript in support thereof.* (Emphasis added.)

In her appeal, defendant caused to be filed a stenographic transcript of the evidence presented before Judge Johnston but failed to provide an appendix to her brief setting forth "in succinct language with respect to those witnesses whose testimony is deemed to be pertinent to the questions raised on appeal, what he says the testimony of such witness tends to establish with citation to the page of the stenographic transcript in support thereof."

For failure to comply with the rule aforesaid, this Court *ex mero motu* dismisses defendant's appeal.

Nevertheless, we have carefully reviewed the record on appeal and the briefs submitted by plaintiff and defendant and find no prejudicial error. There was sufficient competent evidence to support the findings and conclusions of Judge Johnston that plaintiff has not willfully disobeyed the orders of the court and is not in contempt of the orders of the court.

Appeal dismissed.

CAMPBELL and MORRIS, JJ., concur.

SARAH MARGARET SAWYER, BY HER NEXT FRIEND, MIRIAM S. SAWYER AND WALTER W. SAWYER, III, v. GWENDOLYN BRINKLEY SAWYER.

(Filed 12 June 1968.)

1. Appeal and Error § 26—

Where the only assignment of error is to the signing and entry of an order setting aside a default judgment, review is limited to a determina-

tion of whether the facts found and admitted are sufficient to support the judgment.

2. Judgments § 24—

A defendant is entitled to have a default judgment set aside under G.S. 1-220 only upon a showing of excusable neglect and a meritorious defense.

3. Appeal and Error §§ 26, 28—

Exception and assignment of error to the signing of an order setting aside a default judgment do not present for review the findings of fact or the evidence on which they are based.

APPEAL from *Cohoon, Resident Judge* of the First Judicial District, in chambers, 22 December 1967.

Plaintiffs filed their complaint on 27 June 1967 and amendment thereto on 7 July 1967. Defendant was served on 13 July 1967. Time for answer was extended to and including 1 September 1967 by order of the clerk entered 4 August 1967. By written stipulation entered into 1 September 1967, time was further extended to and including 11 September 1967. Because of illness of defendant's counsel, and by oral agreement of counsel, time for answer was further extended to and including Friday, 15 September 1967. On that date at approximately 5:05 p.m., defendant's counsel telephoned plaintiffs' counsel and advised that for "some unknown reason" defendant had not arrived at his office to sign the answer. Plaintiffs' counsel advised that his client would not grant any further extensions and the answer must be filed by midnight. Subsequently, however, it was agreed that the answer could be executed on Saturday. The answer, although executed on Saturday, was not filed until Monday afternoon. Prior to the filing of the answer by defendant's counsel, plaintiffs' counsel had, earlier on Monday, obtained a judgment by default. On 1 December 1967, defendant moved to set the judgment aside. The matter was heard by Cohoon, J., in chambers, by consent of the parties, on affidavits and arguments of counsel. The court entered an order setting aside the judgment, and plaintiffs appealed.

Small, Small & Watts by Thomas S. Watts for plaintiff appellants.

Forrest V. Dunstan for defendant appellee.

MORRIS, J. Plaintiffs do not bring forward any exceptions or assignments of error to any finding of fact by the court. The only assignment of error is to the signing and entry of the order setting aside the default judgment. We, therefore, limit ourselves to a determination of whether the facts found and admitted are sufficient

to support the judgment. 1 Strong, N. C. Index 2d, Appeal and Error, § 26; *Highway Commission v. Reynolds Co.*, 272 N.C. 618, 159 S.E. 2d 198.

Defendant's motion to set aside was made pursuant to G.S. 1-220. To be entitled to have the judgment set aside, he must show excusable neglect and a meritorious defense. *Greitzer v. Eastham,* 254 N.C. 752, 119 S.E. 2d 884.

The findings of fact of Cohoon, J., are full and detailed with respect to the reasons for the failure of the defendant's attorney to file the answer on Saturday or during the day on Monday. This was obviously the result of an inadvertent misunderstanding between counsel. However, the only finding as to defendant's failure to come to her attorney's office at the appointed time to sign the answer is contained in finding no. 4 "That at approximately 5:05 p.m. on Friday, September 15, 1967, defendant's counsel telephoned plaintiffs' counsel to advise that his client, the defendant, for some unknown reason had not come to Elizabeth City, N. C. from Norfolk, Virginia to execute the answer duly prepared . . ." Plaintiffs contend that defendant is guilty of inexcusable neglect and should not be allowed to have the default judgment set aside. The court found that "for some unknown reason" the defendant did not come to sign the answer. We will not assume that she is chargeable with inexcusable neglect. Plaintiffs did not except to the finding of fact nor request findings not made. Their exception is a general exception. This broadside assignment of error is ineffectual to challenge the findings of fact or the sufficiency of the evidence to support the findings. *King v. Snyder,* 269 N.C. 148, 152 S.E. 2d 92.

Plaintiffs also contend that defendant has no meritorious defense. The court found as a fact "that the answer filed by the defendant with the Clerk of Superior Court on September 18, 1967 asserts a meritorious defense . . ." Again plaintiffs took no exception to the finding of fact nor did they tender any finding which the court failed to adopt. The same rule is applicable as set out by Bobbitt, J., in *King v. Snyder, supra:*

> "Defendant's general exception to Judge McLean's order does not present for review the admissibility of the evidence on which the findings of fact are based or the sufficiency of the evidence to support the findings."

The facts found by the court are sufficient to support the judgment to set aside the default judgment.

No error.

CAMPBELL and BRITT, JJ., concur.

CLAUDIA LOMAX MILLS v. WILLIAM TED McCUEN.

(Filed 12 June 1968.)

1. Judgments § 20—

Where plaintiff has not taken default judgment prior to defendant's motion for extension of time to file answer, G.S. 1-220 is inapplicable, and defendant is not required to show mistake, inadvertence, surprise or excusable neglect.

2. Pleadings § 9; Process § 15—

The statutes pertaining to service of process upon a nonresident motorist, G.S. 1-105 *et seq.*, contemplate giving such defendant an opportunity to defend even beyond the right of the judge in his discretion to extend the time for filing answer, G.S. 1-108, and *a fortiori*, the judge in his discretion may extend time to file an answer under G.S. 1-152.

3. Same—

Order of the court extending nonresident's time to file answer upon a finding that defendant's neglect in corresponding with his attorney was excusable, *held* not an abuse of discretion.

4. Appeal and Error § 54—

Ordinarily, where a judge is vested with discretion, his doing or refusing to do the act in question is not reviewable upon appeal.

APPEAL from order of *Shaw, J.*, Superior Court of GUILFORD County, Greensboro Division, in Chambers.

This action was instituted by summons issued 30 January 1968, and served upon the Commissioner of Motor Vehicles as process agent for defendant on 31 January 1968. The defendant was a citizen and resident of Greenville, South Carolina.

At the time of instituting action, a duly verified complaint was filed seeking damages for personal injuries and property damage growing out of an automobile collision between an automobile owned and operated by the plaintiff and an automobile operated by the defendant. The collision had occurred 23 August 1967 on one of the city streets of the City of Greensboro, North Carolina.

Upon receipt of the papers, the Commissioner of Motor Vehicles forwarded same by registered mail to the defendant in Greenville, South Carolina, and the return receipt showed delivery to the defendant on 3 February 1968.

On 7 March 1968 Richard L. Wharton, an attorney of Greensboro, filed a motion setting forth that the defendant had been served by process in accordance with G.S. 1-105 and, pursuant to that statute, he desired a continuance in order to afford the defendant reasonable opportunity to defend the action. He alleged that he had

prepared an answer on behalf of the defendant and had forwarded same to the defendant on 20 February 1968 for verification and return and that he had received no communication from the defendant. He further set forth in the motion his belief that the defendant had a meritorious defense, for that the plaintiff had failed to yield the right of way at a stop intersection. He further set out that unless the defendant be given additional time to file answer, his liability insurance coverage might be prejudiced for failure to cooperate in the defense of the action, and that he desired an opportunity to establish communication with the non-resident defendant.

Upon filing of this motion, which was duly verified by Richard L. Wharton, attorney for defendant, Judge Shaw heard the matter on 8 March 1968 and directed defendant's counsel to seek additional information and in the meantime directed plaintiff's counsel not to take a default judgment.

The matter was heard further on 22 March 1968 by Judge Shaw. He made findings of fact to the effect that the defendant had not realized the importance of the correspondence with his attorney, Mr. Wharton, and that his neglect in not properly attending to the correspondence was excusable. He concluded that the court had discretion to grant additional time to file answer, pursuant to G.S. 1-152, 1-105, and 1-108 and, in the court's discretion, he allowed the defendant to and including 5 April 1968 to answer and set up a counterclaim, if desired.

The plaintiff excepted to the findings of fact and conclusions of Judge Shaw and appealed to this court.

B. Gordon Gentry, Attorney for plaintiff appellant.
Wharton, Ivey & Wharton, Attorneys for defendant appellee.

CAMPBELL, J. No default judgment had been taken by the plaintiff prior to the motion filed on behalf of the defendant for an extension of time. Accordingly, G.S. 1-220 is not applicable and the defendant is not required to show mistake, inadvertence, surprise, or excusable neglect.

Service of process in this case was had pursuant to G.S. 1-105, commonly referred to as the non-resident motorist statute. This statute provides: "The court in which the action is pending shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action."

G.S. 1-108 provides that when a defendant is served under the provisions of G.S. 1-105, "on application and sufficient cause shown at any time before judgment, (such defendant) must be allowed to defend the action; * * *"

It is to be noted that under this statute, if sufficient cause can be shown before judgment, the defendant "must be allowed to defend the action; * * *"

These statutes pertaining to service of process upon a non-resident motorist contemplate giving such a defendant an opportunity to defend even beyond the right of the judge in his discretion to extend the time. *A fortiori,* the judge in his discretion may do so under G.S. 1-152 which provides: "The judge may likewise, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited, or by an order may enlarge the time."

"Ordinarily, where a judge is vested with discretion, his doing or refusing to do the act in question is not reviewable upon appeal." *Harmon v. Harmon,* 245 N.C. 83, 86, 95 S.E. 2d 355.

In the present case the judge not only found good cause for extending the time to plead on behalf of the defendant but allowed the extension in his discretion. No abuse of discretion has been shown, and there was sufficient evidence below to support the court's finding of sufficient cause.

No error.

BRITT and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. DAVID HUFFSTETLER.

(Filed 12 June 1968.)

1. Constitutional Law § 33—

In a prosecution for felonious breaking and entering and larceny, it was not error for the court to permit a defense witness to refuse to answer questions asked by defendant's counsel on the ground of his privilege against self-incrimination, notwithstanding the witness had previously plead guilty to breaking and entering as a result of the same occurrence for which defendant was being tried, since his testimony might disclose facts leading to proof of other crimes in connection with this occurrence which would not have been known without his admission.

2. Criminal Law § 140—

Where the court enters separate judgments imposing sentences of imprisonment, the sentences run concurrently as a matter of law in the absence of a provision to the contrary in the judgment.

3. Criminal Law § 171—

Where concurrent sentences of equal length are imposed upon conviction

on two counts, any error in the charge relating to one count only is harmless.

4. Criminal Law § 166—

Assignments of error not supported by argument or citation of authority in appellant's brief are deemed abandoned, Rule of Practice in the Court of Appeals No. 28.

APPEAL from *Godwin, S.J.*, 27 November 1967 Special Session GASTON Superior Court.

Defendant was charged in a bill of indictment with felonious breaking and entering and larceny of goods of the value of more than $200.00. He entered a plea of not guilty. Upon a verdict of guilty, he was sentenced to a term of not less than 7 nor more than 10 years on each count. From the judgment of the court, defendant appealed.

Attorney General T. W. Bruton, by Andrew A. Vanore, Staff Attorney, for the State.

J. Ralph Phillips for defendant appellant.

MORRIS, J. The evidence presented by the State, in addition to the prosecuting witness and investigating officer, came from three of the persons who were in the company of defendant at the time the offenses were committed. One other who was present, according to the evidence, was called to testify for defendant. He was allowed to refuse to answer the questions of defendant's attorney on the ground that the answers "might tend to incriminate him". The defendant assigns as error (assignment of error no. 2) the court's permitting him to refuse to answer. This witness, it is true, had plead guilty to and was serving sentence for breaking and entering as the result of the same occurrence for which defendant was being tried. However, as the record discloses, he had not been charged with safecracking and safe robbery. He testified, out of the presence of the jury, that he had been advised that he could be charged with this offense. As was said in *Smith v. Smith,* 116 N.C. 386 at p. 387, 21 S.E. 196:

> ". . . the witness ought not to be compelled to answer the question, for the reason that the admission may be the connecting link of a chain of evidence, disclosing other facts and other circumstances leading to clear proof of a crime which would not have been known without the admission."

This assignment of error is overruled.

Defendant also assigns as error the failure of the court to charge the jury that it could find the defendant guilty or not guilty of

larceny of goods of the value of $200.00 or less. Conceding that there is some evidence from which the jury could have found the property was valued at $200.00 or less, the failure to so charge could not have constituted prejudicial error in this case. The sentences imposed on both the first and second count were identical. The court did not specify whether the sentence on the second count, the larceny count, should run consecutively with the sentence on the first count or concurrently therewith. Absent an order to the contrary, these sentences run concurrently as a matter of law. *State v. Efird,* 271 N.C. 730, 157 S.E. 2d 538. The error, if any there was, was not prejudicial. Assignment of error no. 6 is overruled.

By assignment of error nos. 1 and 4 defendant contends the court erred in overruling his motion for nonsuit. The defendant does not argue these assignments of error in his brief nor cite any authority therefor. Although these assignments of error are deemed abandoned under our rules (Rule 28, Rules of Practice in the Court of Appeals of North Carolina), we have examined the record, and there is ample evidence to support the court's ruling.

We have considered assignments of error nos. 3 and 5 and find them to be without merit.

The judgment of the Superior Court is

Affirmed.

CAMPBELL and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. JOE JAMES BRAXTON.

(Filed 12 June 1968.)

Constitutional Law § 31; Criminal Law § 91—

The denial of motion for continuance made by indigent defendant's attorney ten minutes after his appointment to represent the defendant is prejudicial error, there not being sufficient time for the attorney to procure witnesses or to prepare the case for trial by jury.

APPEAL by defendant from *Cowper, J.,* 23 October 1967 Regular Criminal Session of LENOIR Superior Court.

Defendant was charged with the felonies of forgery and uttering a forged instrument in a bill of indictment returned by the Grand Jury at the October 1967 Session of court.

From a verdict of guilty and judgment of imprisonment, defendant appealed.

Attorney General T. W. Bruton and Deputy Attorney General James F. Bullock for the State.

C. E. Gerrans for defendant.

MALLARD, C.J. Defendant's main assignment of error, upon which this case turns, is that the court committed error in the denial of defendant's request for a continuance after the appointment of counsel, to enable counsel to obtain witnesses.

On 31 October 1967 the defendant signed an affidavit in which he asserted that he was an indigent and requested the appointment of counsel. On the same date he was found by the court to be an indigent, and C. E. Gerrans, an attorney at law, was assigned to represent him.

In "approximately ten minutes" after the appointment of counsel, the defendant's case was called for trial. Before pleading to the charges contained in the bill of indictment, defendant's counsel made a motion to continue the case in order to obtain witnesses for the defendant. The motion was denied.

In ruling on the motion the court said, "In view of the fact that the case was called last week and the court gave the defendant time to get ready the court denies the request." The record does not reveal what else, if anything, occurred the week before. There is nothing in the record to indicate that defendant's counsel had knowledge of what had occurred the prior week, and if he had known about it, he was under no obligation to act in this case until he became attorney for the defendant.

We hold that ten minutes after his appointment was not sufficient time for the defendant's lawyer to procure witnesses or to prepare the case for trial by jury. The failure to continue the case under these circumstances was prejudicial error. *State v. Lane,* 258 N.C. 349, 128 S.E. 2d 389.

The defendant made other assignments of error. However, in view of what is said above, these need not be discussed, except we deem it proper to add that there was sufficient evidence in this case for it to be submitted to the jury.

For the reasons stated, it is ordered that there be a new trial.

New trial.

BRITT and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. PLATT WALKER HENRY.

(Filed 12 June 1968.)

Criminal Law § 148—

An appeal from an order allowing the solicitor's motion for a change of venue and denying defendant's petition for an order requiring the State Bureau of Investigation to make available to defense counsel certain written statements relating to the case is premature and will be dismissed by the court *ex mero motu*, there being no provision for an appeal as a matter of right from interlocutory orders in criminal actions. G.S. 7A-27.

APPEAL by defendant from order of *McConnell, J.*, January 1968 Session ANSON Superior Court.

At the January 1968 Session of Anson Superior Court, defendant was indicted for felonious assault. Prior thereto, defendant was given a preliminary hearing in the Anson County Criminal Court. Thereafter, defendant's attorney petitioned Judge McConnell to enter an order requiring the State Bureau of Investigation to make available to defendant's counsel certain written statements said Bureau had obtained from various persons.

After the defendant was indicted by the grand jury, the solicitor moved for change of venue and filed affidavits of several persons stating that in their opinion the State could not get a fair trial in Anson County.

Judge McConnell ordered the case removed to Richmond County for trial and denied defendant's petition pertaining to SBI records. Defendant appealed to this Court.

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

E. A. Hightower, Attorney for defendant appellant.

BRITT, J. Article 5 of Chapter 7A of the General Statutes deals with jurisdiction of the Court of Appeals. Pertinent portions of G.S. 7A-27 are as follows:

"Appeals of right from the courts of the trial divisions.—
* * *

"(b) From any *final judgment* of a superior court, other than one described in subsection (a) of this section or one entered in a post-conviction hearing under article 22 of chapter 15, including any final judgment entered upon review of a decision of an administrative agency, appeal lies of right to the Court of Appeals." (Emphasis added.)

Subsection (d) permits appeals from certain interlocutory orders

in civil actions or proceedings, but there is no provision for an appeal as a matter of right from interlocutory orders in criminal actions.

In his oral argument, defense counsel indicated that *State v. Moore,* 258 N.C. 300, 128 S.E. 2d 563, was his authority for appealing. *State v. Moore* is distinguishable for the reason that it was before the Supreme Court pursuant to petition for *certiorari,* and the further reason that it was decided prior to the enactment of G.S. 7A-27 by the 1967 General Assembly.

This Court *ex mero motu* holds that an appeal in this case was premature and should be dismissed.

Appeal dismissed.

CAMPBELL and MORRIS, JJ., concur.

BARBARA B. WHITE v. TRUDY BROWN HESTER AND JAMES D. COX
AND
WILLIAM SIDNEY WHITE v. TRUDY BROWN HESTER AND JAMES D. COX.

(Filed 12 June 1968.)

1. Appeal and Error § 41—

Where there are two or more appeals in one action, only one copy of the record is necessary. Court of Appeals Rule No. 19(b).

2. Same—

Where appellant caused to be filed with the clerk a stenographic transcript of the evidence in the trial tribunal, the failure to provide an appendix to the brief setting forth "in succinct language with respect to those witnesses whose testimony is deemed to be pertinent to the questions raised on appeal, what he says the testimony of such witness tends to establish with citation to the page of the stenographic transcript in support thereof" subjects the appeal to dismissal by the Court of Appeals *ex mero motu.* Court of Appeals Rule No. 19(d)(2).

3. Automobiles § 19—

When two vehicles arrive at approximately the same time at an intersection not controlled by stop signs or signals, the vehicle to the left shall yield the right of way to the vehicle on the right. G.S. 20-155(a).

APPEAL from *Gambill, J.,* 4 December 1967 Civil Session, IREDELL County Superior Court, from a judgment of nonsuit entered at the close of the plaintiffs' evidence.

These two cases were tried together. In one Barbara B. White,

plaintiff, seeks to recover for personal injuries and in the other William Sidney White, plaintiff, seeks to recover for property damages to his 1958 Plymouth automobile driven at the time by his wife, the plaintiff Barbara B. White.

Battley and Frank by Jay F. Frank, Attorneys for plaintiff appellants.

Smathers and Hufstader by John Robert Hufstader, Attorneys for defendant appellees.

CAMPBELL, J. Two formal records and two sets of briefs were filed in this Court; only one copy was necessary under Rule 19(b).

The appellants availed themselves of our Rule 19(d)(2) and caused the complete stenographic transcript of the evidence to be filed in this Court. The appellants, however, did not comply with that portion of Rule 19(d)(2) which provides: "(T)hen the appellant in an appendix to his brief shall set forth in succinct language with respect to those witnesses whose testimony is deemed to be pertinent to the questions raised on appeal, what he says the testimony of such witness tends to establish with citation to the page of the stenographic transcript in support thereof."

For failure to comply with the rule aforesaid, this Court *ex mero motu* dismisses the appeal. *Crosby v. Crosby,* 1 N.C. App. 398, 161 S.E. 2d 654 (filed this date).

Nevertheless, we have carefully reviewed the record on appeal and the briefs submitted by plaintiffs and defendants and find no prejudicial error. No novel questions were presented by this automobile collision at an intersection in Statesville where there were no traffic control signals or signs of any kind and the evidence revealed that the two vehicles arrived at the intersection at approximately the same time. The vehicle to the left (the plaintiff's vehicle) should have yielded the right of way, pursuant to the statute, G.S. 20-155(a). Furthermore, plaintiffs' evidence reveals that the plaintiff driver failed to keep a proper lookout as required by law.

Appeal dismissed.

BRITT and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. VINCENT KENNETH CAVALLARO.

(Filed 19 June 1968.)

1. Criminal Law §§ 5, 29—

Where defendant had previously undergone several weeks of psychiatric evaluation and was found mentally competent to stand trial, it was not an abuse of discretion for the court to refuse to order further psychiatric examination to determine defendant's competency at the time of the alleged offense, there being no statutory requirement that an indigent defendant be given psychiatric examination at his request to determine whether he can enter a plea of insanity.

2. Criminal Law § 91—

A motion for a continuance is addressed to the discretion of the trial court, and the granting of a continuance due to the illness of a witness for the State is not an abuse of that discretion.

3. Same; Constitutional Law § 30—

Where the State was granted a continuance due to the illness of a witness and the trial was held at the next criminal session of court, the delay did not violate defendant's right to a speedy trial, defendant not having been prejudiced thereby.

4. Criminal Law §§ 90, 106—

Introduction by the State of exculpatory statements made by the defendant does not warrant nonsuit when the exculpatory matter is contradicted by other evidence.

5. Criminal Law § 106—

Motion to nonsuit should be denied if there is substantial evidence tending to prove each essential element of the offense charged. This rule applies whether the evidence is direct, circumstantial, or a combination of both.

6. Homicide § 21— Evidence of defendant's guilt of second degree murder held sufficient to go to the jury.

Evidence of the State tending to show that decedent had been beaten about the head and shot to death, that defendant had been with decedent the evening he disappeared, that on that day decedent had $200 in his possession which was missing when the body was found, that early in the evening of decedent's disappearance defendant, who was unemployed, had no money but later that evening and in the ensuing days paid cash for purchases and living accommodations, that when arrested defendant had a ring which he had pawned to decedent, that the bullet which killed decedent could have come from decedent's pistol which was found in defendant's car with one cartridge fired, that defendant's automobile jack handle was missing, that blood stains of decedent's type but different from that of defendant were found in defendant's automobile, that tire tracks leading to decedent's body were similar to those made by the tires on defendant's automobile, and that an application form which had been given to defendant was found near decedent's body, *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of second degree murder.

STATE *v.* CAVALLARO.

APPEAL by defendant from *Bowman, S.J.*, at the 2 October 1967, Mixed Session, Superior Court of ONSLOW.

Defendant was charged under proper bill of indictment with the murder of Archie Linwood Taylor. Upon the call of the case, the State announced that it would not ask for a verdict of guilty of murder in the first degree but would ask for a verdict of guilty of murder in the second degree or manslaughter or such verdict as the law and the evidence in the case might warrant. The jury returned a verdict of guilty of murder in the second degree. Defendant was sentenced to prison for a term of not less than sixteen nor more than twenty years, and announced in open court that he did not desire to appeal. After having been transferred to State Prison to begin serving his sentence, he changed his mind and wrote a letter to the clerk notifying him of his desire to appeal. Although the letter was dated within the time allowed for appeal, it was not mailed nor received until well after the time expired. Upon motion, the court allowed him to appeal, appointed the same counsel who had, by court appointment, represented him at his trial, and ordered that a transcript of his trial be furnished his counsel.

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

Ellis, Hooper, Warlick & Waters by Glenn L. Hooper, Jr. and John D. Warlick, Jr., for defendant appellant.

MORRIS, J. Defendant brings forward eight assignments of error.

The first is to the denial of defendant's petition that he be returned to Cherry Hospital, Goldsboro, N. C., for a determination as to his competency on the date of the alleged offense. Defendant was arrested in Miami, Florida, on 27 February 1967. He waived extradition and was returned to Onslow County on 10 or 11 March 1967. On 7 April 1967 his court-appointed counsel moved for "psychiatric and neurological examination and evaluation prior to his trial and that he be admitted to a hospital for these purposes." On the same day, an order was entered by Clark, J., directing that defendant be admitted to Cherry Hospital for a period not exceeding 60 days. He was admitted on 8 April 1967 and a detailed report dated 25 May 1967 was made which covered a thorough study of defendant and an exhaustive history of defendant's illnesses, mental and physical, from childhood. The finding was that he was able to plead to the bill of indictment, knew the difference between right and wrong, was aware of the offense with which he was charged, and was able to consult with counsel in the preparation of his defense.

The diagnosis was that he was without psychosis. Defendant, on 12 June 1967 petitioned that he be returned to Cherry Hospital for a determination of his "competency on the date of the alleged offense, January 30, 1967". The denial of this petition, defendant says, constitutes prejudicial error. There is no statutory requirement that an indigent defendant be given psychiatric examination at his request to determine whether he can enter a plea of insanity. This defendant had been given several weeks psychiatric hospitalization at his request. The court in its order denying the request stated that counsel for defendant could pursue any remedies as to the competency of defendant on the date of the alleged offense at the time of the trial of the case. Although many witnesses testified they knew the defendant, he introduced no evidence as to his mental competence or incompetence at the time of the offense, nor did any of the doctors at Cherry Hospital testify for him. We find no abuse of discretion and overrule assignment of error No. 1.

Assignment of error No. 2 is to the court's allowing the State's motion to continue the case on 18 June 1967, and, by assignment No. 3, defendant says that the denial of his motion to dismiss for lack of a speedy trial was error. The defendant was arrested in February, returned to North Carolina in March, admitted to Cherry Hospital where he remained several weeks. The case was calendared for trial at the July 1967 Session. The State asked for a continuance because a State's witness — one of the S.B.I. agents — was confined to his home because of illness. The motion was granted, and the case was tried at the next session at which criminal cases could be tried — October 1967. The granting of the motion to continue was in the discretion of the trial judge, *State v. Allen,* 222 N.C. 145, 22 S.E. 2d 233, and no abuse of discretion is shown. Defendant's contention that his constitutional rights were violated in that the State failed to give him a speedy trial is untenable. The only delay in getting to his trial caused by the State was the continuance for one session of court due to the illness of a witness for the State. There is nothing in the record to indicate that this defendant was not brought to trial in as orderly and speedy a manner as possible. There is nothing in the record to indicate that he ever requested that he be allowed bond. There is nothing in the record to indicate nor does he suggest that because of any delay he lost the benefit of the testimony of any witnesses. Assignments of error Nos. 2 and 3 are overruled.

Defendant next contends that his motion for nonsuit should have been allowed and the failure of the court to so do is assigned as error (Assignment of error No. 4) for that the State offered exculpatory statements of defendant, and the evidence was insufficient.

Defendant had told officers that he knew nothing of the murder of deceased; that he loaned the deceased his car; that he thumbed a ride to a nearby motel and then thumbed back to town to pick up his car, and went to Florida to look for a job; that he subsequently found the pistol in his car. The defendant contends these are exculpatory statements of defendant offered by the State upon which the State must rely and which entitle him to nonsuit. If the exculpatory statements of defendant were offered by the State without contradictory evidence, defendant's contention would have merit. *State v. Johnson,* 261 N.C. 727, 136 S.E. 2d 84. However, in addition to other contradictory evidence of the State, defendant himself at one time stated that he picked up his car later in the night and at another that he picked it up the next morning. There was evidence that he registered his car at the motel and drove up in it; that there was no car of any kind in the parking lot at the time he said he picked it up. Where the exculpatory matter is contradicted by other evidence, nonsuit is properly denied. *State v. Wilson,* 264 N.C. 373, 141 S.E. 2d 801. Defendant introduced no evidence. The evidence presented by the State was circumstantial.

The rule with respect to the sufficiency of circumstantial evidence to carry the case to the jury is set out in *State v. Burton,* 272 N.C. 687, 689, 158 S.E. 2d 883, where the Court quoted with approval the statement of Higgins, J., in *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431:

> "'. . . If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.' The above is another way of saying there must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both. To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of the facts. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury. *S. v. Simpson, ante,* 325; *S. v. Duncan, ante,* 374; *S. v. Simmons, supra; S. v. Grainger,* 238 N.C. 739, 78 S.E. 2d 769; *S. v. Fulk,* 232 N.C. 118, 59 S.E. 2d

617; *S. v. Frye,* 229 N.C. 581, 50 S.E. 2d 895; *S. v. Strickland,* 229 N.C. 201, 49 S.E. 2d 469; *S. v. Minton,* 228 N.C. 518, 46 S.E. 2d 296; *S. v. Coffey,* 228 N.C. 119, 44 S.E. 2d 886; *S. v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472; *S. v. Ewing,* 227 N.C. 535, 42 S.E. 2d 676; *S. v. Stiwinter,* 211 N.C. 278, 189 S.E. 868; *S. v. Johnson, supra.*"

The evidence for the State tends to show that the deceased was last seen on 30 January going to the trailer where he lived. On 2 February his body was found back of a nearby cemetery. He had been dead more than 48 hours and had been brutally beaten about the head before he was shot. His clothing was blood soaked. The cause of death was a bullet fired from a pistol. A few coins were found on the body but no billfold. Near the body was a blank application form. There were tire tracks leading to the body. Deceased often carried large sums of money and on the day last seen had around $200.00 in his possession. Defendant was, by his own statement, with deceased around 8:30 or 9 o'clock on the night of 30 January. Deceased had never been seen driving a car by those who knew him although he worked at a service station during the day and attended a parking lot at night. He had no driver's license. The defendant owned a 1959 black Cadillac and was friendly with deceased. He had been seen at the service station where deceased worked at about 5 o'clock p.m. on 30 January while deceased was there. About 5:30 he attempted to pawn a watch to deceased, was refused and pawned it to the service station operator for $1.00 worth of gas and $2.00 in cash. He had previously pawned a ring to deceased. He was unemployed. A car was seen leaving Archie Taylor's trailer about the time defendant said he was with Taylor. About 9:00 p.m., 30 January, defendant drove his car to the service station where he had pawned the watch, coming from the direction of the cemetery. He had money and used a $20 bill to buy a tank full of gas and received the change therefrom. He registered at a nearby motel for the night, registered his car, paid in cash and left for Florida the next morning, paying cash for his motel and YMCA accommodations on the way and after arriving in Florida. When arrested in Florida, he had the ring he had pawned to decedent. Decedent's pistol was found in his car from which one cartridge had been fired. The bullet which killed decedent could have come from this pistol. The car jack handle was missing, though other parts of the jack were in the trunk of defendant's car. A part of the car seat and a part of the seat liner were blood soaked. This blood was type A as was the blood on decedent's clothing. Decedent had type A blood. Defendant had type O blood. The tire tracks at the scene

where the body was found were like those made by the tires on defendant's car. The application form found near the decedent's body was from a local bread company. Defendant had been given such a form by a company employee only a few days before 30 January. This was the only such form which had not been returned to the company of those given to applicants for a job.

The chain of circumstantial evidence in this case raises more than a suspicion or conjecture. It is clearly sufficient to establish that defendant was the perpetrator of the crime. Assignment of error No. 4 is overruled.

The remainder of defendant's assignments of error are to the charge of the court. We have carefully examined the judge's charge, and construing it as a whole, we find no prejudicial error.

Affirmed.

MALLARD, C.J., and BRITT, J., concur.

NANCY PRUDEN, MARY P. WILLIS AND HUSBAND, B. G. WILLIS; VIRGIE P. PHELPS; W. GRADY PRUDEN AND WIFE, SUE PRUDEN, v. J. B. KEEMER AND WIFE, ELLA KEEMER.

(Filed 19 June 1968.)

1. Trespass to Try Title § 1—

In an action in trespass to try title plaintiff must allege and prove both title in himself and trespass by defendant.

2. Trespass to Try Title § 2—

In an action in trespass to try title defendant's denial of plaintiff's allegations of title and trespass places the burden on plaintiff to establish each of these allegations.

3. Same—

Plaintiff must rely on the strength of his own title which he must prove by some method recognized by law.

4. Trespass to Try Title § 4; Partition § 1—

In an action in trespass to try title, plaintiff's evidence that its title derived from a partition proceeding is insufficient to establish the proceeding as a common source of title for the plaintiff and the defendant when there is no showing that defendant or its predecessors in title were parties to the partitioning.

5. Evidence § 25; Boundaries § 13—

In an action in trespass to try title, it was error to admit in evidence a map prepared for the purpose of applying for a bank loan, since a map

is ordinarily inadmissible as substantive evidence unless made in pursuance of a court order.

6. Appeal and Error § 59—

Fact that referee and the trial court considered incompetent evidence introduced by plaintiff in an action for trespass to try title does not entitle defendant to a directed verdict, and the evidence will be considered on appeal in passing upon the sufficiency of plaintiff's evidence to withstand nonsuit, since the admission of such evidence may have caused plaintiff to omit competent evidence of the same import.

APPEAL by defendants from *Parker, J.*, 1 December 1967 Session of BERTIE Superior Court.

This is a civil action in which plaintiffs allege that defendants trespassed upon plaintiffs' lands by cutting and removing timber therefrom. Plaintiffs ask for damages and injunctive relief.

In their complaint plaintiffs allege that they are the fee simple owners of lot no. 5 of the Jacob Pruden lands as particularly described in a division proceeding recorded in Book RR, page 42, *et seq.*, Bertie County Public Registry.

In their answer defendants deny plaintiffs' title and deny any trespass on any lands belonging to plaintiffs. In their further answer defendants allege that defendant J. B. Keemer is the owner of certain lands described in deed dated 6 December 1934 from Billie B. Rice and wife to J. B. Keemer, and recorded in Book 289 at page 517, Bertie County Registry. Defendants further allege that they have been in continuous possession "of the lands claimed by the plaintiffs in the action as the place of trespass and timber cutting under known and visible lines and boundaries and under colorable *(sic)* title for more than seven years next preceding the commencement of the action," which possession is expressly pleaded.

On 29 November 1965 Peel, J., referred the action to Honorable Eric Norfleet, Referee, with directions to hear the evidence, find the facts, and report his findings of fact and conclusions of law to the court as provided by statute. Plaintiffs and defendants excepted to the order of compulsory reference.

Hearings were held by the Referee, and on 5 November 1966 he filed his report containing the following findings of fact and conclusions of law pertinent to this appeal:

FINDINGS OF FACT

"1. The plaintiffs and defendants are adjoining land owners. The lands of the plaintiffs extend to and constitute and *(sic)* southern boundary of the lands of the defendants, and the lands of the defendants extend to and constitute the northern boundary of the lands of the plaintiffs.

"4. The chain of title of plaintiffs and defendants stems from a common source, namely, Jacob Pruden.

"5. The plaintiffs' lands are accurately described in the Jacob Pruden Division (PX 1 and 2). The defendants' lands are described by adjoining land owners, and reference to the Jacob Pruden lands, and several of the owners deriving title under that division. The deed under which the defendants acquired title to their lands contains like references (PX 3).

"6. The chain of title to defendants' lands show the acreage as '122 acres, more or less'. Their contentions would give them from 125 to 130 acres additionally, which would be cut out of the plaintiffs' lands, Lot No. 5 of the Jacob Pruden Division.

"7. In 1948, the defendants had a survey and map of their lands made by J. B. Parker, a Registered Land Surveyor. This map shows 122 acres (PX 6).

"8. The boundary line between the lands of the plaintiffs and the lands of the defendants is on the line DEF, as shown on the Court Map, however, by stipulation the plaintiffs do not claim any lands lying north of the line shown on map of the J. B. Keemer land (PX-6), which is as follows:"
(Line was set out by courses and distances.)

CONCLUSIONS OF LAW.

"5. The plaintiffs are entitled to recover of the defendants the sum of $231.49 and interest from May 19, 1960 for the trespass and cutting and removing of the timber and trees in question."

In due time defendants filed numerous exceptions to the Referee's report. The action came on for hearing on the exceptions before Parker, J., who denied all of defendants' exceptions, approved and adopted the findings of fact and conclusions of law of the Referee, and entered judgment adjudging the boundary line between the lands of plaintiffs and the lands of defendants as determined by the Referee, and entered monetary judgment against the defendants for Two Hundred Thirty-One Dollars and Forty-Nine Cents ($231.49) plus interest and costs. Defendants entered exceptions to the judgment and appealed.

Pritchett, Cooke & Burch by J. A. Pritchett, Attorneys for plaintiff appellees.

James R. Walker, Jr., Attorney for defendant appellants.

MALLARD, C.J. This action resolves itself into an action in trespass to try title; therefore, plaintiffs must allege and prove both title in themselves and trespass by defendants. 4 Strong, N. C. Index, Trespass to Try Title, § 1.

In their complaint plaintiffs allege fee simple title ownership of Lot No. 5 of the Jacob Pruden Estate Lands and trespass thereon by defendants; in their answer, defendants flatly deny these allegations.

Defendants' denial of plaintiffs' allegations of title and trespass places the burden on plaintiffs to establish each of these allegations. *Day v. Godwin,* 258 N.C. 465, 128 S.E. 2d 814. Plaintiffs must rely on the strength of their own title, and prove their title by some method recognized by law. *Tripp v. Keais,* 255 N.C. 404, 121 S.E. 2d 596; *Day v. Godwin, supra.* This requirement may be met by various methods which are specifically set forth in *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142.

In his report the Referee recognized these principles of law and evidently concluded that plaintiffs had introduced sufficient evidence to come within Rule 6 in *Mobley v. Griffin, supra.* In paragraph 4 of his report the Referee states: "The chain of title of plaintiffs and defendants stems from a common source, namely, Jacob Pruden."

Defendants except to this particular finding of fact and contend that it is not supported by sufficient, competent evidence. The exception is well taken.

As a starting point in proving their title, plaintiffs introduced the Report of Commissioners and map in the partition proceeding of the Jacob Pruden Estate Lands, dated 18 January 1877, together with order confirming the report. In said proceeding Lot No. 5 was allotted to Joseph C. Pruden, father of the plaintiffs.

Plaintiffs also introduced a deed from Angy Luton *et als* to Aaron L. Collins, dated 12 September 1871, conveying "one part of the tract of land left to us by our grandfather William Bunch and lately in the possession of Jacob Pruden situated in Bertie County, adjoining the lands of Jacob Pruden and Elizabeth Spivey." Defendants allege Collins as their predecessor in title and the evidence shows that plaintiffs' land is located south of defendants' land.

The partition proceeding and deed aforesaid were insufficient to show Jacob Pruden as a common source of title for plaintiffs and defendants. The legal effect of the introduction of the partition proceeding before the Referee was to prove plaintiffs as the owners of lot no. 5 to the exclusion of other heirs of Jacob Pruden; it did not have the effect of proving any title or establishing any boundary as against defendants inasmuch as there was no showing that defend-

ants or their predecessors in title were parties to the partition proceeding. See *Huffman v. Pearson,* 222 N.C. 193, 22 S.E. 2d 440.

The only evidence before the Referee to support his finding of fact no. 4 was the partition proceeding and the deed aforesaid. He erroneously considered the partition proceeding as a beginning link in plaintiffs' chain of title.

Defendants also excepted to the introduction of a map of their lands made by J. B. Parker, surveyor, in 1948; this map is referred to in the Referee's finding of fact no. 7. The exception is well taken.

The evidence indicates that the map was prepared for the purpose of applying for a Federal Land Bank loan but was not used; neither was it recorded. It was said by Winborne, J. (later C.J.), in *Searcy v. Logan,* 226 N.C. 562, 39 S.E. 2d 593: "A map or plat of a survey not made in pursuance of an order of the court is inadmissible as evidence *per se.* While it may be used by a witness under examination to explain or elucidate his testimony, it may not be exhibited as substantive evidence." (citations.)

Defendants contend that the Referee and Superior Court committed prejudicial and reversible error in refusing to enter a directed verdict and judgment for the defendants on questions of title and boundaries. This contention is overruled. In *McDaris v. "T" Corp.,* 265 N.C. 298, 144 S.E. 2d 59, it is said: "Notwithstanding the incompetency of the testimony, we must consider it on the motion for nonsuit. Evidence erroneously admitted will nevertheless be considered on appeal in passing upon the sufficiency of plaintiff's evidence to withstand nonsuit since the admission of such evidence may have caused plaintiffs to omit evidence of the same import."

We hold that crucial findings of fact and conclusions of law of the Referee were based on improper evidence and that the Superior Court committed error in not sustaining defendants' exceptions thereto.

Defendants made numerous additional assignments of error, but inasmuch as this action is being remanded because of the errors above mentioned, we do not deem it necessary to consider the remaining assignments of error.

The judgment of Judge Parker is vacated, and this cause is remanded to the Superior Court of Bertie County for further proceedings consistent with this opinion.

Error and remanded.

BRITT and MORRIS, JJ., concur.

WALTER W. HENDRIX, JR. v. JAMES R. ALSOP.

(Filed 19 June 1968.)

1. Bill of Discovery § 2—

The statute allowing compulsory examination of an adversary prior to the filing of the complaint does not contemplate that the examination is to be lightly allowed or that plaintiff is to be given a general permit to embark upon an unrestricted "fishing expedition" through the records and recollections of his adversary. G.S. 1-568.9, G.S. 1-568.10(b)(2).

2. Same— Plaintiff fails to show necessity for adverse examination of former employer.

In plaintiff's action to recover damages resulting from his wrongful discharge from employment by the defendant, plaintiff made application, prior to the filing of the complaint, to examine defendant with respect to methods defendant used to prevent plaintiff from obtaining positions of similar employment. Plaintiff's affidavit for extension of time to plead, filed contemporaneously with the application for pre-trial examination, alleged that defendant had attempted, through malicious prosecution, abuse of process and libel, to prevent plaintiff from securing similar employment. *Held:* Plaintiff's affidavit for extension of time to plead specifically negates the necessity for an order to examine defendant prior to pleading, since it affirmatively alleges that plaintiff knows what methods defendant used to deny him other employment.

3. Same; Malicious Prosecution § 1—

Malicious prosecution and abuse of process are actions associated with legal proceedings which are matters of public record, and information thereon is available to a plaintiff without resort to a pre-trial examination of an adverse party.

APPEAL by defendant from *Exum, J.*, in Chambers in GUILFORD Superior Court 12 January 1968.

The facts are as set out in the opinion.

Forman, Zuckerman & Scheer by William Zuckerman for plaintiff appellee.

Frazier & Frazier by Harold C. Mahler for defendant appellant.

MALLARD, C.J. Plaintiff instituted this action by causing summons to issue on 5 May 1967. An order of the same date extended the time within which to file the complaint to and including twenty days after the report of the examination of defendant has been filed. Plaintiff alleges in his application for extension of time within which to plead: "That the nature and purpose of said action is recovering damages proximately caused by his wrongful discharge from employment by the defendant and the defendant's attempt, through malicious prosecution, abuse of process, and libel, to prevent plaintiff from securing other positions of similar employment."

Plaintiff filed with the Clerk of the Superior Court of Guilford County on 5 May 1967 an application for the adverse examination of the defendant pursuant to the provisions of G.S. 1-568.10. In this application plaintiff alleges, among other things, "that there is within the knowledge of the defendant certain facts and information which it is necessary for this plaintiff to have to properly draft and file his complaint; that said information is not otherwise available to plaintiff in that it involved the reasons and authority for and the methods employed by the defendant in bringing about plaintiff's employment termination and in attempting to prevent the plaintiff securing other positions of similar employment; that plaintiff on several occasions attempted to obtain said information from his employer but was refused any information of or reasons for defendant's actions; that the defendant is therefore the only source from which said information may be obtained; that said information is material and necessary and that this application is made in good faith."

On 5 May 1967 Esther B. Sharp, an Assistant Clerk of the Superior Court of Guilford County, signed an order *(ex parte)* requiring the defendant to appear at a stated time and place to be examined "in the manner prescribed by the provisions of G.S. Sec. 1-568.10, with respect to the reasons and authority for and the methods employed in bringing about plaintiff's employment termination."

The defendant on 16 May 1967 filed a motion to vacate the order of 5 May 1967 signed by the Assistant Clerk. On 21 June 1967 J. P. Shore, the Clerk of Superior Court of Guilford County, signed an order in which there appears after certain findings of fact the following:

"Upon the foregoing findings, it is concluded:

1. That all parties are properly before the Court and the Court has jurisdiction of this proceeding.

2. That the information sought by plaintiff with respect to the reasons and authority for his discharge are already known or sufficiently apparent to plaintiff and, accordingly, that section of the order requiring the defendant to be examined with respect thereto should be stricken.

3. That the information sought by plaintiff with respect to the methods employed by defendant in discharging plaintiff from his employment is not otherwise available or apparent to plaintiff, is within the knowledge of the defendant, is essential for the preparation of the plaintiff's complaint, and is a proper subject for inquiry under the provisions of G.S. Section 1-568.10.

WHEREFORE, IT IS ORDERED that the order of examination of May 5, 1967, be modified in accordance with the above conclusions and that as so modified, said order be affirmed in all respects."

The defendant did not except to the findings of fact but gave "Notice of Appeal to the Superior Court of Guilford County." The plaintiff did not appeal and made no exceptions to the findings of fact.

Thereafter, the matter was heard by Judge Exum, and on 12 January 1968 order was entered making certain findings and conclusions as follows:

"1. The application heretofore filed in this proceeding by the plaintiff on May 5, 1967, is sufficient to support an order allowing plaintiff to examine the defendant with regard to the methods employed by the defendant in attempting to prevent the plaintiff from securing positions of similar employment;

2. The information sought by plaintiff with respect to all other matters to be inquired into on examination as set forth in his application is already known by, or sufficiently apparent to plaintiff, such that plaintiff ought not to be allowed to examine the defendant with regard to these other matters;

3. That no order as yet has been entered by the Clerk of Superior Court of Guilford County allowing examination into the methods employed by the defendant in attempting to prevent the plaintiff from securing positions of similar employment;

4. That the matter ought to be remanded to the Clerk so that he might enter an order allowing the plaintiff to examine the defendant with regard to the methods employed by the defendant in attempting to prevent plaintiff from securing positions of similar employment; now, therefore, IT IS

ORDERED, ADJUDGED AND DECREED that the original order entered by the Assistant Clerk of the Superior Court of Guilford County be, and the same is hereby vacated and set aside; that the order of the Clerk of Superior Court of Guilford County, dated June 21, 1967, be vacated with regard to paragraph 3 thereof on page 2, but that the order of June 21, 1967, is affirmed in all other respects; and that this proceeding be remanded to the Clerk of Superior Court of Guilford County for the entry of an order allowing plaintiff to examine the defendant prior to the filing of plaintiff's complaint with respect only

to the methods employed by the defendant in attempting to prevent the plaintiff from securing positions of similar employment."

The defendant did not except to the findings of fact but appealed from the signing of the order to the Court of Appeals. The plaintiff did not appeal and did not except to the findings of fact.

Thus, we see that the Assistant Clerk of Superior Court first found and entered an order, pursuant to G.S. 1-568.10, that the defendant was to be examined *with respect to the reasons and authority for and the methods employed* in the discharge of plaintiff from his employment. Then the Clerk of Superior Court modified that order and found that "the information sought by plaintiff with respect to the reasons and authority for his discharge are already known or sufficiently apparent to plaintiff" and ordered such part of the Assistant Clerk's order stricken. The Clerk also found that the plaintiff was entitled to examine the defendant *with respect to the methods employed by defendant in discharging plaintiff.* Upon the defendant's appeal, Judge Exum found that the plaintiff should be permitted to examine the defendant *with regard to the methods employed by the defendant in attempting to prevent plaintiff from securing positions of similar employment,* and Judge Exum also found that the plaintiff ought not to be allowed to examine the defendant with regard to the other matters alleged because such was already known by or sufficiently apparent to the plaintiff.

"The plaintiff may procure an order for such examination of the officers of his corporate adversary, prior to the filing of his complaint, only by showing 'that the examination is necessary to enable him properly to prepare his complaint.' G.S. 1-568.9. In such affidavit the plaintiff must show 'that, in order to prepare his complaint * * * it is necessary * * * to secure information from the person proposed to be examined about certain matters, which matters must be designated with reasonable particularity.' G.S. 1-568.10(b) (2).

"The statute does not contemplate that compulsory examination of his adversary by one who has not filed a complaint is to be lightly allowed. This Court has said many times that the statute does not contemplate the issuance of a general permit for the plaintiff to embark upon an unrestricted 'fishing expedition' through the records and recollections of his adversary." *Kohler v. Construction Co.,* 271 N.C. 187, 155 S.E. 2d 558.

In this case the plaintiff's application fails to show the necessity to examine the defendant with respect to the methods employed by him "in attempting to prevent plaintiff from securing positions of similar employment." In fact, plaintiff's affidavit for extension of

time in which to plead specifically negatives necessity and supplies the answer to what methods were employed by defendant when he says, "and the defendant's attempt, *through malicious prosecution, abuse of process, and libel,* to prevent plaintiff from securing other positions of similar employment." (emphasis added.)

Defendant contends, and we agree, that malicious prosecution and abuse of process are associated with and follow legal proceedings which are matters of public record, and therefore available to plaintiff. And libel is "a malicious publication expressed either in printing or writing, or by signs, or pictures, tending either to blacken the memory of one dead or the reputation of one alive, and to expose him to public hatred, contempt, or ridicule." *Brown v. Lumber Co.,* 167 N.C. 9, 82 S.E. 961.

If the plaintiff knows, and he alleges he does, that libel is one of the methods used by the defendant in attempting to prevent plaintiff from procuring other positions of similar employment, there is no necessity shown to examine defendant about libel.

In this case we hold that no necessity is shown by the affidavit for an order allowing plaintiff to examine the defendant. *Griners' & Shaw, Inc., v. Casualty Co.,* 255 N.C. 380, 121 S.E. 2d 572. It follows, therefore, that the order of Judge Exum directing the Clerk to amend his order was not proper, and this cause is remanded to the Superior Court of Guilford County for entry of an order consistent with this opinion.

Error and remanded.

BROCK and PARKER, JJ., concur.

ROBERT FORD NEESE v. THOMAS R. NEESE, JR.

(Filed 19 June 1968.)

1. Evidence § 14—

In an action to rescind a sale of stock on the ground of mental incapacity to make the sale, plaintiff does not waive the physician-patient privilege established by G.S. 8-53 by filing a complaint detailing his mental state where the complaint contains no assertion of a communication between plaintiff and the physician or of any specific treatment given plaintiff by the physician.

2. Same—

The patient does not waive the physician-patient privilege by introducing into evidence at a hearing upon an application for a temporary restraining order pursuant to G.S. 55-81 an affidavit of his physician as to his mental

capacity, and the physician may not be compeled by the opposing party to disclose privileged information at a deposition hearing held thereafter.

APPEAL by defendant from *Lupton, J.*, 11 December 1967 Civil Session of GUILFORD Superior Court.

Plaintiff is seeking to rescind the sale of 41 shares of stock in a family-owned business to the defendant, his nephew, on the grounds that he, the plaintiff, at the time of such sale was suffering from a mental condition similar to amnesia and did not have sufficient mental capacity to make the sale. Plaintiff applied for and obtained a temporary restraining order impounding the 41 shares of stock, pursuant to G.S. 55-81, and prohibiting defendant from disposing of or encumbering it pending the trial. At the hearing upon the application for a restraining order affidavits were used. Among the affidavits used by the plaintiff was one of Dr. Kenneth Epple, of Greensboro, North Carolina, specializing in psychiatry. The pertinent parts of this affidavit read as follows:

> "I have seen Mr. Neese intermittently from May of 1965 through the present time. I have studied his history and personal interviews. I have also examined the affidavits from a number of people closely associated with Mr. Neese, both in personal life and in business, regarding his behavior prior to and during the time of the stock transaction. It is my conclusion that Mr. Neese was not competent to handle the transfer of the stock at the time."

No objections or exceptions were made by the defendant to the notice to show cause, to the signing of the temporary restraining order on 30 December 1966, to the findings of and order of Judge Crissman dated 17 February 1967 impounding the stock certificate, or to continuing the restraining order pending the trial of the case.

On 4 May 1967 pursuant to G.S. 8-71, the defendant served notice on the plaintiff of the taking of "the deposition of Dr. Kenneth Epple to be read as evidence for the defendant if he so desires." At the time and place of the taking of the deposition, the plaintiff objected to questions propounded to Dr. Epple and claimed the physician-patient privilege created by G.S. 8-53. On these grounds Dr. Epple declined to answer the questions relating to his identification of certain paper writings, as to whose affidavits he had examined, as to the identification of the plaintiff, and all questions propounded to him relating to the plaintiff. Defendant then applied to the judge of superior court for an order requiring the physician

to answer. From the order of Judge Lupton denying defendant's motion, defendant appeals to this Court.

Poteat & Franks and Jordan, Wright, Henson & Nichols by Welch Jordan for plaintiff appellee.

Smith, Moore, Smith, Schell & Hunter by James R. Turner for defendant appellant.

MALLARD, C.J. Defendant contends that the plaintiff waived his right to invoke the physician-patient privilege when he filed a complaint detailing his mental state and also when he introduced into evidence at the hearing on the temporary restraining order several affidavits relating to his mental condition including one from Dr. Epple.

G.S. 8-53 reads:

> "No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: Provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice."

We are concerned here with the question of the interpretation of the statute and whether the plaintiff has waived his right to claim the privilege established by the statute.

In *Capps v. Lynch,* 253 N.C. 18, 116 S.E. 2d 137, we find the following:

> "The privilege established by the statute is for the benefit of the patient alone. It is not absolute; it is qualified by the statute itself. A judge of superior court at term may, in his discretion, compel disclosure of such communications if, in his opinion, it is necessary to a proper administration of justice and he so finds and enters such finding on the record. * * *
>
> We now come to the question of waiver of privilege. 'That this purely statutory privilege may be waived is undisputed.' 16 N. C. Law Review 54. Since the privilege is that of the patient alone, it may be waived by him and cannot be taken advantage of by any other person. Stansbury: N. C. Evidence, s. 63, p. 110. *State v. Martin, supra.*
>
> The waiver may be express or implied. Where the patient con-

sents that the physician be examined as a witness by the adverse party with respect to the communication, the privilege is expressly waived. The privilege may be expressly waived by contract in writing. *Fuller v. Knights of Pythias,* 129 N.C. 318, 40 S.E. 65. See also *Creech v. Woodmen of the World,* 211 N.C. 658, 191 S.E. 840.

'Unless a statute requires express waiver, the privilege may be waived by implication.' 16 N. C. Law Review 54. The North Carolina statute does not require express waiver. The privilege is waived by implication where the patient calls the physician as a witness and examines him as to patient's physical condition, where patient fails to object when the opposing party causes the physician to testify, or where the patient testifies to the communication between himself and physician. 16 N. C. Law Review 55. *Hayes v. Ricard,* 244 N.C. 313, 93 S.E. 2d 540; *State v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84.

A patient may surrender his privilege in a personal injury case by testifying to the nature and extent of his injuries and the examination and treatment by the physician or surgeon. Whether the testimony of the patient amounts to a waiver of privilege depends upon the provisions of the applicable statute and the extent and ultimate materiality of the testimony given with respect to the nature, treatment and effect of he injury or ailment. The question of waiver is to be determined largely by the facts and circumstances of the particular case on trial."

In the instant case the defendant contends that the plaintiff waived the privilege when he filed a complaint alleging his mental condition. A careful scrutiny of the lengthy complaint fails to reveal any allegation therein asserting a communication between the plaintiff and the physician or any specific treatment given plaintiff by the physician.

There was no express waiver, either by words or in writing. The plaintiff has not called and examined the physician *as a witness,* although plaintiff has used an affidavit signed by the physician. The plaintiff *has not testified* as to his mental condition.

We are of the opinion and so decide that the plaintiff did not waive the physician-patient privileges in the *allegations* in his complaint as to his mental incapacity. *Capps v. Lynch, supra.*

The defendant contends that the plaintiff waived his right to invoke the physician-patient privilege when he introduced into evidence the affidavit of Dr. Epple at the hearing on 17 February 1967 before Judge Crissman on the question of whether to continue the

temporary restraining order to the final hearing. The defendant did not ask to cross-examine Dr. Epple at that hearing. The defendant did not object or except to the use of affidavits at such hearing. In fact, the record reveals that at this hearing the matter was heard upon affidavits presented by both parties. In *Gustafson v. Gustafson,* 272 N.C. 452, 158 S.E. 2d 619, which was an action for alimony and custody of children, the plaintiff made no allegations concerning the treatment given her but was adversely examined and answered questions of defendant with regard to the names of physicians and the dates and nature of the treatment prescribed by each of them. The plaintiff also used affidavits of physicians who treated her on her application for alimony *pendente lite* and custody of the children. The defendant on appeal to the Supreme Court asserted as error the denial by the judge of the superior court of his motion to take the deposition of physicians who had treated plaintiff. The Supreme Court emphasized that custody orders are temporary and held:

> "It must be recalled that at the trial of the case affidavits will not be admissible and that the witnesses must appear in person. Therefore the fact that in this hearing for a *temporary* purpose the plaintiff used the affidavits of physicians who treated her does not bring into play the proviso of G.S. 8-53."

In the case before us the plaintiff used the affidavit of the physician for the purpose of obtaining a temporary restraining order pending the hearing of the case on the merits. We are of the opinion and so decide that by the use of this affidavit the plaintiff did not waive the physician-patient privilege. *Gustafson v. Gustafson, supra.*

Defendant further contends that the superior court committed error in sustaining plaintiff's objections to questions asked Dr. Epple concerning the affidavits he referred to in his affidavit introduced into evidence and to the identification of certain papers. All the pertinent circumstances on this record tend to show that Dr. Epple was a psychiatrist and that the information he had was obtained by him for the purpose of the physician-patient relationship with the plaintiff. If upon the trial of this case on its merits it should be determined by the trial judge that certain information, or papers, were not obtained by Dr. Epple for this purpose, then as a matter of right, the defendant would be entitled to examine the doctor about such. If they were obtained for such purpose, the trial judge will have the discretionary power to order disclosure.

We are of the opinion and so decide that the order of Judge Lupton is correct and should be

Affirmed.

BROCK and PARKER, JJ., concur.

KLIMATE-PRUF PAINT & VARNISH COMPANY v. KLEIN CORPORATION, MAX KLEIN AND WIFE, SARAH KLEIN.

(Filed 19 June 1968.)

1. Sales § 6—

There can be no implied warranties when the contract of sale contains express warranties upon the subject.

2. Sales §§ 5, 14—

In an action by the assignee of accounts receivable against the assignor, evidence that some accounts were uncollectible in that the debtors had declared bankruptcy and that other debtors refused to pay accounts because they had received defective merchandise, *is held* insufficient to be submitted to the jury on the issue of assignor's breach of a warranty that such assets "are free and clear of all liens and encumbrances and claims of every nature," the effect of the warranty being to protect against liabilities which would infringe on the title to the accounts and not to guarantee their collectibility.

APPEAL by plaintiff from *Lupton, J.*, at the 29 January 1968 Civil Session of GUILFORD Superior Court.

This is a civil action in which plaintiff seeks to recover damages for the alleged breach of certain warranties made by the defendants in the sale of accounts receivable by the corporate defendant to plaintiff.

Plaintiff's pleadings allege that on 10 May 1962, Klimate-Pruf Paint Company, Inc., under a written contract, sold its operating assets, including raw materials, finished goods, work in progress, inventory, equipment, and accounts receivable to plaintiff, a newly organized company. The vendor then changed its name to the Klein Corporation.

This action is concerned only with the assignment of the accounts receivable and more particularly with only five of the 337 assigned. The contract of sale contains the warranty hereinafter set forth in the opinion. The individual defendants joined in the contract of sale for purpose of guaranteeing that the assets and properties conveyed were free and clear of all claims, liens, and encumbrances of every nature, and agreed to indemnify and save the purchaser harmless from any claims or demands arising out of the purchase of the assets covered by the agreement.

The complaint further alleges that plaintiff exercised due diligence to collect the accounts receivable; that it was unable to collect two of the accounts in question because the debtors filed petitions in bankruptcy; that it was unable to collect the other three because the debtors contended that the products purchased were defective.

Plaintiff made demand on defendants to pay the accounts re-

ceivable which plaintiff was unable to collect. Defendants failed to make the accounts good.

At the trial, plaintiff introduced evidence in support of its pleadings, including depositions from the three debtors relating to the defective merchandise.

At the conclusion of plaintiff's evidence, defendants moved for judgment as of involuntary nonsuit, which motion was granted and judgment entered thereon. Plaintiff appealed.

Moseley & Edwards, Attorneys for plaintiff appellant.
Falk, Carruthers & Roth, Attorneys for defendant appellees.

BRITT, J. In its brief, appellant raises two questions: (1) Did plaintiff introduce sufficient evidence to raise a jury question under the theory of a breach of implied warranty of validity? (2) Did plaintiff introduce sufficient evidence to raise a jury question under the express warranty contained in the contract between the parties?

The paragraph of the bill of sale most pertinent to this appeal reads as follows:

> "The seller covenants that it has the right to convey the assets and properties set forth above; that the said assets and properties are free and clear of all liens and encumbrances and claims of every nature; and that it will warrant and defend the title to these assets and properties against the lawful claims of all persons whomsoever."

The first question posed by appellant must be answered in the negative.

"There can be no implied warranties when the contract of sale contains express warranties upon the subject." 4 Strong, N. C. Index, Sales, § 6, citing *Petroleum Co. v. Allen,* 219 N.C. 461, 14 S.E. 2d 402.

The bill of sale set forth in the complaint contains an express warranty from the seller to the buyer (plaintiff) on the subject in controversy in this action; therefore, we hold that in this case there was no implied warranty.

Answering appellant's second question is more difficult, but it too must be answered in the negative.

It is plaintiff's contention that the uncollected accounts constitute a breach of that portion of the bill of sale which reads: "The seller covenants . . . that the said assets and properties are free and clear of all liens and encumbrances and claims of every nature . . ." With commendable candor, appellant's counsel admit in their brief that the covenant contained in the contract was not a warranty

of collectibility as to accounts receivable. Clearly, the two accounts against debtors who filed bankruptcy proceedings fall within this admission and, as to them, nonsuit was proper.

Payment has been refused on the other three accounts on the grounds that the merchandise was defective. Plaintiff argues that this constitutes a breach of the covenant that the "assets and properties are free and clear of all . . . claims of every nature." This requires a construction of those words, and the context in which they were used must be considered.

An examination of the contract of sale indicates that there are three distinct covenants or warranties. First, to borrow a real estate term, there is a covenant of right to convey by which the seller provided assurance that it had sufficient capacity and title to convey the property which it, by its bill of sale, undertook to convey.

Second, there is the covenant or warranty against "liens and encumbrances and claims of every nature." *Liens* and *encumbrances* obviously embrace mortgages, tax liens, and the like. Then, without even a comma to break the connotation, follow the words, *and claims of every nature.* We think the effect of these words was to warrant the title to the property conveyed, including the accounts receivable, against liabilities that might not be considered a *lien* or an *encumbrance,* but which would affect or infringe on the title; a possible example would be the violation of the bulk sales statutes. A debtor's right of setoff or counterclaim for defective merchandise cannot be considered as affecting or infringing defendant's title to the accounts receivable.

Third, there is the warranty to defend which relates to the two preceding sections.

The defenses asserted by the three debtors do not create a lien, encumbrance or claim against the title of the accounts, but rather they relate to collectibility. If the parties intended that the accounts receivable be warranted to be free from any right of setoff or counterclaim, they should have so covenanted. See *Warner v. Seaboard Finance Co.,* 75 Nev. 470, 345 P. 2d 759.

The judgment of involuntary nonsuit entered by the Superior Court is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

JAMES J. BOOKER v. ROBERT E. PORTH AND WILLIAM R. PORTH.

(Filed 19 June 1968.)

1. Lis Pendens—

G.S. 1-116, authorizing the filing of a notice of *Lis Pendens*, does not apply to an action to secure a personal judgment for the payment of money even though such a judgment, if obtained and properly docketed, is a lien upon land of the defendant.

2. Judgments §§ 14, 19—

In an action by an attorney to recover upon an alleged express contract for the payment of attorney fees, a judgment by default final is irregularly and improvidently entered where the complaint fails to allege a sum of money fixed by the terms of the contract or capable of being ascertained therefrom by computation, G.S. 1-211, the plaintiff being entitled at most to judgment by default and inquiry, G.S. 1-212, and upon motion in the cause the clerk has authority to vacate the judgment by default final.

3. Pleadings § 9—

The Superior Court in its discretion has authority to allow verification of the answer *nunc pro tunc*.

APPEAL by plaintiff from *Martin, Robert M., J.*, 9 October 1967 Session FORSYTH Superior Court.

This action was instituted by the plaintiff, a licensed and practicing attorney in the State of North Carolina, to recover upon an alleged express contract for attorney fees.

The complaint was filed 10 June 1966, and summons was issued on the same day. Also, on 10 June 1966, the plaintiff filed with the Clerk of Superior Court a "Notice of *Lis Pendens*."

Summons was served on defendant Robert E. Porth on 10 June 1966. Due to temporary absence from the state summons was not actually served on defendant William R. Porth until 25 August 1966. On 7 July 1966 Womble, Carlyle, Sandridge and Rice, Attorneys at Law, purporting to act on behalf of both defendants, filed a motion to cancel the notice of *lis pendens*. On 8 July 1966 the same attorneys filed an answer purporting to be on behalf of both defendants, verified only by Robert E. Porth.

On 27 September 1966, upon the *ex parte* application of the plaintiff, a judgment by default final was entered against the defendant William R. Porth by the Assistant Clerk of Superior Court of Forsyth County. On 15 December 1966, defendant William R. Porth filed a motion through his attorneys of record to vacate the judgment by default final. This motion was heard upon affidavits by the Clerk of Superior Court of Forsyth County and his order was entered on 6 January 1967 finding in substance that William R. Porth was represented by counsel and that counsel had filed answer

on behalf of both defendants on 8 July 1966; that William R. Porth had a meritorious defense; and that the judgment by default final was improvidently entered. He thereupon entered an order vacating and setting aside the judgment by default final.

From the Clerk's order the plaintiff appealed to the Judge of Superior Court. On 10 October 1967 Judge Martin entered an order canceling and removing from the records the notice of *lis pendens* theretofore filed by the plaintiff. Also, on 10 October 1967, Judge Martin affirmed the order of the Clerk vacating the judgment by default final, and Judge Martin further permitted defendant William R. Porth to verify the answer *nunc pro tunc.*

From the two orders entered by Judge Martin on 10 October 1967 the plaintiff appeals to this Court.

James J. Booker, pro se, plaintiff appellant.

Womble, Carlyle, Sandridge and Rice by Charles F. Vance, Jr., Attorneys for defendant appellee.

BROCK, J. In this case we will proceed to the merits of the appeal without comment upon the very serious questions of whether plaintiff's case on appeal was served upon defendant in time, and whether plaintiff's record on appeal was docketed in this Court within the time prescribed by our rules.

It is abundantly clear from a reading of the complaint that plaintiff seeks by this action to recover personal judgment against the defendants for the payment of money. In his "Notice of *Lis Pendens*" plaintiff alleges: "The object of said action is to recover upon an express contract for payment of attorney's fees . . ."

G.S. 1-116, authorizing the filing of a Notice of *Lis Pendens,* does not apply to an action the purpose of which is to secure a personal judgment for the payment of money even though such a judgment, if obtained and properly docketed, is a lien upon land of the defendant. *Cutter v. Realty Co.,* 265 N.C. 664, 144 S.E. 2d 882. The "Notice of *Lis Pendens*" in this case was not authorized and Judge Martin was correct in canceling and removing the same from the records.

The plaintiff's complaint consists of thirty-five paragraphs of detailed allegations and will not be reproduced here. Plaintiff details his professional services to the defendant Robert E. Porth in preparation, trial, appeal, and in collateral matters. However, nowhere does he allege a contract for the payment of a total specific sum for his professional services and expenses; nor does he allege a contract agreed to by the parties from which contract a total specific sum could be computed. At best he alleges a contract for services and expenses, a determination of the amount of which would require evi-

dence and findings of fact, even in the absence of an answer denying the claim. The statute provides for judgment by default final "where the complaint sets forth one or more causes of action, each consisting of the breach of an express or implied contract to pay, absolutely or upon a contingency, a sum or sums of money *fixed by the terms of the contract, or capable of being ascertained therefrom by computation.*" (Emphasis added.) G.S. 1-211. There was no certainty of total amount to be paid under the contract alleged by plaintiff; therefore, upon failure of answer by defendant, plaintiff would be entitled, at most, to judgment by default and inquiry. G.S. 1-212. The judgment by default final was irregularly and improvidently entered in this case by the Assistant Clerk, and the Clerk had authority to vacate the same upon motion in the cause. *Cook v. Bradsher,* 219 N.C. 10, 12 S.E. 2d 690; *Bailey v. Davis,* 231 N.C. 86, 55 S.E. 2d 919; 5 Strong, N. C. Index 2d, Judgments, § 19, p. 40. Judge Martin was correct in affirming the Clerk's action.

It appears that both defendants, in apt time, properly filed a joint answer verified by one of the defendants in accordance with G.S. 1-145; but, in any event, after the judgment by default final had been vacated, Judge Martin allowed the defendant William R. Porth to verify the answer. This he was authorized to do in the exercise of his discretion. *Rich v. R. R.,* 244 N.C. 175, 92 S.E. 2d 768. No abuse of discretion is shown. The plaintiff has not been damaged; his action is pending and stands ready for trial.

Affirmed.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. WALTER WEAVER.

(Filed 19 June 1968.)

1. Homicide § 14—

When the intentional killing of a human being with a deadly weapon is admitted or is established by the evidence, the burden is on the defendant to prove to the satisfaction of the jury the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or the legal justification that will excuse it altogether upon the ground of self-defense.

2. Assault and Battery § 12—

In a prosecution for felonious assault, the admission of defendant that he used a deadly weapon does not raise a presumption of malice and

thereby place the burden on defendant to prove that he acted in self-defense.

3. Assault and Battery § 15—

In a prosecution for felonious assault, it is error for the court to place the burden upon the defendant to prove self-defense.

APPEAL by defendant from *Bowman, J.*, 15 January 1968 Session, ALAMANCE Superior Court.

Defendant was tried upon a bill of indictment charging that he did unlawfully, willfully and feloniously assault Cecil Hayes with a deadly weapon, with the felonious intent to kill and murder Cecil Hayes, inflicting serious injuries not resulting in death.

The State's evidence tended to show an assault with the stock of a shotgun upon the person of Cecil Hayes, causing serious injuries. The State's evidence tended to show that the assault occurred on or near the defendant's front porch. The defendant admitted the assault but testified he was acting in self-defense.

The jury returned a verdict of guilty of a felonious assault as charged in the bill of indictment. Judgment was entered imprisoning defendant for a term of not less than eight nor more than ten years.

The defendant appeals, assigning error.

T. W. Bruton, Attorney General by Charles M. Hensey, Trial Attorney, for the State.

W. R. Dalton, Jr., for the defendant appellant.

BROCK, J. After explaining the principles of the law relative to the right of self-defense, the trial judge instructed the jury as follows:

> "In order to have the benefit of this principle of law the defendant must show:
>
> 1. That he was free from any blame.
>
> 2. That the assault on him was with a felonious purpose or appeared to be such.
>
> 3. That he attacked the person assaulting him, if you find that he did so, only when it was apparently necessary to do so to protect himself from death or great bodily harm."

The defendant excepted to the foregoing instruction, and assigns it as error.

The rule with respect to the burden of proof of self-defense in the case of a homicide, and the rule with respect to the burden of proof of self-defense in a non-homicide case are not the same.

When the intentional killing of a human being with a deadly weapon is admitted, or is established by the evidence, the law presumes malice from the use of a deadly weapon, and the law then casts upon the defendant the burden of proving to the satisfaction of the jury the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or the legal justification that will excuse it altogether upon the ground of self-defense. *State v. Warren,* 242 N.C. 581, 89 S.E. 2d 109. *State v. Calloway,* 1 N.C. App. 150, 160 S.E. 2d 501.

On the other hand, when a defendant is charged with an assault with a deadly weapon, with intent to kill, inflicting serious injury, not resulting in death, although the defendant may admit that he inflicted the injury with a deadly weapon, the law does not raise the presumption that it was done with malice and thereby shift the burden to the defendant to satisfy the jury that his conduct was justified. *State v. Warren, supra.*

The charge of the trial judge erroneously placed upon the defendant, in a non-homicide case, the burden of proving his defense of self-defense; for this error the defendant is entitled to a new trial.

In view of this disposition, we will not discuss the remaining assignments of error.

New trial.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. WARNER FOWLER, ALIAS JOHNNY RINGO GRAHAM.

(Filed 19 June 1968.)

1. Criminal Law § 82—

The allowance of leading questions is a matter entirely within the discretion of the trial judge, and his rulings will not be disturbed on appeal in the absence of an abuse of discretion.

2. Homicide § 14—

In a homicide prosecution in which defendant enters a plea of not guilty, testimony of an officer on cross-examination that defendant admitted shooting the deceased *is held* not so prejudicial as to warrant a new trial when defendant later testifies that he was holding the gun when the

shot was fired, it being left to the province of the jury to determine whether the shooting was done accidentally, in self-defense, or with malice.

3. Criminal Law § 89—

In a homicide prosecution, evidence offered by defendant to the effect that welfare payments are withheld from an unmarried female with children who has a continuous relationship with a male, defendant having sought to show that the State's principal witness with whom the defendant had spent several nights in her home had slanted her testimony against him in order not to lose her welfare payments, *is held* properly excluded as irrelevant.

APPEAL by defendant from *Cowper, J.*, and a jury, November 1967 Criminal Session of WAYNE.

The Wayne County Grand Jury returned a true bill of indictment charging Warner Fowler (alias Johnny Ringo Graham) with the first degree murder of W. B. Braswell. The offense occurred on 13 November 1965.

At the January 1966 Session of Wayne Superior Court, the defendant was tried upon the indictment. The jury returned a verdict of guilty of murder in the first degree with the recommendation that punishment should be imprisonment for life in the State's prison. On appeal to the Supreme Court a new trial was awarded. *State v. Fowler,* 268 N.C. 430, 150 S.E. 2d 731.

The new trial resulted in a verdict of guilty of murder in the first degree. The jury failed to make any recommendation. The court imposed a sentence of death. Defendant again appealed to the Supreme Court asserting error in the admission of certain evidence and was awarded a new trial. *State v. Fowler,* 270 N.C. 468, 155 S.E. 2d 83. Defendant is now before an appellate court for the third time seeking a review of his case.

The facts may be summarized as follows: On the morning of 13 November 1965 the defendant and his girl friend, Ruby Rivers, (both of whom had drunk a quantity of liquor) were engaged in a fight on the streets of Fremont. Police Officer W. B. Braswell arrived and took both into custody and transported them to the city jail. No one was in the jail at the time Officer Braswell entered with his prisoners. Ruby Rivers was locked in Cell No. 1. When Officer Braswell attempted to lock defendant in Cell No. 2, a scuffle ensued and Officer Braswell was shot and killed with his own pistol.

The jury returned a verdict of guilty of murder in the second degree and the sentence of the court was that defendant be committed to the State Prison to serve a term of thirty (30) years. The trial judge also ordered that defendant be given credit for two (2) years time already served — that being two (2) years — and that the sentence should be reduced accordingly by two (2) years.

From this judgment defendant appealed.

Attorney General T. Wade Bruton by James F. Bullock, Deputy Attorney General, and Millard R. Rich, Jr., Assistant Attorney General, for the State.

John H. Kerr, III and W. Dortch Langston, Jr., for defendant appellant.

MORRIS, J. Defendant assigns as error the admission of certain evidence given by Ruby Rivers and Deputy Sheriff James Sasser.

The record discloses that Ruby Rivers testified for the State. She was questioned extensively by the solicitor and at one point in the direct examination defendant contends certain leading questions were asked and certain answers given that should have been excluded. The allowance of leading questions is a matter entirely within the discretion of the trial judge, and his rulings will not be disturbed on appeal, at least in the absence of abuse of discretion. Stansbury, N. C. Evidence, 2d, § 31, p. 59. No abuse of judicial discretion appears here. This assignment of error is overruled.

We have carefully examined defendant's assignment of error relating to the testimony of Deputy Sheriff James Sasser. Defendant contends that the admission of certain of the testimony of Deputy Sheriff Sasser was prejudicial error and he should therefore be awarded a new trial. Although Deputy Sheriff Sasser did testify on cross-examination that defendant admitted shooting Mr. W. B. Braswell, when the context in which this testimony was given is considered, the evidence was not so prejudicial as to mislead the jury and warrant a new trial. Defendant later took the stand in his own behalf and testified that he was holding the gun when the shot was fired and Mr. Braswell was killed. These two statements are not inconsistent, and the jury was properly left to determine whether the killing was done accidentally, in self-defense, or with malice. This assignment of error is overruled.

Defendant assigns as error the action of the trial judge in excluding certain testimony given by Rebecca Rouse, a welfare employee and caseworker. The substance of Rebecca Rouse's testimony, if admitted, would have concerned the policy of the Welfare Department in withholding welfare payments when a single female person with children has a continuous relationship with a male. Defendant sought to show that Ruby Rivers slanted her testimony against Warner Fowler, who had spent several nights at her home, in order not to lose her welfare payments. We feel that this argument is so conjectural as to be irrelevant and the trial judge acted properly in excluding the answers from jury consideration.

We have considered the other assignments of error and deem

them to be without merit. Defendant was ably and well represented both at trial and on this appeal. He had a fair trial, free from prejudicial error.

Affirmed.

MALLARD, C.J., and BRITT, J., concur.

BILLY GENE KINLEY v. J. BROOKS HONEYCUTT, T/A HONEYCUTT TRANSPORT COMPANY, A PROPRIETORSHIP.

(Filed 19 June 1968.)

1. Negligence § 20— Plaintiff's injury by hot asphalt is not a result of defendant's negligence.

Plaintiff's allegations were to the effect that defendant delivered by tank truck to the premises of plaintiff's employer hot asphalt at a temperature of approximately 410 degrees F. which was to be transferred into a vat by means of a flexible pipe, one end of which was connected to a valve on the tank truck and the other end to a valve on an electrically operated pump maintained by the employer which was connected to the vat; that the defendant's employee, contrary to customary procedure, failed to open the outlet valve on the truck and failed to warn plaintiff's co-employee not to start the pump; that the co-employee threw the switch on the pump in the wrong direction, causing hot asphalt to be pumped out of the vat toward the defendant's truck; and that the failure of defendant's employee to open the valve caused the pipe to burst, resulting in plaintiff's injuries by the hot asphalt. *Held:* The complaint fails to allege facts sufficient to state a cause of action, and the demurrer of defendant should have been sustained.

2. Negligence § 7—

Only negligence which proximately causes or contributes to the accident is of legal import, and foreseeability is an essential element of proximate cause.

ON Writ of *Certiorari* to review an Order of *Hasty, J.*, entered 29 January 1968, Schedule B. Session, MECKLENBURG Superior Court.

Plaintiff was an employee of Republic Steel Corporation at its place of business in Charlotte, North Carolina. In the operation of its business, Republic Steel maintains a vat upon its premises for the storage of hot asphalt. The defendant delivers by tank truck to the premises of Republic Steel hot asphalt at a temperature of approximately 410 degrees F. which is transferred from the defendant's tank truck into Republic Steel's vat. This transfer is accomplished by means of a flexible pipe, one end of which is connected to

a valve on the tank truck and the other end to a valve on an electrically operated pump maintained by Republic Steel which in turn is connected to the vat.

On the day in question, after the connection between defendant's tank truck and Republic Steel's pump had been completed, the plaintiff's co-employee turned the switch on Republic Steel's pump in the wrong direction, causing the asphalt in the vat to be pumped through the pipe towards the truck instead of from the truck to the vat as was intended. At this time the defendant's driver had not opened the valve on the tank truck, and the pressure in the pipe caused the pipe to rupture. The plaintiff suffered injury from the hot asphalt spewing from the ruptured pipe, and brings this action to recover damages for personal injury.

The pertinent allegations of the complaint are summarized as follows:

1. Defendant's employee was sent to deliver hot asphalt by truck to plaintiff's employer, Republic Steel Corporation (hereinafter referred to as Republic).

2. The customary procedure for delivering hot asphalt from defendant's truck to Republic consisted of four steps in sequence as follows:

a. Defendant's driver would hook one end of a rubber pipe to an outlet on defendant's truck. A Republic employee would hook the other end of the rubber pipe to an outlet on a Republic pump.

b. A Republic employee would open a valve on the Republic pump and notify defendant's driver.

c. Defendant's driver would then open an outlet valve on the truck.

d. A Republic employee would then throw an electric switch on the Republic pump to pump asphalt out of the truck into a vat at Republic.

3. The defendant's driver on the occasion in question either knew or should have known that the foregoing steps were customary delivery procedure.

4. On the specific occasion in question, after the delivery pipe was attached to both the truck and the pump, plaintiff's co-employee was led by defendant's employee to believe that the truck valve had been opened, but defendant's employee failed to open the outlet valve on the truck, and failed to warn plaintiff's co-employee not to start the pump. Thereafter plaintiff's co-employee threw the switch on the Republic pump in the

wrong direction causing hot asphalt to be pumped out of the Republic vat toward the defendant's truck instead of out of the defendant's truck toward the Republic vat. Defendant's driver failed to open the truck valve after the pump had been started even though he knew or in the exercise of due care should have known that such failure would result in the pipes bursting and spewing hot asphalt over the area wherein the plaintiff was positioned. The negligence of the defendant's driver was the direct and proximate cause of the plaintiff's injuries as alleged in the complaint.

The defendant demurred to the complaint for failure to state a cause of action. Judge Hasty overruled the demurrer, and defendant applied to this Court for Writ of *Certiorari* which we issued.

Berry and Bledsoe by C. Ralph Kinsey, Jr., for plaintiff appellee.

Kennedy, Covington, Lobdell and Hickman by Charles V. Tompkins, Jr., for defendant appellant.

BROCK, J. Plaintiff seeks to hold defendant liable upon the theory that defendant's driver failed to open the valve on the tank truck, and that plaintiff's co-employee was led by defendant's driver to believe the valve had been opened. However, the complaint is silent as to the manner in which defendant's driver led plaintiff's co-employee to believe the truck valve was open other than to allege that the driver climbed up on the truck to a position from which he could open the valve. There is no allegation of how long the driver was in position to open the valve, or of any act on his part that would lead plaintiff's co-employee to believe the valve had been opened.

Nevertheless, assuming, *arguendo,* that the driver was negligent in taking his time in opening the valve on the truck, there is no allegation that the driver knew the switch had been thrown in either direction on the pump by plaintiff's co-employee. There is no allegation that the driver knew that the switch could be thrown on Republic's pump so as to cause asphalt to be pumped from the vat towards the truck, and no allegation that the driver knew the switch had been so thrown. There is no allegation from which it can be reasonably deduced that the defendant's driver could reasonably foresee that plaintiff's co-employee would throw the switch on Republic's pump in the wrong direction.

Only negligence which proximately causes or contributes to the accident is of legal import. And foreseeability is an essential element of proximate cause. *Williams v. Boulerice,* 268 N.C. 62, 149 S.E. 2d 590. Even the fact that the injury would not have occurred

but for an asserted act of negligence does not constitute such act a proximate cause of the injury unless consequences of a generally injurious nature were reasonably foreseeable as a result of such act. *Ratliff v. Power Co.*, 268 N.C. 605, 151 S.E. 2d 641.

We hold that the complaint in this action fails to allege facts sufficient to withstand the demurrer.

Reversed.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. WILLIAM H. HAMM.

(Filed 19 June 1968.)

Robbery § 5; Criminal Law § 115—

In a prosecution for robbery the court must of its own motion submit the issue of defendant's guilt of assault when there is evidence to support such a finding, even though the State contends solely for conviction of robbery and the defendant contends solely for complete acquittal, and error in failing to so charge is not cured by a verdict convicting defendant of armed robbery as charged.

APPEAL by defendant from *Bailey, J.*, 27 November 1967 Session, DURHAM Superior Court.

Defendant was charged in a bill of indictment with the offense of armed robbery under G.S. 14-87. Upon arraignment the defendant pleaded not guilty, and was tried before a jury upon the charge contained in the bill of indictment.

The State's evidence tended to show that the prosecuting witness, Mr. James King, drove to a place in the city of Durham known as Shaw Markham's for the purpose of buying a beer; that the defendant was at Markham's when King arrived; that King purchased a beer for himself and also one for the defendant; that as King started to leave the defendant grabbed him by the collar, put a knife to his throat, and tried to take his wallet; that King pulled away from defendant and was going down the steps when defendant kicked him down the steps and onto the ground; that defendant jumped on King and cut his throat, but King pulled away again and started for his car; that defendant caught King at the car, held the knife to his throat and took his wallet containing about fifteen dollars; that defendant then told King to get out of there because he didn't like a white man anyway, and threatened him again with the

knife while he was trying to start his car; that King went directly to the police station and from there to the hospital.

The defendant's evidence tended to show that the defendant was at Shaw Markham's place with his wife and a large group of people when King came in; that King bought whiskey and beer; that defendant and another took a drink with King; that King whistled at defendant's wife and defendant remonstrated with him about his conduct; that as defendant's wife was leaving, King made a remark about her and defendant again remonstrated with him; that King made a smart remark to defendant and King pulled a knife from his pocket; that defendant grabbed King's hand and told him to turn the knife loose; that defendant also had a knife and that he may have cut King in the struggle; that if he cut him, he didn't mean to; that he did not take King's wallet or anything else from him.

From a verdict of guilty as charged, and judgment of imprisonment, the defendant appealed.

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

Standish S. Howe for defendant appellant.

BROCK, J. The trial judge instructed the jury that it might return any one of three verdicts: *i.e.,* guilty of armed robbery, guilty of common law robbery, or not guilty. The defendant assigns as error that the trial judge failed to submit the case to the jury upon two additional possible verdicts of guilty of lesser degree offenses: *i.e.,* guilty of assault with a deadly weapon, or guilty of assault. The defendant does not argue that the trial judge should not have submitted the case to the jury upon the possible verdicts of guilty of armed robbery, and guilty of common law robbery; but he urges that in addition thereto he was entitled to have the possible verdicts of assault with a deadly weapon, and assault submitted to the jury.

The Attorney General concedes error in this respect, and we agree.

The trial judge correctly instructed the jury that it could return a verdict of guilty of armed robbery or common law robbery, or not guilty. These issues were raised by the evidence for the State. However, the two additional issues of assault with a deadly weapon, and assault, were raised by the defendant's evidence.

It may be that the State contended solely for conviction of armed robbery and the defendant contended solely for complete acquittal; nevertheless, when there is evidence from the State or the defendant tending to support a verdict of an included crime of less

degree than that charged, the trial judge must instruct the jury that it is permissible for them to reach such a verdict if it accords with their findings from the evidence. G.S. 15-169; *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545. Where there is evidence tending to show the commission of a lesser included offense, the court, of its own motion, should submit such offense to the jury for its determination. *State v. Wenrich,* 251 N.C. 460, 111 S.E. 2d 582.

In this case the evidence was such that, depending upon what the jury found the facts to be, the jury might have returned a verdict of guilty of armed robbery, common law robbery, assault with a deadly weapon, simple assault, or not guilty. The fact that the jury found the defendant guilty of armed robbery as charged does not cure the error of the failure to submit the case with each of the alternative verdicts.

New trial.

MALLARD, C.J., and PARKER, J., concur.

JAMES W. WILLIAMS v. ANNIE ELIZABETH PENDER WILLIAMS.

(Filed 19 June 1968.)

Appeal and Error § 39—

Where appellant dockets record on appeal in the Court of Appeals 153 days after the date of the judgment appealed from, which is 63 days after the time prescribed by Rule 5, and in addition fails to file a brief, the appeal will be dismissed for noncompliance with the rules of the Court upon motion of the appellee.

APPEAL by defendant from *Clark, J.,* 9 October 1967 Civil Session of CUMBERLAND Superior Court.

This is a civil action filed 29 July 1965 in the Superior Court of Cumberland County for an absolute divorce on the grounds of one year's separation. The defendant filed answer denying the separation and a further answer and counterclaim in which she alleged that the plaintiff, without legal provocation or justification, had abandoned and separated himself from the defendant, had been guilty of acts of misconduct, and had failed to provide defendant with necessary subsistence. Defendant prayed that plaintiff's action for absolute divorce be dismissed and for a judgment for alimony without divorce pursuant to G.S. 50-16. Plaintiff filed a reply, in which he denied the material allegations of defendant's counteraction. At the

trial, the jury answered all issues in favor of the plaintiff and against the defendant. From judgment of absolute divorce, defendant appealed.

Thomas H. Williams, Attorney for plaintiff appellee.
Marion C. George, Jr., Attorney for defendant appellant.

PARKER, J. The judgment here appealed from was entered on 11 October 1967. One hundred and fifty-three days thereafter, on 12 March 1968, appellant filed in this court what purports to be a statement of the case on appeal. No brief has been filed by the appellant.

Upon the regular call of the district to which this case belongs, appellee in apt time as provided by Rule 16 of the Rules of Practice of this court moved to dismiss this appeal for failure of appellant to comply with the rules of this court in perfecting her appeal.

Rule 5 of the Rules of Practice of this court provides that if the record on appeal is not docketed within 90 days after the date of the judgment appealed from, the case may be dismissed; provided, the trial tribunal may, for good cause, extend the time not exceeding 60 days. The record on appeal was docketed in this court 153 days after the date of the judgment appealed from, and 63 days after the time prescribed by Rule 5 within which the record on appeal should have been docketed. In addition, appellant has filed no brief with this court.

On 6 June 1968 appellant filed with this court a petition for writ of *certiorari*. No sufficient grounds were alleged to justify granting such writ as a substitute for an appeal, and the same is being this day denied.

Appellee's motion to dismiss this appeal for noncompliance with the rules of this court in perfecting the appeal is allowed and this appeal is

Dismissed.

MALLARD, C.J., and BROCK, J., concur.

STATE v. JIM HAMMONDS.

(Filed 19 June 1968.)

Assault and Battery § 14—

Evidence in this case *is held* sufficient to support a conviction of assault in violation of G.S. 14-34.

APPEAL from *McKinnon, J.*, Regular October-November 1967 Session, ROBESON Superior Court.

The defendant was charged in a valid warrant with the violation of G.S. 14-34, an assault on 28 September 1967 on Magnolia Deese by unlawfully and wilfully pointing a pistol at her. The defendant entered a plea of not guilty in the District Court Division of the General Court of Justice, and from a finding of guilty in that Court, he appealed to the Superior Court.

In the Superior Court the defendant, through his privately-employed attorney, entered a plea of not guilty and a jury returned a verdict finding the defendant guilty as charged.

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

N. L. Britt, Attorney for defendant appellant.

CAMPBELL, J. The evidence reveals that on 28 September 1967 the defendant went to the home of his aunt, Magnolia Deese, for the purpose of getting his ten year old daughter Marlene. While at the home, the defendant threatened to kill Magnolia Deese with a pistol and, likewise, threatened to kill other members of the family.

The evidence is replete to the effect that the defendant did commit an assault upon Magnolia Deese by pointing a pistol at her. The record reveals no error in the trial.

Affirmed.

BRITT and MORRIS, JJ., concur.

BETTY HARLESS v. JOYCE ANN CHURCH FLYNN (AMENDED SUBSEQUENT TO THE MARRIAGE OF THE DEFENDANT TO READ JOYCE ANN KIMBERLIN).

(Filed 10 July 1968.)

1. Master and Servant § 86—

An employee who sustains an injury arising out of and in the course of employment, caused by the negligence of a fellow employee who was act-

ing within the course of employment, G.S. 97-2(6), may not maintain an action at common law against the negligent employee.

2. Master and Servant § 53—

In order to be compensable under the Workmen's Compensation Act, an injury must arise out of and in the course of employment.

3. Same—

The phrase "arising out of" has reference to the origin or cause of the accident, and where any reasonable relationship to the employment exists, or employment is a contributory cause, the court is justified in upholding the award as arising out of employment.

4. Same—

An accident has a reasonable relationship to the employment when it is the result of a risk or hazard incident to the employment.

5. Same—

For an accident to arise out of the employment there must be some causal connection between the injury and the employment, and when an injury cannot fairly be traced to the employment as a contributing proximate cause, or if it comes from a hazard to which the employee would have been equally exposed apart from the employment or from a hazard common to others, it does not arise out of the employment.

6. Same—

The words "in the course of" have reference to the time, place and circumstances under which the accident occurred, and an injury occurs in the course of employment where there is evidence that it occurred during the hours of, and at the place of, employment while the claimant was actually in the performance of the duties of the employment.

7. Same—

With respect to time, the course of employment begins a reasonable time before actual work begins, continues for a reasonable time after work ends, and includes intervals during the work day for rest and refreshment.

8. Same—

With respect to place the course of employment includes the premises of the employer.

9. Same—

With respect to circumstances, injuries within the course of employment include those sustained where the employee is engaged in activity which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business.

10. Master and Servant § 58—

In tending to his personal physical needs, an employee is indirectly benefiting his employer.

11. Master and Servant § 54—

The risk of injury in automobile mishaps is one that is obviously common to the public at large, yet, where large numbers of employees drive

automobiles to their place of employment and provision is made for parking on the employer's premises, it is clear that the employment itself has created conditions in which the risk of automobile-connected injury is different in kind and possibly greater in degree than that confronted by the public at large.

12. Master and Servant §§ 57, 86— Employee's injury on parking lot of employer during lunch hour is compensable under Compensation Act.

Evidence that during the lunch hour employees were free to go anywhere they pleased, that plaintiff and defendant, who were fellow employees, prepared to leave their employer's parking lot to eat lunch somewhere off the employer's premises, that the vehicle in which plaintiff was a passenger was struck by the vehicle operated by defendant while both were still upon the parking lot, and that the plaintiff was injured, *is held* sufficient to support findings (1) that the plaintiff was injured by accident arising out of and in the course of her employment within the meaning of G.S. 97-2(6) and (2) that the plaintiff is barred from maintaining a common law action against the defendant.

APPEAL by defendant from *Martin, Robert M., J.,* 8 January 1968 Session, DAVIDSON Superior Court.

On 25 January 1967 plaintiff and defendant were employees at the Henry T. Link Corporation plant in Lexington, Davidson County, North Carolina. Link Corporation maintained upon its premises a parking lot where its employees and guests parked their automobiles. On 25 January 1967 plaintiff and defendant were preparing to leave their employer's parking lot to go to eat lunch at some place off the employer's premises. The vehicle in which plaintiff was a passenger was struck by the vehicle operated by defendant, while both were still upon the employer's premises. Plaintiff was injured and brings this common law action against the defendant for damages, alleging negligence in the operation of defendant's vehicle.

By her further answers, the defendant alleges that the plaintiff is barred from proceeding in this action because the accident arose out of and in the course of her employment and is covered under the Workmen's Compensation Act. The plea in bar was heard by Olive, J., at the 17 July 1967 Session, Davidson Superior Court, upon stipulated facts as follows:

"(a) The plaintiff and the defendant were on the 25th day of January, 1967, both employed at the furniture manufacturing plant of the Henry T. Link Corporation near Lexington, and on said date, both the plaintiff and the defendant began their work in the manufacturing plant of the Henry T. Link Corporation at the regular time to begin the working day, which was 7:30 A.M.

"(b) The Henry T. Link Corporation premises consist *(sic)* of a tract of land located a short distance south of the City of Lexington, and on this tract of land was located a building approximately 1,000 feet in length and located on the east side of this building and about 40 feet from the building at a lower level was a cleared and improved but unpaved strip of land approximately 60 feet wide which extended the entire length of the building. This strip was maintained by the Henry T. Link Corporation for the use of its employees and guests as a parking area for automobiles which were normally and customarily parked perpendicular to each side of the strip in two single rows with the vacant area in the middle of the strip being left and used for driving into and out of the parking area. Two or more flights of steps led down from the manufacturing plant to the parking area, and a gate was located on the southern end of the parking area leading to the road which provided access to the manufacturing plant of the Henry T. Link Corporation. This road was a public road maintained by the State Highway Commission. The plaintiff customarily rode to her place of work with Cliff Dameron who parked his car in the area described above, and the defendant customarily drove her car to work and parked it in this area also.

"(c) The duties of both the plaintiff and the defendant required them to work within the building of the Henry T. Link Corporation during the work period, and they remained at their job positions within the building until about 12:00 Noon on the 25th day of January, 1967.

"(d) The regular work schedule followed by both the plaintiff and the defendant was from 7:30 A.M. to 12:00 Noon, and at 12:00 Noon they were allowed a one-hour lunch period, after which they were required to return and work until 4:30 P.M. On the 25th day of January, 1967, both the plaintiff and the defendant were at their normal job positions when the lunch whistle blew, signifying the beginning of the lunch period. During this time, they were free to eat lunch on the premises or leave the premises and go away for the purpose of obtaining lunch. Some of the employees customarily ate on the premises, while others went to places away from the premises, and some of those who left the premises went in private passenger cars.

"(e) At about 12:00 Noon the 25th day of January, 1967, when the noon lunch whistle sounded, the plaintiff and the defendant each left their respective places of work within the

plant, and the plaintiff, without any appreciable delay, entered the automobile of Cliff Dameron while it was within the aforesaid strip of land extending along the side of the building for the purpose of going to eat lunch.

"(f) At 12:00 Noon, upon the sounding of the lunch whistle, the defendant went directly from her place of work within the plant to the place where her car was parked beside the plant in the aforesaid strip of land upon the premises of the Henry T. Link Corporation in order to leave the premises and go eat lunch at some place away from the premises.

"(g) Without any appreciable delay, the car in which the plaintiff was riding proceeded in a southern direction along the center of the aforesaid strip of land toward the gate which was located on the southern end of the strip of land, and the defendant also proceeded in her car along the strip of land toward the gate behind the car in which the plaintiff was riding.

"(h) When the plaintiff's car had proceeded about 200 feet and was still approximately 300 feet north of the gate leading to the strip of land and was traveling toward said gate, and defendant's car was also traveling in a southern direction toward said gate, a collision occurred between the two vehicles, and at this time both vehicles were still located on the aforesaid strip of land of the Henry T. Link Corporation and were in the process of proceeding toward the gate and were approximately 300 feet away from the gate.

"(i) The Henry T. Link Corporation is a corporation employing five or more employees and the plaintiff, the defendant, and the Henry T. Link Corporation were on the 25th day of January, 1967, subject to and bound by the provisions of the North Carolina Workmen's Compensation Act, which is Chapter 97 of the General Statutes of North Carolina, insofar as said Act was applicable, and the Henry T. Link Corporation had secured the payment of compensation to its employees as provided by said Workmen's Compensation Act."

Judge Olive entered an order on 22 July 1967 overruling defendant's plea in bar. The defendant excepted to the entry of this order.

The case came on for further hearing before Judge Martin at the 8 January 1968 Session upon stipulations as set out in Judge Martin's judgment. Upon the stipulations Judge Martin entered judgment as follows:

"This cause coming on to be heard before The Honorable

Robert M. Martin, Judge Presiding at the January 8, 1968, Civil Session of the Superior Court of Davidson County; and it appearing to the Court that the defendant has filed an Answer in this action containing a plea in bar, and that the plea in bar was heard before the Honorable Hubert E. Olive, Judge Presiding at the July 17, 1967, Civil Session of the Superior Court of Davidson County upon an agreed statement of facts pursuant to a stipulation of the parties and that a judgment was entered overruling the plea in bar; that the defendant duly excepted to the entry of said judgment; and that this cause has come on for trial upon the issues of negligence and damages. The parties have agreed to waive a trial by jury as to these issues, and have stipulated that the Court might determine said issues without the intervention of a jury; and it further appearing that the parties have, subject to the limitations and reservations hereinafter contained, agreed that the issues which arise on the pleadings other than the defendant's plea in bar might be answered as follows:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the Complaint?

"ANSWER: Yes.

"2. In what amount, if any, has the plaintiff been damaged as a result of the injuries she sustained?

"ANSWER: $2,750.00.

"It has been expressly agreed between the parties, and it is ordered by the Court that the consent of the defendant to the answers to the above issues shall not constitute a waiver of her right to appeal from the judgment of the Court previously entered upon the plea in bar asserted in the answer of the defendant filed in this cause and that the answers to said issues shall have the same effect as if this action had been tried before a jury in an adversary proceeding in which the defendant had denied that she was negligent and had denied that the plaintiff was entitled to recover any amount in damages and had offered evidence in support of her contentions and the jury had answered the issues as hereinabove set forth.

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment against the defendant in the amount of $2,750.00 and that the costs of this action shall be paid by the defendant."

The defendant appealed, assigning as error the entry of Judge Olive's order overruling defendant's plea in bar.

Robert L. Grubb for plaintiff appellee.

Walser, Brinkley, Walser and McGirt by Walter F. Brinkley for defendant appellant.

BROCK, J. The basic question for determination by this Court has been succinctly pointed up by the Record on Appeal and the briefs as follows:

> Does G.S., Chap. 97 (The North Carolina Workmen's Compensation Act) bar a common law action by an employee against a fellow employee for damages negligently inflicted in an automobile accident in the parking lot maintained by their employer for use by the employees, when both employees were in process of leaving the employer's parking lot during the lunch hour, with the acquiescence of the employer, to eat lunch at some place away from the employer's premises?

The answer to this question will be YES if the plaintiff's alleged injuries were injuries by accident *arising out of* and *in the course of* her employment within the meaning of G.S. 97-2(6). This is so because an employee who sustains an "injury arising out of and in the course of . . . employment," caused by the negligence of a fellow employee who was acting within "the course of employment," as that term is used in G.S. 97-2(6), may not maintain an action at common law against the negligent employee. *Altman v. Sanders,* 267 N.C. 158, 148 S.E. 2d 21. Here, according to the stipulated facts, the time, place and circumstances of the collision placed the plaintiff and defendant in identical positions with respect to their employment. Thus, if the plaintiff was within the course of her employment at the time of the collision, the defendant was also.

It seems clear that any injuries sustained by the plaintiff in the collision were injuries "by accident." The remaining inquiry is whether the accident was one *arising out of* and *in the course of* her employment.

In numerous decisions, the Supreme Court of North Carolina has had occasion to consider the application of these words to particular fact situations. It has made clear that the phrase encompasses two separate and distinct concepts — "out of" and "in the course of" — both of which must be satisfied in order for particular injuries to be compensable under the Act. *Poteete v. Pyrophyllite,* 240 N.C. 561, 82 S.E. 2d 693; *Conrad v. Foundry Company,* 198 N.C. 723, 153 S.E. 266.

From the briefs, it is apparent the parties were of the opinion that the present controversy could best be determined by reference

to North Carolina cases involving accidents occurring in "mealtime" and "coming and going" situations. Clearly, those cases are pertinent here, but only because they apply general principles found in other situations. There is nothing special about the "mealtime" and "coming and going" cases, and they can best be understood by applying to them the general principles of other cases.

The phrase *arising out of* has reference to the origin or cause of the accident. *Clark v. Burton Lines,* 272 N.C. 433, 158 S.E. 2d 569. But this is not to say that the accident must have been caused by the employment. "Taking the words themselves, one is first struck by the fact that in the 'arising' phrase the function of employment is *passive* while in the 'caused by' phrase it is *active.* When one speaks of an event 'arising out of employment,' the initiative, the moving force, is something other than the employment; the employment is thought of more as a *condition* out of which the event arises than as the force producing the event in affirmative fashion." 1 *Larson,* Workmen's Compensation Law, § 6.50, p. 45. The North Carolina Supreme Court has similarly stated the connection between the employment and the accident: "Where any *reasonable relationship* to the employment exists, or employment is a contributory cause, the court is justified in upholding the award as 'arising out of employment.'" *Allred v. Allred-Gardner, Inc.,* 253 N.C. 554, 557, 117 S.E. 2d 476, 479. (Emphasis added.)

An accident has a reasonable relationship to the employment when it is the result of a risk or hazard incident to the employment. An injury arises out of the employment when it comes from the work the employee is to do, or out of the service he is to perform, or as a natural result of one of the risks of the employment; the injury must spring from the employment or have its origin therein. *Bolling v. Belk-White Co.,* 228 N.C. 749, 46 S.E. 2d 838; *Taylor v. Twin City Club,* 260 N.C. 435, 132 S.E. 2d 865. For an accident to arise out of the employment there must be some causal connection between the injury and the employment. When an injury cannot fairly be traced to the employment as a contributing proximate cause, or if it comes from a hazard to which the employee would have been equally exposed apart from the employment, or from the hazard common to others, it does not arise out of the employment. *Cole v. Guilford County,* 259 N.C. 724, 131 S.E. 2d 308.

The words *in the course of* have reference to the "time, place and circumstances" under which the accident occurred. *Clark v. Burton Lines, supra.* Clearly, a conclusion that the injury occurred in the course of employment is required where there is evidence that it occurred during the hours of employment and at the place of em-

ployment while the claimant was actually in the performance of the duties of the employment. *Withers v. Black,* 230 N.C. 428, 53 S.E. 2d 668; *Alford v. Chevrolet Co.,* 246 N.C. 214, 97 S.E. 2d 869.

With respect to *time,* the course of employment begins a reasonable time before actual work begins, *Altman v. Sanders, supra,* and continues for a reasonable time after work ends, *Maurer v. Salem Co.,* 266 N.C. 381, 146 S.E. 2d 432, and includes intervals during the work day for rest and refreshment. *Rewis v. Insurance Co.,* 226 N.C. 325, 38 S.E. 2d 97; *Pickard v. Plaid Mills,* 213 N.C. 28, 195 S.E. 28.

With respect to *place,* the course of employment includes the premises of the employer. "Probably, as a general rule, employment may be said to begin when the employee reaches the entrance to the employer's premises where the work is to be done; but it is clear that in some cases the rule extends to include adjacent premises used by the employee as a means of ingress and egress with the express or implied consent of the employer." *Bass v. Mecklenburg County,* 258 N.C. 226, 233, 128 S.E. 2d 570, 575; quoting with approval from *Bountiful Brick Co. v. Giles,* 276 U.S. 154, 158, 72 L. Ed. 507, 509. "It is usually held that an injury on a parking lot owned or maintained by the employer for his employees is an injury on the employer's premises." *Davis v. Manufacturing Co.,* 249 N.C. 543, 545, 107 S.E. 2d 102, 103; quoted and applied in *Maurer v. Salem Co., supra.*

With respect to *circumstances,* injuries within the course of employment include those sustained while "the employee is doing what a man so employed may reasonably do within a time which he is employed and at a place where he may reasonably be during that time to do that thing." *Conrad v. Foundry Company, supra,* at 727, 153 S.E. at 269; quoted with approval in *Clark v. Burton Lines, supra.* Thus, where the employee is engaged in activity which he is authorized to undertake and which is calculated to further, *directly or indirectly* the employer's business, the circumstances are such as to be within the course of employment. *Perry v. Bakeries Co.,* 262 N.C. 272, 136 S.E. 2d 643. Therefore, the fact that the employee is not engaged in the actual performance of the duties of his job does not preclude an accident from being one within the course of employment. *Brown v. Aluminum Co.,* 224 N.C. 766, 32 S.E. 2d 320. And an employee may be in the course of his employment when he is on the way to the place of his duties, *Altman v. Sanders, supra,* leaving the place of his duties at the end of the day, *Maurer v. Salem Co., supra,* or leaving upon learning that there was no work for him to do. *Morgan v. Cloth Mills,* 207 N.C. 317, 177 S.E. 165.

In tending to his personal physical needs, an employee is indi-

rectly benefiting his employer. Therefore, the course of employment continues when the employee goes to the washroom, *Rewis v. Insurance Co., supra,* takes a smoke break, *Fox v. Mills, Inc.,* 225 N.C. 580, 35 S.E. 2d 869, takes a break to partake of refreshment, *Pickard v. Plaid Mills, supra,* goes on a personal errand involving temporary absence from his post of duty, *Bellamy v. Manufacturing Co.,* 200 N.C. 676, 158 S.E. 246, voluntarily leaves his post to assist another employee, *Riddick v. Cedar Works,* 227 N.C. 647, 43 S.E. 2d 850.

Thus, it is the conjunction of all three of these factors — time, place and circumstances — that brings a particular accident within the concept of *course of* employment. If, in addition to this, the accident arose *out of* employment, then any injury resulting therefrom is compensable under the Act.

The "mealtime" and "coming and going" cases, traditionally classified as two particular types of situations, should be treated as any other case by applying the foregoing general principles.

The two "mealtime" cases discussed by the parties in their briefs are *Horn v. Furniture Co.,* 245 N.C. 173, 95 S.E. 2d 521; and *Matthews v. Carolina Standard Corp.,* 232 N.C. 229, 60 S.E. 2d 93. In *Horn,* the claimant was injured during his lunch break when hit by an automobile as he was crossing from the plant site to the company parking lot on the other side of a state highway. The Court denied compensation on the ground that the injury did not arise out of and in the course of employment, relying on these facts: (1) The accident occurred off the premises of the employer; (2) The claimant was engaged in the activity of crossing a state highway to eat his lunch; and (3) The risk of the hazards of the highway were those common to the general public. In *Matthews,* compensation was denied upon the ground that the injury and death of the plaintiff's decedent did not arise out of his employment. The injuries occurred when, following the sounding of the lunch whistle, the decedent attempted to jump onto the back of a truck moving across the employer's premises. Noting that the decedent had no apparent reason for getting onto the truck, the Court held that the injury did not arise out of the employment since it "did not result from a hazard incident to his employment." *Id.* at 234, 60 S.E. 2d at 96. Far from precluding recovery for mealtime injuries, the *Matthews* case makes it clear that such recovery may be had, for the Court therein conceded that the decedent was in the course of his employment. In *Moore v. Stone Co.,* 242 N.C. 647, 89 S.E. 2d 253, a case not discussed by the parties in their briefs, the Supreme Court, in a *per curiam* decision, affirmed a denial of compensation upon the ground

that the injury did not arise out of the employment. The claimant was injured while on his lunch break when he, "out of curiosity or for reasons unknown, wired the blasting machine . . . and in his attempt to set off a single dynamite cap ignorantly and accidentally detonated the 300 dynamite caps beside the doghouse resulting in a terrific explosion and in the injuries which he sustained." *Id.* at 648, 89 S.E. 2d at 254.

It seems, therefore, that these three cases involving injuries during the lunch period are not properly labeled "mealtime" cases, for the element of time is merely incidental, not decisive. In *Horn*, place, activity and the nature of the risk out of which the injury arose were the crucial factors. In *Matthews* and *Moore*, the nature of the risk and the activity in which the employee was engaged were determinative. Nothing in any of these cases suggests that mealtime, as a time, or the activity of eating lunch or preparing to eat lunch, as a circumstance, are not within the course of employment. To the contrary, the *Matthews* case makes it clear that mealtime is within the course of employment, even where such time is completely free for the employees: "The work hours were 8 to 4:45, except that from 12 noon to 12:45 work was stopped for lunch. During this time employees were not paid, and were free to eat their lunch there or go anywhere they wished. Most of them ate their lunch on the premises, some went home for lunch and some went to a store a quarter of a mile away." *Id.* at 231, 60 S.E. 2d at 94. In light of these facts, the Court conceded that the course of employment requisite was satisfied. Nothing in *Horn* or *Moore* suggests a contrary view.

The basic rule disallowing recovery for injuries sustained in going to and coming from work is well established by many decisions in this jurisdiction. See cases collected in 5 Strong, N. C. Index 2d, Master and Servant § 62. There are certain clearly settled exceptions to the rule, however, including one for injuries sustained *on the premises* of the employer. See *Altman v. Sanders, supra; Maurer v. Salem Co., supra; Davis v. Manufacturing Co., supra.* These cases make it clear that the disallowance of recovery in the usual coming and going case is based, not upon the ground that the circumstances (*i.e.*, the employee's going to or leaving work) are not within the course of employment, but upon considerations of time and place. In addition, the question of *arising out of* is not satisfied in many of these cases, especially where the injury is due to the hazards of the public highway — risks common to the general public. Thus, recovery was denied where the injury was sustained in a highway accident, away from the premises, some five hours after the employee left work. *Alford v. Chevrolet Co., supra.*

These cases clearly show that while recovery may be denied where an injury is sustained while the employee is going to or coming from work, such denial is *not* upon the ground that going and coming are circumstances not within the course of employment. To the contrary, the cases clearly show that such activity is within the course of employment if the time and place requisites are satisfied, and that injuries sustained while engaged therein are compensable if the injury arose out of employment: *i.e.*, that they were due to an employment-connected risk. *Altman v. Sanders, supra; Maurer v. Salem Co., supra; Bass v. Mecklenburg County, supra; Davis v. Manufacturing Co., supra; Morgan v. Cloth Mills, supra; Gordon v. Chair Co.*, 205 N.C. 739, 172 S.E. 485.

The plaintiff here was injured in a collision between two automobiles operated by fellow employees in the company parking lot. Is the hazard, or risk, of injury under such circumstances one that is peculiar to the employment? The risk of injury in automobile mishaps is one that is obviously common to the public at large. *Horn v. Furniture Co., supra.* Yet, where large numbers of employees drive automobiles to their places of employment and provision is made for parking on the employer's premises, it is clear that the employment itself has created conditions in which the risk of automobile-connected injuries is different in kind and possibly greater in degree than that confronted by the public at large. The risk may be increased by a large number of automobiles, concentrated in a confined space, coming into and going out of the lot at approximately the same times, operated by employees who may be preoccupied with thoughts of work to be begun, or exhausted from work completed and anxious to get to their respective homes or other places of relaxation and refreshment. Thus, the Supreme Court has held that injuries sustained in automobile mishaps in company parking lots arise out of employment. *Altman v. Sanders, supra; Maurer v. Salem Co., supra.* This would seem to be the kind of hazard from which the Workmen's Compensation Act was designed to protect employees. "The philosophy which supports the Workmen's Compensation Act is that the wear and tear of human beings in modern industry should be charged to the industry, just as the wear and tear of machinery has always been charged." *Vause v. Equipment Co.*, 233 N.C. 88, 92, 63 S.E. 2d 173, 176. It clearly appears that plaintiff was injured by accident *arising out of* her employment.

If, as alleged in the plaintiff's complaint, her injury was due to the negligence of the defendant, the above conclusion is bolstered by that fact. "An injury suffered by an employee while engaged in his master's business within the scope of his employment proximately

resulting from the negligence of fellow employees is, as to the employee, an 'accident' arising out of and in the course of his employment." *Tscheiller v. Weaving Co.*, 214 N.C. 449, 199 S.E. 623.

The plaintiff was injured in the company parking lot, shortly after the whistle signaled the beginning of a one-hour lunch period during which employees were free to go anywhere they pleased. She was a passenger in an automobile which was being driven toward the parking lot exit for the purpose of taking its occupants off the premises for lunch. The plaintiff was, therefore, injured in the course of her employment with respect to *time, place* and *circumstances*. *Matthews v. Carolina Standard Corp., supra.* Therefore, the plaintiff's injuries arose *in the course of* her employment within the meaning of G.S. 97-2(6).

The view that on-premises mealtime injuries may be within the coverage of Workmen's Compensation provisions, depending upon the circumstances of the injury, finds support among legal writers and in the decisions of other jurisdictions. See 1 *Larson,* Workmen's Compensation Law § 1550-1554 (1966); 7 *Schneider,* Workmen's Compensation Text § 1632-1635 (3d ed. 1950); 58 Am. Jur., Workmen's Compensation § 228 (1962); 99 C.J.S., Workmen's Compensation § 240 (1958); annots., Compensation For Injuries During Lunch Hours On Employer's Premises, 6 A.L.R. 1151 (1920); Liability Under Workmen's Compensation Acts For Injuries Occurring During Lunch Or Meal Period, 26 N.C.C.A. (NS) 271 (1950), 1 N.C.C.A. (NS) 791 (1937).

We hold therefore that under the allegations of the complaint and the stipulated facts, the plaintiff is barred by G.S. Chap. 97 from proceeding in this common law action against the defendant. It follows that in our opinion Judge Olive erred in overruling defendant's plea in bar, and that the judgment entered by Judge Martin must be vacated. Defendant's plea in bar should have been sustained, and plaintiff's action dismissed.

The judgment awarding damages to the plaintiff in this action, and the verdict upon which the judgment is based, are vacated and set aside; and this action is dismissed.

Reversed and dismissed.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. JOHN McCABE, JOSEPH WAYNE LOFTEN, JACK GEORGE PERLMUTTER AND FRED PAUL THOMPSON

AND

STATE v. JOSEPH WAYNE LOFTEN AND FRED PAUL THOMPSON.

(Filed 10 July 1968.)

1. Criminal Law § 42—

In a prosecution for armed robbery, defendant's motion to suppress the admission of clothing identified as that worn by defendant at the time of the robbery *is held* properly denied without a preliminary investigation in the absence of the jury.

2. Criminal Law § 9—

The mere presence of a person at the scene of a crime does not make him a principal even though he makes no effort to prevent the commission of the crime and even though he may approve of its commission and intend to assist if his aid should become necessary.

3. Same—

A person aids or abets in the commission of a crime when he shares the criminal intent and by word or deed gives encouragement to the actual perpetrator or by his conduct makes it known to such perpetrator that he is standing by to render assistance if necessary.

4. Same—

Circumstances to be considered in determining whether a person is guilty of aiding and abetting in the commission of a crime are the relationship of that person to the actual perpetrator, the motives tempting him to assist, his presence at the time and place of the crime, and his conduct before and after the crime.

5. Robbery § 4— Evidence held sufficient to be submitted to jury in robbery prosecution.

Evidence of the State tending to show that an automobile with four occupants parked near a finance company, that one defendant who was seated in the right front seat put a coin in the parking meter, that two defendants who were in the rear seat left and entered the finance company, that one of the defendants robbed the finance company at gunpoint while the other stood by, that these two defendants fled the finance company together and reentered the parked automobile, that the automobile with four occupants fled the scene with police officers in pursuit and was thereafter wrecked, with its occupants fleeing by foot, that the defendant who actually perpetrated the robbery surrendered at the scene of the wreck and the stolen money was found on his person, that the other three defendants were found hiding together under a nearby house, and that the two defendants who allegedly occupied the front seat of the getaway car had been seen together in the area of the robbery shortly before the robbery occurred, *is held* sufficient to be submitted to the jury as to the guilt of all four defendants of the crime of armed robbery.

6. Criminal Law § 166—

Assignments of error not brought forward in the brief are deemed abandoned.

7. Criminal Law § 92—

A motion for a separate trial is addressed to the discretion of the court, and no abuse of discretion is shown in the denial of such a motion where defendants are charged with committing the same offense as partners in crime.

8. Criminal Law § 162—

Where no objection is made at the trial to the introduction of evidence, an exception to the admissibility of the evidence will not be considered on appeal.

9. Indictment and Warrant § 13—

A motion for a bill of particulars is addressed to the discretion of the trial court, and no abuse of discretion is shown in the denial of such a motion where the State introduced no evidence which could have been a surprise to defendant.

10. Robbery § 5—

In a trial of four defendants for armed robbery, a statement by the court in its instructions to the jury that one defendant contends "that all he could be, if he is anything, would be an aider and abettor," will not be held for prejudicial error when considered with other portions of the charge to the effect that this defendant contended that he had nothing to do with the robbery and that the evidence was insufficient to show that he was an aider and abettor, and that by his plea of not guilty defendant denied the charges against him and all the evidence presented by the State.

APPEAL by defendants from *Crissman, J.*, 4 December 1967 Regular Criminal Session, GUILFORD Superior Court, Greensboro Division.

The defendants were charged in separate bills of indictment with armed robbery. Another defendant, Perlmutter, was charged, tried with these defendants and convicted, but as to him no appeal has been perfected. The cases were consolidated for trial. Since the evidence pertinent to the questions presented for decision is the same, all three appeals will be considered in this opinion.

The defendants did not testify nor present any evidence. The evidence for the State tends to show that defendant Perlmutter had a reservation to pick up a rental car on 27 June 1967 and did rent a 1966 Ford, four-door sedan bearing North Carolina license number 2757C about 11:30 on that day, to be returned the same day. Subsequently the rental agent saw Perlmutter with a "little short man" standing by a brown Cadillac bearing a Florida license in front of the O'Henry Hotel, where the rental office was located. Thompson and Loften were seen together by a police officer about noon of that day. They were at the intersection of Cedar Street and Friendly Street walking westerly on Friendly Street. At approximately 2:30 that afternoon the Ford pulled into a parking space on Elm Street

at the corner of North Elm and West Market, in the last position headed south. The occupant seated on the right side of the front seat, later identified as Loften, got out and put a coin in the parking meter. The occupants of the rear seat, later identified as Perlmutter and McCabe, got out and walked in a northerly direction on Elm Street and entered the office of the Local Finance Company, located at 121 North Elm Street. Perlmutter pulled a gun and advised the employee "this is a holdup". He told her not to try anything funny and she wouldn't get hurt. He asked for the keys, and either he or McCabe locked the front door. Perlmutter then told her to give him the cash, and she gave him some $2100.00, which he stuffed in his pockets. He then demanded to be shown the inside of the safe which was empty. The manager came up and tried to get in the front door. Perlmutter told the employee to tell him they were police officers and to come in. Perlmutter and McCabe stood on the left side of the door. The manager refused to come in, and Perlmutter and McCabe ran out. The employee testified that Perlmutter had on a gray suit and McCabe a "sort of royal blue" suit. She identified the coat and pants worn by McCabe. She testified that McCabe said nothing during the time the two were in the office. McCabe and Perlmutter ran around the corner and headed west on Friendly Street. The witness who had seen them go in the loan company started pursuing them and called for help to a police officer across the street. They started east on Friendly Street to attempt to intercept Perlmutter and McCabe at the car. Another witness who heard the call pursued them around the block. All three witnesses testified that Perlmutter and McCabe jumped in the rear seat of the parked car, the door being open, and the car immediately "took off", crossed four lanes of traffic and turned left. The witnesses testified that the driver of the car was broad shouldered and stocky and that the occupant of the right front seat was small and short. All of the witnesses identified the clothing worn by McCabe, and they identified McCabe, Perlmutter and Loften in the courtroom. The car was chased by police officers accompanied by one of the witnesses who had joined in the chase. The car was never out of sight of the police car except momentarily. After a chase of several blocks the Ford was wrecked and abandoned. The occupants fled on foot.

A few minutes after the police officers arrived on the scene, Perlmutter came up and surrendered, and the money was recovered from his person. He told the officers where his Cadillac was located. A bloodhound was brought to the scene. A blue coat, identified as McCabe's, had been found in some bushes in the area and this was used for the dog to get a scent. He carried the officers to a nearby house

and the other defendants came out of the basement on orders of the officers. Photographs were taken and defendant Thompson objected to the introduction of a photograph of him with an officer on either side. No defendant other than Perlmutter had on his person any of the money taken in the robbery. A .38 special colt revolver and a pair of sunglasses were found under the house. A felt hat was found in the area. Witnesses testified that Perlmutter was wearing sunglasses and a soft felt hat at the time of the robbery.

At trial, the solicitor moved for consolidation of the cases for trial and the motion was allowed. Thompson and Loften excepted and moved for severance. This motion was denied and they excepted. Loften moved for a bill of particulars. This motion was denied and he excepted. Motions for nonsuit were denied. The jury found all defendants guilty as charged. McCabe, Thompson and Loften appealed.

McCabe's Appeal: Attorney General Bruton and Deputy Attorney General Moody for the State.

Jerry S. Weston for defendant appellant.

Thompson and Loften's Appeal: Attorney General Bruton and Staff Attorney Andrew A. Vanore, Jr., for the State.

Percy L. Wall for defendant appellant Loften; Comer and Harrilson by John F. Comer, for defendant appellant Thompson.

MORRIS, J. The appeals of the defendants will be considered separately:

MCCABE'S APPEAL.

Defendant objected to the admission of testimony of witnesses identifying a blue coat and blue trousers as being the coat and trousers worn by the defendant McCabe at the time of the alleged robbery. Upon introduction of the items into evidence, defendant McCabe moved to suppress and requested to be heard in the absence of the jury. He contends the court committed reversible error in denying his motion and request. In support of his contention, he relies heavily on *State v. Pike,* 273 N.C. 102, 159 S.E. 2d 334. There the motion to suppress was based on defendant's contention that the evidence sought to be admitted was obtained by an illegal search. The court there held that the procedure on a motion to suppress evidence because of an illegal search and seizure should be the same as the inquiry by the court into the voluntariness of a confession. Here the objection is to the admission of clothing worn by the defendant at the time of the commission of the crime.

Our Supreme Court has long held that evidence as to fingerprints

and footprints is admissible. In *State v. Paschal,* 253 N.C. 795, 797, 117 S.E. 2d 749, the Court said:

> "The established rule in this jurisdiction is that '(t)he scope of the privilege against self-incrimination, in history and in principle, includes only the process of testifying by word of mouth or in writing, *i.e.,* the process of disclosure by utterance. It has no application to such physical, evidential circumstances as may exist on the accused's body or about his person.' *S. v. Rogers,* 233 N.C. 390, 399, 64 S.E. 2d 572, where Ervin, J., reviews prior decisions of this Court. See also *S. v. Grayson,* 239 N.C. 453, 458, 80 S.E. 2d 387, opinion by Parker, J., and cases cited."

In *State v. Colson,* 1 N.C.App. 339, 161 S.E. 2d 637, the defendant assigned as error the admission into evidence of clothing worn by him on the night his wife was killed. While intoxicated, the defendant exhibited his underclothing to the police who immediately observed bloodstains thereon. These articles were admitted into evidence over defendant's objection. He contended that search of his person and seizure of his clothing was illegal as not being an incident of his arrest and the act of revealing his underclothing was not voluntary because of his intoxicated condition. As to his first contention, this Court said:

> "When the incriminating article is in plain view of the officers or is revealed by the voluntary act of the defendant, no search is necessary and the constitutional guaranty does not apply. *State v. Kinley,* 270 N.C. 296, 154 S.E. 2d 95."

As to his second contention, the Court said:

> "Incriminating articles which are plainly in view of the police may be observed by them. They would be derelict in their duties if they failed to do so. And it makes no difference that the articles are disclosed to view by the irrational motives of a drunk, rather than by the calculated actions of his sober brother. In either case, nothing in the Constitution or in our laws relating to searches and seizures requires that the police close their eyes and refuse to see what is plainly in sight." *State v. Colson, supra,* at 343.

The articles objected to here were in plain view. They were identified as clothing worn by the defendant at the time of the commission of the crime and were rightly received in evidence without a preliminary investigation in the absence of the jury.

The defendant further contends that his motion for nonsuit should have been granted for that the State failed to show any overt

act on the part of the defendant McCabe. This contention is without merit. It is true that the mere presence of a person at the scene of a crime does not make him a principal, even though he makes no effort to prevent the commission of the crime, and even though he may approve of its commission and intend to assist if his assistance should become necessary. *State v. Birchfield,* 235 N.C. 410, 70 S.E. 2d 5. He must also aid or abet the actual perpetrator. This he does when he shares in the criminal intent of the actual perpetrator and by word or deed gives active encouragement to the perpetrator or by his conduct makes it known to such perpetrator that he is standing by to render assistance when and if necessary. *State v. Gaines,* 260 N.C. 228, 132 S.E. 2d 485. Circumstances to be considered in determining whether McCabe aided and abetted in the perpetration of the crime are his relationship to the actual perpetrator, the motives tempting him to assist, his presence at the time and place of the crime, and his conduct before and after the crime. *State v. Birchfield, supra.* The evidence was that McCabe was with all the other defendants before the crime was committed; that they all arrived in a rented car and parked near the finance company office; that he accompanied Perlmutter from the automobile to the finance company; that he entered the finance company with Perlmutter; that he stood by the entire time, taking a position on one side of the door when the manager attempted to enter; that he left with Perlmutter, reentered the getaway car with him, and was with the other defendants when apprehended. Certainly McCabe was more than a mere bystander. The circumstances are sufficient to show that McCabe was actually present; that he shared in Perlmutter's criminal intent; that he, by his actions, gave active encouragement to Perlmutter; and, by his conduct, made it known to Perlmutter that he was standing by to lend assistance if it should become necessary. Consequently, the court properly permitted the jury to pass on McCabe's guilt or innocence.

Other exceptions assigned as error by McCabe were not brought forward in his brief and are, therefore, deemed abandoned. *State v. Pardon,* 272 N.C. 72, 157 S.E. 2d 698.

As to the trial of McCabe, we find

No error.

THOMPSON'S APPEAL.

Defendant Thompson noted fourteen assignments of error. He brings forward in his brief four of them. Those exceptions not brought forward and argued are deemed abandoned. *Knutton v. Cofield,* 273 N.C. 355, 160 S.E. 2d 29.

He assigns as error the court's allowing the case against him to

be consolidated with the others and denying his motion for a separate trial. This assignment of error is overruled. The granting or refusing of defendant's motion for a separate trial was a matter which rested in the sound discretion of the trial judge. *State v. Hines,* 266 N.C. 1, 145 S.E. 2d 363. Defendant contends that consolidation was so prejudicial to defendant as to constitute abuse of discretion. We find no abuse of discretion in this record. These defendants were charged with the same offense, occurring at the same time, as partners in crime. They were tried together as the trial court thought they should be.

The defendant contends the court committed prejudicial error in allowing into evidence State's Exhibit #25 — a photograph showing Thompson in the custody of two police officers. It appears from the record that no objection was made at the time the photograph was introduced into evidence but an exception was entered when the case on appeal was prepared. G.S. 1-206(3) provides that no exception need be taken to any ruling *upon an objection* to the admission of evidence. It does not dispense with the necessity of making an objection to the ruling of the court. By failing to object, the defendant has waived any rights he might have had, and this assignment of error does not present any question for our decision. *State v. Howell,* 239 N.C. 78, 79 S.E. 2d 235.

The last two assignments of error brought forward by defendant Thompson are addressed to the denial of his motion for judgment of nonsuit made at the close of the State's evidence and all evidence.

Defendant contends that there was no evidence of his presence at the scene, no evidence of possession of a weapon, no evidence of knowledge on his part of the purported robbery or any intent to commit any robbery, and no evidence that he shared in the fruits of the offense. Defendant earnestly contends that these are elements of the offense and without these the State had little on which to rely, and the case should not have been submitted to the jury. We disagree. It is true that Thompson was not identified by any of the State's witnesses, either as being at the finance company or in the car in which Perlmutter and McCabe were carried from the scene. However, the four defendants were apprehended after the robbery. Thompson was with McCabe and Loften, and the getaway car had been only momentarily out of sight of the officers. Loften was identified as the one who put the coin in the parking meter and he and Thompson had been seen together in the area of the robbery shortly before the robbery occurred. There were four persons in the car when it arrived on the scene, and there were four persons in it when

it left. Perlmutter and McCabe occupied the rear seat and Loften occupied the right front seat. It is true that Thompson had no fruits of the crime on his person, but there had been no time for a division.

Found with Thompson, McCabe and Loften was a pistol and a pair of sunglasses. The evidence was that Perlmutter wore sunglasses and used a pistol in the robbery. Neither was on his person when arrested.

Defendant strongly relies on *State v. Aycoth,* 272 N.C. 48, 157 S.E. 2d 655. There Aycoth's codefendant, Shadrick, appealed from a conviction of robbery contending evidence as to him was insufficient for submission to the jury. There the evidence tended to show that Shadrick was seated in Aycoth's car on the right front seat. Aycoth went in the store and was there no more than two or three minutes. The storekeeper testified that she could see Shadrick and he could see her through the window, but he never looked around. There was evidence that Aycoth concealed the pistol he was carrying before he stepped out of the store. There is no evidence Shadrick ever observed what was going on in the store. There was no evidence he shared in the money taken. The robbery occurred about 1:15 p.m., and the two were arrested at 9:00 p.m. the same day. At that time Shadrick had about $15.00 on his person. There was no evidence that Shadrick owned or controlled the car wherein weapons were found under the seat. The Supreme Court held that this evidence, while pointing the finger of suspicion toward Shadrick, was not sufficient to warrant a verdict of guilty of the armed robbery as an aider and abettor of Aycoth.

In this case, we think the evidence does more than point the finger of suspicion toward Thompson. The trial court did not commit error in submitting the case to the jury.

As to the trial of defendant Thompson, we find

No error.

LOFTEN'S APPEAL.

Defendant Loften brings forward four of his eleven assignments of error.

He also assigns as error the consolidation of the cases for trial. What was said in Thompson's appeal is applicable here, and this assignment is overruled.

Defendant Loften assigns as error the refusal of the trial court to grant his motion for a bill of particulars. The refusal or allowance of this motion was addressed to the sound discretion of the trial judge. The solicitor in his answer to the motion stated that the defendant had been at liberty all the time to inquire through the solicitor's office regarding any of the facts of the case and that the

State had at all times been ready, willing, and able to provide defendant with a list of State's witnesses and permit him to confer with any of them had a request been made. The solicitor had no signed statements of any witness. It was apparent that no evidence was introduced by the State which could have been a surprise to defendant Loften. There was no abuse of discretion, and the court's refusal to grant the motion was not error. *State v. Porth*, 269 N.C. 329, 153 S.E. 2d 10.

Defendant Loften contends that by the following quoted portion of the charge, the court expressed an opinion because he, in effect stated that defendant Loften admitted his guilt of the crime charged:

> "Now, members of the jury, as to the defendant Joseph Wayne Loften, this defendant says and contends that he was not involved at all, and, even if you believe all of the testimony, all of the evidence, that he certainly didn't go in the store and have any part in the hold-up or in obtaining the money. And so he says and contends, members of the jury, that all he could be, if he is anything, would be an aider and abetter, and he says and contends that there is not enough evidence here to satisfy you beyond a reasonable doubt to make him an aider and abetter under the terms of this Statute."

If defendant felt the court had misstated his contentions, the alleged misstatement should have been called to the court's attention at the time so as to permit the court to correct its alleged inadvertent mistake.

While exceptions to the statement by the court of the contentions of the parties not called to the attention of the court at the time are treated on appeal as ineffectual or waived, *Johnson v. Lamb*, 273 N.C. 701, 161 S.E. 2d 131, we have nevertheless carefully studied the charge of the court. The court at several places in his charge stated that defendant Loften contended he had nothing to do with the robbery and instructed the jury more than once that, by his plea of not guilty, Loften denied the charges against him. In the last paragraph of the charge, the court said:

> "Now, members of the jury, the court wants you to understand that each of these defendants by his plea of not guilty denies every bit of the evidence of the State and does not admit anything, and the court in stating the contentions or saying what the evidence might tend to show, if the court left any other impression that was certainly by inadvertence and did not mean to. Each of these defendants deny that they had any connection with it, and do not admit any part of the testimony that you

have heard, but on the other hand deny it. They don't admit being in the car. They don't admit that any of them were under the house, or admit being anywhere."

We fail to see how from a reading of the entire charge, the jury could have gotten the impression that the court believed the defendant Loften was guilty and expressed that opinion. This assignment of error is overruled.

Defendant Loften's remaining assignment of error is to the denial of his motion for nonsuit. He relies strongly on *State v. Aycoth,* 272 N.C. 48, 157 S.E. 2d 655, the facts of which are set out in Thompson's appeal. As we said in Thompson's appeal, we are of the opinion that the evidence in this case is more than sufficient to carry the case to the jury as to all defendants.

In the trial of defendant Loften, we find

No error.

The final result is that in the trial of these three defendants, we find

No error.

CAMPBELL and BRITT, JJ., concur.

SUE MORRISON BOST (WIDOW), JAMES V. QUERY AND WIFE, NOREEN M. QUERY, MARY QUERY MORSE AND HUSBAND, T. W. MORSE, DOROTHY QUERY HEPBURN AND HUSBAND, C. C. HEPBURN, WILLIAM M. MORRISON AND WIFE, ANN MORRISON, AND WILLIAM M. MORRISON, ADMINISTRATOR OF THE ESTATE OF HENRY C. MORRISON, DECEASED, v. CITIZENS NATIONAL BANK, ADMINISTRATOR OF THE ESTATE OF WILLIAM McKEE MORRISON, JR., CITIZENS NATIONAL BANK, ADMINISTRATOR OF THE ESTATE OF ETHEL HUDSON MORRISON, WILLIE H. SIMPSON (WIDOW), ELIZABETH G. ALEXANDER AND HUSBAND, CHARLES R. ALEXANDER, ANNIE G. HOWIE (UNMARRIED), ADELAIDE B. CROMARTIE AND HUSBAND, WILLIAM KING CROMARTIE, AGNES BOGER (SINGLE), ALLEN T. BOGER, III (SINGLE), MARY FRANCES WHITE GRIFFIN AND HUSBAND, VERNON GRIFFIN, AND GLADYS M. LANG AND HUSBAND, G. L. LANG, JR.

(Filed 10 July 1968.)

1. Appeal and Error § 44—

By their failure to file a brief the appellants are deemed to have abandoned their objections and exceptions, and their appeal is accordingly dismissed. Rules of Practice in the Court of Appeals Nos. 28 and 48.

2. Appeal and Error § 40—

A statement of case on appeal is frequently used as an introduction to, or

a brief summary of, the "record on appeal," but it is not required. Rule of Practice in the Court of Appeals No. 19(a).

3. Appeal and Error § 42—

Where *contradictory* statements in the case on appeal conflict with a statement of a fact found by the judge, the latter must control.

4. Trial § 1—

Appellants' contention that their case was never properly calendared in the Superior Court because their attorney did not receive prior notice that it was to be placed on the trial calendar *is held* without merit when there is evidence showing that the attorney had received knowledge a week in advance from opposing counsel that the case was to be placed on the trial calendar and that the attorney felt constrained to write the presiding judge about the matter but did not request a continuance.

5. Trial § 3—

It is customary and proper for a lawyer to request a continuance when he has a conflict if he wants the case continued.

6. Same—

Continuances are not favored.

7. Appeal and Error § 41—

Where the evidence in the record on appeal is submitted under Rule of Practice 19(d)(2) in the Court of Appeals, the appeal is subject to dismissal under Rule 48 when the brief does not contain an appendix setting forth in succinct language with respect to those witnesses whose testimony is deemed to be pertinent to the questions raised on appeal, what appellant says the testimony of such witnesses tends to establish, with citation to the page of the stenographic transcript in support thereof.

8. Trial § 18—

Where the matter for determination raised by the pleadings is an issue of law and not of fact, a motion for trial by jury is properly denied.

9. Appeal and Error § 24—

An assignment of error is ineffectual where it is based upon an exception not clearly stated or numbered in accordance with Rule of Practice No. 21 in the Court of Appeals.

10. Partition § 1—

In special proceeding for partition by tenants in common under a will, the evidence *is held* sufficient to support the necessary findings of fact which in turn support the conclusions of law of the trial court.

APPEAL by defendants Adelaide B. Cromartie, William King Cromartie, Gladys M. Lang, G. L. Lang, Jr., Agnes Boger, and Allen T. Boger, III, from *Exum, J.*, 2 February 1968 Session of CABARRUS Superior Court. There was no appeal by the other defendants.

This started as a special proceeding for the sale for partition of the real property owned by W. M. Morrison who died a resident of

Cabarrus County, North Carolina, on 15 May 1948, leaving a last will and testament which was admitted to probate. His estate was duly administered.

The defendants Agnes Boger, Gladys M. Lang and husband, G. L. Lang, Jr., were duly served with process herein on 27 June 1966; the defendants Adelaide B. Cromartie and husband, William K. Cromartie, were duly served with process herein on 28 June 1966; and Allen T. Boger, III, was served with process herein on 1 July 1966.

On 15 July 1966 Hartsell, Hartsell & Mills, attorneys, filed answer for all of the defendants, and this answer was verified by the defendant Gladys M. Lang.

On 28 January 1967 the defendants Cromartie and Lang retained attorney Ottway Burton to represent them. On 22 August 1967 Mr. Burton wrote Mr. John Hugh Williams, attorney for the plaintiffs, and stated, among other things, that he desired to "file a formal answer" for his clients. Mr. Burton had theretofore requested the Clerk of Superior Court to list him as attorney of record for the defendants Lang and Cromartie. Thereafter on 22 September 1967, upon motion of Hartsell, Hartsell & Mills, and after notice to the defendants Boger, Lang and Cromartie, Judge Seay without objection, removed Hartsell, Hartsell & Mills as attorneys of record for the defendants Boger, Lang and Cromartie.

On 22 September 1967, without objection, the defendants Citizens National Bank, Administrator of the Estate of William McKee Morrison, Jr.; Citizens National Bank, Administrator of the Estate of Ethel Hudson Morrison; Willie H. Simpson, widow; Elizabeth G. Alexander and husband, Charles R. Alexander; Annie G. Howie, unmarried; and Mary Frances White Griffin and husband, Vernon Griffin, filed another answer which had been verified by Elizabeth G. Alexander on 27 May 1967. This answer is identical in substance to the first answer filed herein on 15 July 1966.

Ottway Burton, as attorney for the defendants Lang and Cromartie, did not file an answer. The first answer filed was not stricken or withdrawn.

Dorothy Query Hepburn, one of the plaintiffs, died in February 1967 leaving Lola Hepburn, 18 years of age, as her sole heir at law, and B. S. Brown, Jr., was appointed guardian *ad litem* for her and filed answer.

This cause was placed on the court calendar for the 29 January 1968 Session of Superior Court of Cabarrus County and was heard in the absence of Ottway Burton, attorney for the defendants Lang and Cromartie, after he did not appear and did not request a continuance.

Judge Exum found, among other things, that this cause was calendared for trial at the June 1967 Session of Court and continued at the request of Mr. Burton; that it was put on the calendar for trial at the November 1967 Session of Court and was continued at the request of Mr. Burton, with informal directions, by the Presiding Judge to the calendar committee that the case be peremptorily set for trial at an early date; that the case was calendared for trial and placed on the calendar at this session, and upon the convening of court on 29 January 1968 Mr. Burton was not present; the court considered a letter from Mr. Burton in which no request was made for a continuance; the case was calendared for Tuesday but the court ordered it to be heard as the fourth case to be tried during the week but not to be heard on Tuesday; and that this was communicated to the office of Mr. Burton on the morning of Monday, 29 January 1968. Again on the morning of Wednesday, 31 January 1968, Mr. Burton's office was notified that this case would be called during the afternoon of that date; and this case was reached and called for hearing at 4:00 p.m. on Wednesday, 31 January 1968.

After the hearing, Judge Exum entered the following judgment dated 2 February 1968:

> "This cause coming on to be heard and being heard as calendared at the January 29, 1968 Session of the Superior Court of Cabarrus County before the undersigned Judge Presiding, and it appearing to the court that the following admitted facts appear from the pleadings:
>
> DETERMINATION OF FACTS.
>
> 1. That W. M. Morrison died on May 15, 1948, a resident of Cabarrus County, North Carolina.
>
> 2. That W. M. Morrison left a last will and testament which was duly admitted to probate in the Superior Court of Cabarrus County and is recorded in Will Book 9, page 192, a copy of which appears as 'Exhibit A' to the Petition; that the estate of W. M. Morrison has been fully administered and settled.
>
> 3. That the plaintiffs include all of the collateral heirs, and their spouses, of the said W. M. Morrison; that plaintiff, Sue Morrison Bost, is a sister of W. M. Morrison; that the plaintiffs Mary Query Morse, Dorothy Query Hepburn and James B. Query are children of Lola M. Query, a sister of W. M. Morrison, who predeceased W. M. Morrison's wife and son; that the plaintiff William M. Morrison is the only son of Henry C. Morrison, who died intestate a resident of Mecklenburg County in

January 1966, and that William M. Morrison is the duly qualified and acting administrator of the estate of Henry C. Morrison; that the only brother W. M. Morrison predeceased W. M. Morrison's wife and son without leaving lineal descendants; that Dorothy Query Hepburn has died since the institution of this proceeding, and that Lola Hepburn, who is her sole heir, appears herein by her duly appointed Guardian *ad Litem.*

4. That the defendant, Citizens National Bank, is a banking institution with place of business in Cabarrus County, North Carolina, and is duly qualified and acting administrator of the estate of William McKee Morrison, Jr., and of the estate of Ethel Hudson Morrison.

5. That William McKee Morrison, Jr., son of W. M. Morrison, died intestate on the 5th day of December, 1965, a resident of Cabarrus County, North Carolina, having never married and having no children; that Ethel Hudson Morrison, wife of W. M. Morrison, died intestate a resident of Cabarrus County, North Carolina, on the 30th day of December, 1965, leaving no lineal descendants surviving; that William McKee Morrison, Jr., had been the only child of the said W. M. Morrison and his wife Ethel Hudson Morrison.

6. That the individual defendants include all of the heirs at law and their spouses of the said Ethel Hudson Morrison.

7. That W. M. Morrison died seized and possessed of the real property lying and being in Cabarrus County and Mecklenburg County, North Carolina, which is the subject of this proceeding, and which was devised by the Last Will and Testament of the said W. M. Morrison.

Based upon the foregoing facts, admitted by the pleadings by all parties of record to this proceeding, the court concludes as a matter of law:

CONCLUSIONS OF LAW.

I. That the pleadings raise only a matter of law concerning the interpretation of the will of W. M. Morrison, and there are no facts to be determined by the intervention of a jury.

II. That under and by virtue of the will of W. M. Morrison the collateral heirs of W. M. Morrison, the plaintiffs in this action, became the owners in fee simple as tenants in common, and entitled to the possession of the real property referred to in the Petition, owned by W. M. Morrison at the time of his de-

cease, upon the decease of William McKee Morrison, Jr., and Ethel Hudson Morrison, without William McKee Morrison, Jr. leaving children or issue him surviving and not having a living wife.

III. That as tenants in common of the real property of W. M. Morrison referred to in the Petition the plaintiffs have requested, and are entitled to, a sale for partition of said real property as by law provided.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiffs be and they are hereby adjudicated the owners in fee simple as tenants in common, and entitled to the possession, of the real property of W. M. Morrison referred to in the Petition.

IT IS FURTHER ORDERED that the real property of W. M. Morrison referred to in the Petition be sold for partition among the plaintiffs as tenants in common as their interests may appear. IT IS FURTHER ORDERED that this cause be and it is hereby remanded to the Clerk of Superior Court of Cabarrus County for the entry of such orders as may be just and proper for the sale for partition of said real property as by law provided.
This 2 day of February, 1968."

Mr. Burton, as attorney for the defendants Lang and Cromartie, filed a motion for a new trial. This motion was dated 8 February 1968 and asserts that he did not receive any notice prior to 20 January 1968 that this case would be calendared for trial at the 29 January Civil Session of court; that the first indication he had was on 20 January 1968 by a letter he received from appellees' attorney informing him that this case was to be peremptorily set for trial on Tuesday, 30 January 1968; that he had a case to argue in the Court of Appeals on that date and also had cases set for trial in Randolph County during that week; and that he made no specific request to have this case continued because it was felt that such was "totally unnecessary"; that this case in Cabarrus County was not properly on the trial calendar.

On 9 February 1968 Judge Exum, after a hearing, made extensive findings of fact and entered an order denying the motion of the defendants Lang and Cromartie.

The defendants Lang and Cromartie gave notice of appeal to the Court of Appeals after objecting and excepting to the findings of fact, the conclusions of law, and the signing and entry of the following: the order of trial entered on 31 January 1968; the judgment

dated 2 February 1968; and the order of 9 February 1968 denying the motion for a new trial. The defendants Lang and Cromartie also objected and excepted to the refusal of the court to find certain facts.

Williams, Willeford & Boger by John Hugh Williams for plaintiff appellees.

Ottway Burton for defendants Adelaide B. Cromartie, William King Cromartie, Gladys M. Lang and G. L. Lang, Jr.

No Counsel (and no brief filed) for defendants Agnes Boger and Allen T. Boger, III.

MALLARD, C.J. The appellants Anges Boger and Allen T. Boger, III, by their failure to file a brief are deemed to have abandoned their objections and exceptions, and their appeal is dismissed. *Rules of Practice in the Court of Appeals,* #28 and #48.

In the record there appears that which is designated, "Statement of Case on Appeal." This is frequently used as an introduction or brief summary of the "record on appeal." As a part of the record on appeal, it is not required. See Rule 19(a) of the Rules of Practice in the Court of Appeals of North Carolina, for what the record on appeal is to contain and how it should be arranged. That which appears in this "Statement of Case on Appeal" could have and should have been properly included in appellants' brief. Rule 28 of the Rules of Practice in the Court of Appeals. Appellants in their brief refer to the "facts" set out in the "Statement of Case on Appeal." There appears therein, among other things, the following apparent contradictions:

> "At a date after January 22, 1968, the defendants' attorney, Ottway Burton, received a copy of the January 29, 1968 Calendar *showing the case on the calendar.* * * * *The case was never on the trial calendar* and the defendants had no notice that the case was going to be on the trial calendar until January 20, 1968, which was the same thing as no notice." (Emphasis Added.)

The foregoing contradictory statements in a brief would not pose any question, but do when placed in the record on appeal, particularly when, as here, counsel stipulate that it is a part of the record on appeal. In this case the above statements are particularly significant because in this appeal the contention of the appellants Lang and Cromartie is that the case was not on the trial calendar and that the court should not have ordered the case to trial on Wednes-

day, 31 January 1968, in the absence of Mr. Burton, attorney for such defendants. It is stated in the record, as a fact found by the Judge, that pursuant to the rules of the Cabarrus County Bar Association, this case appeared on the calendar to be heard at the 29 January 1968 Session of Superior Court of Cabarrus County. We hold that this finding by the Judge must control over this contradictory statement appearing in the record. *Blair v. Coakley,* 136 N.C. 405, 48 S.E. 804.

Appellants Lang and Cromartie through their attorney Mr. Burton, contend that the case was never *properly* on the calendar at the 29 January 1968 Session of Superior Court of Cabarrus County because Mr. Burton did not receive notice that it was to be placed on the calendar before it was. This contention is without merit. Rule 22 of the Rules of Superior Court provide that, "The Court will reserve the right to determine whether it is necessary to make a calendar, and, also, for the dispatch of business, to make orders as to the disposition of causes placed upon the calendar and not reached on the day for which they may be set." Mr. Burton had knowledge on 20 January 1968 that this case was on the trial calendar and deemed it necessary to, and had time to write and did write, a letter to the Presiding Judge about it but felt that it was totally unnecessary to request a continuance. It is customary and proper for a lawyer to request a continuance when he has a conflict if he wants the case continued.

"Furthermore, a motion for continuance is addressed to the sound discretion of the trial judge, and in the absence of manifest abuse of such discretion his ruling thereon is not reviewable." *Becker v. Becker,* 262 N.C. 685, 138 S.E. 2d 507; *Watters v. Parrish,* 252 N.C. 787, 115 S.E. 2d 1. In this case there was no motion to continue, and there is no abuse of discretion by the trial judge shown. "Continuances are not favored." *Wilburn v. Wilburn,* 260 N.C. 208, 132 S.E. 2d 332. The only case cited by appellants in their brief, *Randleman v. Hinshaw,* 267 N.C. 136, 147 S.E. 2d 902, is distinguishable from this case. It involved a failure of notice in accordance with statutory procedures of condemnation. Here we have a case on the calendar for a session of court, and counsel for defendants Lang and Cromartie did not move to continue trial of the case and did not appear at the call of the calendar or the trial although he admits he had knowledge on 20 January 1968 that the case was on the calendar for trial on 30 January 1968.

Appellants contend that the judge should have found other facts and that the evidence did not support the court's findings of fact in ordering the case tried or in the judgment dated 2 February 1968 or

in its order denying the motion for a new trial. The appellants also object to the conclusions of law reached in the order of trial, in the judgment dated 2 February 1968, and in the order denying the motion for a new trial. The evidence in this case was submitted under Rule 19(d)(2). Appellants' brief does not comply with the provisions of Rule 19(d)(2). The appeal is subject to being dismissed under Rule 48 for that it does not contain an appendix in which is set forth in succinct language with respect to those witnesses whose testimony is deemed to be pertinent to the questions raised on appeal, what they say the testimony of such witness tends to establish with citation to the page of the stenographic transcript in support thereof.

Defendants Lang and Cromartie contend that they were entitled to a jury trial. Upon an examination of the pleadings, we hold that the matter for determination by the court was whether the plaintiffs or the defendants owned the land involved herein under the terms of the will of W. M. Morrison, and this was not an issue of fact, but one of law involving the construction of the will of W. M. Morrison. *Wells v. Clayton,* 236 N.C. 102, 72 S.E. 2d 16.

The exceptions, other than number eight, in this record on appeal do not comply with Rule 21 which requires that the exceptions shall be *clearly stated and numbered.* These are numbered but do not clearly state, other than Exception No. 8, to what they refer. An assignment of error is ineffectual if not based on a proper exception. *Langley v. Langley,* 268 N.C. 415, 150 S.E. 2d 764.

However, we have carefully examined the record and the evidence and are of the opinion, and so decide, that there is ample evidence to support the necessary findings of fact, and the necessary findings of fact support the conclusions of law of Judge Exum ordering the case tried, and also the judgment dated 2 February 1968 and the order dated 9 February 1968 denying the motion for a new trial.

As to the appeal of Agnes Boger and Allen T. Boger, III, dismissed.

As to the appeal of the defendants Adelaide B. Cromartie, William King Cromartie, Gladys M. Lang and G. L. Lang, Jr., the judgment and orders of the Superior Court are

Affirmed.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. BERTHA MAE WRIGHT, MADELINE PEARSOLL, SARAH MIDGETTE, PHOEBE PEARSOLL AND FRANCES MARSHALL, CASES #504 AND #513.

(Filed 10 July 1968.)

1. Grand Jury § 3—

While a Negro moving to quash an indictment on the ground of racial discrimination must prove affirmatively the intentional exclusion of members of his race from the grand jury, he may do so by circumstantial evidence, and a showing that in the county over a substantial period a small proportion of Negroes had served on the jury or a showing that the jury scrolls had a symbol designating the race of those appearing thereon, while not conclusive, does raise a *prima facie* case of discrimination, casting the burden upon the State to go forward with evidence sufficient to overcome the *prima facie* case.

2. Same—

The mere denial by the officials charged with the duty of listing, selecting and summoning jurors that there was any intentional, arbitrary or systematic exclusion because of race is insufficient to overcome a *prima facie* showing to the contrary, nor is a *prima facie* case rebutted by reliance upon a presumption that public officers have discharged their sworn official duties.

3. Same—

To overcome a *prima facie* showing of racial discrimination in the composition of the grand jury, there must be a showing by competent evidence that the institution and management of the jury system of the county is not in fact discriminatory, and where the evidence is contradictory and conflicting the trial judge must make findings as to all material facts.

4. Same—

Where defendant's own evidence is sufficient to rebut a *prima facie* showing of unlawful discrimination in the composition of the grand jury which indicted him, the State is not required to go forward and produce independent evidence to the same effect.

5. Same—

Findings of fact made by the trial court on the question of grand jury discrimination are conclusive on appeal when supported by competent evidence produced either by the defendant or the State and will not be disturbed unless so grossly wrong as to amount to an infraction of constitutional guaranties.

6. Same— Evidence held insufficient to show systematic exclusion of grand jurors by race.

On a motion to quash an indictment on the ground that Negroes were systematically excluded from the grand jury, defendant's evidence that a proportionately small number of Negroes had served on grand juries in the county during the preceding ten years and that the list of prospective jurors was prepared from taxpayer lists which were kept separated by race and from voter registration lists which designated the voter's race, even if sufficient to make a *prima facie* showing of systematic exclusion,

is held rebutted by defendant's further evidence that an attempt was made by those preparing the list of prospective jurors to include a proportionate number of Negroes, that this list contained no indication of color or race, that the board of commissioners placed the names on this list in the jury box except for those removed because of death, nonresidency, bad moral character or mental incapacity, that no name was eliminated because of race, and that the names placed in the jury box carried no racial designation, and the denial of the motion to quash upon findings supported by such evidence was proper.

7. Same—

Upon the hearing of a motion to quash an indictment by reason of racial discrimination in the composition of the grand jury, a motion for permission to examine the names in the jury box is addressed to the discretion of the trial judge, and no abuse of discretion is shown in the denial of such a motion where there was evidence before the court that the names in the jury box contained no racial designation and defendants made no showing that they could produce a witness who would readily determine the race of the persons whose names appeared therein, and where even with such a witness an examination of the names in the jury box and a determination of the race of each would protract the hearing for many days.

8. Arrest and Bail § 6—

An attempted arrest without a warrant by an officer exceeding his lawful authority may be resisted as in self-defense, and the person resisting cannot be convicted under G.S. 14-223 of the offense of resisting an officer. engaged in the discharge of his duties.

9. Same—

A person may not resist an arrest by an officer acting under authority of a court process which is sufficient on its face to show its purpose, even though the process may be defective or irregular in some respect.

10. Same—

Where defendants resisted an attempt by the sheriff to serve upon one of them a capias issued by the clerk of a recorder's court having jurisdiction to issue such process and directing the sheriff to arrest the named defendant, the sheriff having informed defendants that he had the capias and intended to serve it, and the sheriff's identity and official position being known to defendants, the defendants are guilty of resisting an officer engaged in the discharge of his duties in violation of G.S. 14-223, notwithstanding the capias may be invalid.

APPEAL by defendants from *Morris, E.J.*, October 1967 Mixed Session of PAMLICO Superior Court.

The defendant Bertha Mae Wright was indicted in Case No. 504 by the Grand Jury of Pamlico County under a bill of indictment, proper in form, charging her with the crime of willfully and unlawfully resisting a public officer, to wit: The Sheriff of Pamlico County, while he was attempting to discharge a duty of his office, namely, executing a *capias* issued by the Clerk of the Recorder's

Court of Pamlico County for the arrest of the said Bertha Mae Wright. The remaining defendants were indicted in Case No. 513 for the same offense. In apt time prior to entering pleas, the defendants in both cases moved to quash the bills of indictment on the grounds that Negroes had been systematically excluded from the Grand Jury which had returned said indictments. By consent the cases were consolidated for purposes of hearing the motions to quash. At the request of defendants the court entered an order directing that subpœnas be issued for the chairman, the clerk, and each member of the Board of County Commissioners of Pamlico County, directing them to appear before him and to produce certain appropriate records to be examined concerning the manner of selecting jurors in Pamlico County. An extensive hearing was conducted at which these officials and other persons, including members of former boards of county commissioners, the former sheriff, the chairman of the Board of Elections of Pamlico County, and the clerical workers who had actually copied the names of jurors from the tax lists and from the voter registration books, appeared and were examined as witnesses. In the course of the hearing it was stipulated by counsel for defendants and the solicitor that according to the 1960 census there was in that year a total of 5,301 persons 21 years of age and older in Pamlico County, of whom 3,708 were white and 1,593 were nonwhite. On a percentage basis there were 69.94 percent white and 30.05 percent nonwhite persons 21 years of age and older in Pamlico County in 1960. At the conclusion of the hearing, the court entered an order making the following findings of fact:

"1. That each Bill of Indictment referred to above charges the defendants with resisting Robert A. Whorton, Sheriff, while attempting to make a lawful arrest in violation of the General Statutes of North Carolina.

"2. That Pamlico County is a rural county of small size with few small incorporated towns.

"3. That for the year 1965 there was a total of 4,632 taxpayers in the county, 3,511 were of the white race and 1,121 were of the Negro race; that the percentage of white taxpayers was for said years 75.798 (%) and the percentage of Negro taxpayers for said year was 24.201 (%).

"4. That there are five (5) townships in Pamlico. In Number 1 township there are 957 white taxpayers and 81 Negro taxpayers; in Number 2 township there are 485 white taxpayers and 202 Negro taxpayers; in Number 3 township there are 771 white taxpayers and 481 Negro taxpayers; that in Number 4

township there are 437 white taxpayers and no Negro taxpayers; in Number 5 township there are 861 white taxpayers and 352 Negro taxpayers.

"5. That the jury list for Pamlico County was revised in 1963 by the then Board of County Commissioners and that the revision of the said jury list at that time was accomplished by the Clerk of the Board of County Commissioners at the direction of the said Board of Commissioners by said Clerk furnishing to the Board a list of names of both white and Negro citizens from which list the Board of Commissioners, without regard to race or color compiled the jury list and caused the names of such persons whom the Board of Commissioners found to be competent to serve as jurors, typed upon small scrolls of paper without any indicia as to race or color and caused said names or scrolls bearing said names to be placed in the jury box all in accordance with Chapter 9 of the General Statutes of North Carolina. It being found as a fact that the principal source of information for said list was obtained from the tax scrolls of Pamlico County.

"6. The jury list of Pamlico County was again revised in 1966 and the Court finds that the Board of County Commissioners directed the Sheriff along with the Clerk of the Board of Commissioners or the deputy or the assistant Register of Deeds to compile a list of eligible jurors and submit said list to said Board for approval. The Court finds from the evidence that the Board of Commissioners desired to have more women in the jury box and authorized and directed the Sheriff who had the tax scrolls in his possession to have the list made from the tax scrolls and from the Voter Registration Books and to submit such list to the Board of Commissioners for its approval or rejection; that some of the names submitted, the exact number not reflected by the evidence, were discarded by the Board of Commissioners due to persons being deceased or physical or mental infirmities, non-residents in the County and not of sufficient good moral character, and that the Board of Commissioners caused a total of 1,014 scrolls bearing the names of eligible jurors to be placed in the jury box; that said list of 1,014 persons was selected without reference to race or color and that no indicia appears on any scroll of any nature or description that would indicate in any manner the race of any person whose name the scroll bears; that the list from which said jury list was made or copied was made by Mrs. Robert A. Whorton and Mrs. Ida MacCotter, Assistant Register of Deeds,

and who in so doing acted for the Register of Deeds who is *ex officio* Clerk of the Board of County Commissioners. That the actual selection of the jury list was made by the Board of County Commissioners without reference to race or color and in substantial accordance with Chapter 9 of the General Statutes of North Carolina.

"7. The Court finds as a fact that the tax scrolls of Pamlico County showed the white taxpayers in the front of the scroll or tax book and the Negroes in the back portion of said each book and said scroll indicated whether the taxpayer was white or Negro. The Court further finds that the Voter Registration Book shows the name of the voter, first, last and middle, the party he or she affiliated, the sex, the race, whether it was white or Negro, the age, the address, the place of birth of the voter and a space for the notation of change of party affiliation, that to that extent the person or persons making up the tax list would have benefit of the knowledge of the race of the proposed juror.

"8. The Court finds that at each term of Superior Court of Pamlico County for the trial of criminal cases over a period of ten years from this date with the exception of the August Term, 1957, and the August Term of 1960, the Grand Juries of each other Term had one to three members of the Negro race who served as Grand Jurors. That at the January Term, 1967, there were three members of the Negro race upon the Grand Jury. That at the April Term, 1967, there was one possibly two members of the Grand Jury who were members of the Negro race.

"9. The Court further finds as a fact and does take judicial notice of the fact that at least two members of the Negro race have served as jurors this week and that on Wednesday a.m. the undersigned at the request of one of them for good and sufficient cause shown excused him for the remainder of the Term.

"10. The Court further finds as a fact that the present and former Board of Commissioners of the County of Pamlico have not systematically excluded members of the Negro race from the jury list of Pamlico County; that the scrolls bearing the names of eligible jurors now in the jury box bear no indicia of any kind or nature or description to identify such person as white or Negro."

Based upon the foregoing findings of fact, the court concluded

as a matter of law that the applicable statutory provisions respecting the qualification, selection, listing, drawing and attendance of jurors was fair and non-discriminatory and meets all constitutional requirements; that the use of tax rolls and voter registration books in making up a jury list was not in itself discriminatory; that the Board of County Commissioners of Pamlico County in preparation of the jury list had complied with the provisions of Chapter 9 of the General Statutes; and that the defendants were not entitled to quash the bills of indictment against them. Accordingly, the court denied defendants' motions to quash, to which action defendants duly noted their exceptions.

Prior to entering upon the trial defendants also moved for a change of venue, which motion was denied, but the court in its discretion ordered that trial jurors be drawn from Pitt County. The cases were consolidated for trial before a jury so drawn from Pitt County. All defendants pleaded not guilty. The jury returned verdicts of guilty as charged as to each defendant and from judgments entered thereon, the defendants appealed.

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

John Harmon, J. LeVonne Chambers, Romallus O. Murphy, and James Lanning for defendant appellants.

PARKER, J. Defendants' first assignment of error is to the action of the trial court in denying their motions to quash the bills of indictment against them because of racial discrimination in the composition of the Grand Jury which indicted them. A similar question was considered by the Supreme Court of North Carolina in the recent case of *State v. Yoes*, 271 N.C. 616, 157 S.E. 2d 386. In that case Justice Lake, speaking for the Court in a thorough and scholarly opinion, said:

> "A Negro, moving to quash a bill of indictment on the ground that the grand jury, which returned it was unlawful, because of discrimination against Negroes in its selection, must prove affirmatively that qualified Negroes were intentionally excluded from the grand jury because of their race. (Citing cases.) This, however, may be shown by circumstantial evidence. Neither a showing that, over a substantial period, in a county with a relatively large Negro population only a few Negroes had served on juries, nor a showing that the race of the persons whose names appeared on scrolls in the jury box was designated on such scrolls, is conclusive proof of arbitrary and systematic exclusion

of Negroes from the grand jury which indicted the defendant. A showing of these circumstances does, however, constitute a *prima facie* showing of the discrimination forbidden by the law of this State. Such *prima facie* showing casts upon the State the burden to go forward with evidence sufficient to overcome it. (Citing cases.)"

In the cases before us, defendants contend they have carried the burden of showing a systematic exclusion of qualified Negroes from the Grand Jury which indicted them by presenting evidence of a statistical disparity between the ratio of the races in the adult population of Pamlico County as compared with the ratio of the races in the list of persons serving on grand juries in said county over the past ten years. They point to the evidence that approximately 30 percent of the adult population (according to the 1960 census), approximately 24 percent of the listed taxpayers (according to 1965 tax records), and approximately 20 percent of registered voters of Pamlico County, were colored. They compare these ratios with the ratios of Negroes serving on grand juries in Pamlico County over the past ten years, which was 16.6 percent when three Negroes served, ranging down to .055 percent when only one Negro served, and zero on the two occasions, one in 1957 and one in 1960, when no Negro served. They contend that this statistical disparity, when coupled with the fact that the list of prospective jurors was prepared from the taxpayer lists which were kept segregated by races and from the voter registration lists on which the race of each voter was indicated, established a *prima facie* case of unlawful discrimination in the selection of jurors which shifted the burden of proof to the State to rebut. Without deciding the question of whether the showing here made by defendants was sufficient to establish a *prima facie* case (compare *Jones v. Georgia,* 389 U.S. 24, 19 L. ed. 2d 25, 88 S. Ct. 4; *Whitus v. Georgia,* 385 U.S. 545, 17 L. ed. 2d 599, 87 S. Ct. 643), we hold that even should this be conceded there was here sufficient evidence produced by defendants' own witnesses that Negroes were not systematically excluded from the Grand Jury which indicted the defendants to rebut a *prima facie* showing to the contrary and to support the trial court's finding of fact that members of the Negro race were not so excluded.

It is well established that the mere denial by the officials charged with the duty of listing, selecting and summoning jurors that there was any intentional, arbitrary or systematic discrimination because of race, is not sufficient to overcome a *prima facie* case to the contrary. *State v. Wilson,* 262 N.C. 419, 137 S.E. 2d 109. Nor is such a *prima facie* case rebutted by reliance upon a presumption that public

officers are presumed to have discharged their sworn official duties. *Jones v. Georgia, supra.* "To overcome such *prima facie* case, there must be a showing by competent evidence that the institution and management of the jury system of the county is not in fact discriminatory. And if there is contradictory and conflicting evidence, the trial judge must make findings as to all material facts." *State v. Wilson, supra.* In the cases before us the trial judge has made full findings as to all material facts. These findings are supported by competent evidence introduced by the defendants themselves. Included in this evidence was the testimony of Mrs. Lennie Whorton, one of the clerks who participated in the preparation of the list of names to be submitted to the county commissioners to be used as jurors. For this purpose the tax records and the registration books were used. Mrs. Whorton testified:

> "I would say we made an attempt to include from the list we were preparing approximately one-fourth Negro persons, because I am sure we got that many, if not more. I don't know the number, we didn't keep any record. We just tried to get equal as best we knew how. I would say there was approximately three hundred names of Negro persons on the list we prepared. That would be roughly one-fourth of twelve hundred."

Other testimony submitted by defendants showed that the list prepared in 1966 contained approximately 1200 names, that there was no indication on this list as to color or race, that from this list the Board of County Commissioners selected 1,014 names which were placed in the jury box as jurors of Pamlico County. The chairman of the Board of County Commissioners testified:

> "From the larger list, the list that was handed to me, we did exclude from that list people that we knew were dead. We also excluded from that list of people, persons who were not of good moral character. We also excluded from that list people whom we felt did not have sufficient intelligence to serve as jurors. That was the only ones that we laid aside. From the list that was handed to me and on the chosen names of the 1,014, there was not a way to tell or no designation as to color or race. Not in the least degree!"

Other members of the Board of County Commissioners also called as witnesses by defendants testified that they had not eliminated any name from the list of jurors because of race. When, as here, the defendants' own witnesses furnish evidence sufficient to rebut a *prima facie* showing of unlawful discrimination in the composition of the Grand Jury which had indicted them, it is not required that

the State then go forward and produce independent evidence to the same effect. Here, the defendants had already called to the stand as their own witnesses practically all of the officials and clerical workers who had had any connection with the preparation of the lists and the selection of names of persons to be placed in the jury box. It would be ridiculous to require the State to recall to the stand these same witnesses simply for the purpose of testifying a second time to what had already been said. The findings of fact made by the trial court, when supported by competent evidence whether produced by the defendants or by the State, are conclusive on appeal and will not be disturbed unless so grossly wrong as to amount to an infraction of constitutional guaranties. *State v. Wilson, supra.* We find here no error in the trial court's denial of defendants' motions to quash the indictments against them.

Defendants' second assignment of error is directed to the trial court's action in denying defendants, during the hearing on their motion to quash by reason of racial discrimination, the right to inspect the jury box from which names of prospective jurors were drawn. In this connection, there was evidence before the court that the names as they appeared in the jury box were on slips of paper on which there was no designation of any kind which would indicate the color or race of the person whose name appeared thereon. The Register of Deeds, who also served as County Accountant and Tax Supervisor of Pamlico County and as Clerk to the Board of County Commissioners, testified:

> "There was no designation of any kind whatsoever on those slips in the jury box which would indicate any color or any race. There was no designation on the list that was turned in to the Commissioners to indicate race or color. When the jury panel was drawn from the box, I was present. And the list was drawn by a child as the statute so required, under school age."

The defendants made no showing that, had they been permitted to examine the slips of paper with the names of jurors in the jury box, they would have been able to produce any witness who could readily determine the race of the persons whose names appeared thereon. Without such a witness, examination of the jury box would have availed defendants nothing. Even with such a witness or witnesses available, examination of the entire 1,014 names in the jury box and determination of the race of each would have consumed days of time in the hearing on the motions to quash. Throughout the entire hearing the trial court was most meticulous in protecting defendants' right to develop and fully present their evidence. He

ordered subpœnas issued for all witnesses and production of all pertinent records desired by them. The hearing on these motions had already consumed two days of the court's time. The granting or denial of defendants' motion to be permitted to examine the names in the jury box was within the discretion of the trial court, and there was no abuse of discretion in denying this motion, particularly since this would have protracted the hearing for many additional days.

Defendants' third assignment of error relates to the trial court's refusal to quash the *capias* which the Sheriff of Pamlico County was attempting to serve upon the defendant Bertha Mae Wright at the time she and the other defendants resisted him, giving rise to the present cases against them. This *capias* was issued by the Clerk of the Recorder's Court of Pamlico County, was issued in the name of the State of North Carolina, was directed to the Sheriff of Pamlico County, and commanded him to "take the body of Bertha Wright (if to be found in your county) and her safely keep, so that you have her before his Honor, the Judge of our Recorder's Court, at a court to be held for the County of Pamlico, at the courthouse in Bayboro, N. C., on the 9th day of December, 1966, next, then and there to answer the charge of the State against her on an indictment for failure to comply with a court order." Defendants contend that there was in fact no indictment then pending against Bertha Wright, no valid judgment or court order directed against her, and that the *capias* on its face is void since there is no such indictable offense in North Carolina as "failure to comply with a court order." But if after careful judicial inquiry it could be determined that the *capias* was void, this did not justify the defendants in resisting the officers when they attempted to serve it.

When an officer attempts to make an arrest without a warrant and in so doing exceeds his lawful authority, he may be resisted as in self-defense and in such case the person resisting cannot be convicted under G.S. 14-223 of the offense of resisting an officer engaged in the discharge of his duties. *State v. Mobley,* 240 N.C. 476, 83 S.E. 2d 100. But when an officer is acting under authority of process of a court, a different situation exists. In such case if the writ is sufficient on its face to show its purpose, even though it may be defective or irregular in some respect, yet the officer is protected. "It would be monstrous to lay down a different rule. It would put in jeopardy the life of every officer in the land. It never could be intended that they should determine, at their peril, the strict legal sufficiency of every precept placed in their hands." *State v. Jones,* 88 N.C. 671, quoting from Judge Lumpkin in *Boyd's* case, 17 Ga. 194.

In the cases before us the *capias* was issued by the Clerk of the

Recorder's Court of Pamlico County, a proper officer of a court having jurisdiction to issue such process. It was directed to the Sheriff of the county and commanded him to arrest the defendant, Bertha Wright. At the time the Sheriff attempted to carry out its mandate he had been Sheriff of the county for nearly 30 years and his identity and official position were known to defendants. There was evidence that he informed them that he had a *capias* in his possession for Bertha Mae Wright and that he intended to serve it. Even if it be shown that the *capias* was for some reason invalid, defendants mistook their remedy when they resorted to violence in resisting. The defendant Wright should have submitted to the arrest and raised the question of the validity of the process in an orderly way in a court having power to make a judicial determination of the matter. When defendants, instead of following the orderly processes of the law, attempted to take matters into their own hands and to resolve the question by violence, they violated G.S. 14-223.

We have carefully reviewed defendant's other assignments of error and find them to be without merit.

In the trial we find

No error.

MALLARD, C.J., and BROCK, J., concur.

FREDERICK B. WORRELL, JR., AND WIFE, HAZEL M. WORRELL, AND N. E. HORNE, v. W. E. ROYAL AND WIFE, JUANITA P. ROYAL.

(Filed 10 July 1968.)

1. Deeds § 19—

Restrictive covenants are not favored and are to be strictly construed against limitation on use.

2. Deeds § 20—

In an action seeking to enjoin defendants from violating restrictive covenants relating to a certain subdivision, nonsuit is proper where the instrument purportedly placing the restrictive covenants on the property is ambiguous as to whether defendants' property is included within the area restricted.

APPEAL from *Herring, District Court Judge,* 20 November 1967, Civil Session of CUMBERLAND District Court.

Plaintiffs seek a permanent injunction to require the defendants to cease and desist from violating the restrictive covenants pertain-

ing to Bordeaux Subdivision, Section 5, as recorded in Plat Book 18, page 61, of the Cumberland County Public Registry.

Upon motion the plaintiff, N. E. Horne, was removed as a party plaintiff. The case was tried before a jury and the jury answered the issue:

> "Do the restrictive covenants covering the subdivision known as Bordeaux, Section Number Five (5), prevent the defendants from erecting a service station on the property they own in that subdivision, as alleged in the Complaint?
> ANSWER: Yes."

The trial court signed a judgment permanently and forever restraining and enjoining the defendants from constructing or continuing to construct any building or fixtures to be used in furtherance of a service station business on their land as shown on the duly recorded plat of said Bordeaux Subdivision.

The defendants appealed from said judgment and assert that their motion to dismiss the case should have been granted for that their land is not subject to any restrictions.

Brown, Fox & Deaver by Bobby G. Deaver, Attorneys for plaintiff appellees.

Rose & Thorp by Charles G. Rose, Jr., Attorneys for defendant appellants.

CAMPBELL, J. In July, 1956, John Sandrock was the owner of a tract of land in Cumberland County which he caused to be laid off in lots and blocks, and a plat thereof recorded in Book of Plats 18, page 61, of the Cumberland County Public Registry. The recorded plat shows two blocks designated thereon, Block I and Block E. Block I contains twenty-two lots bearing numbers one through twenty-two, and Block E contains eighteen lots bearing numbers one through eighteen. A street designated "Boone Trail" divides the two blocks and the respective lots front on said Boone Trail. On the southwesterly side, Boone Trail runs into another designated road, "Roxie Avenue." The intersection is at an angle and, located in the intersection, there is shown a small circular portion of land with no designation as to number or as to its purpose in the subdivision. The plaintiffs are the owners of Lot 17, Block I, as shown on said map. They acquired their property by deed from Walter F. Snead and wife, dated 15 February 1958, and recorded 3 March 1958 in the Cumberland County Public Registry in Book 745, at page 269.

The defendants acquired "all of that unnumbered parcel of land

located at the intersection of Boone Trail and Roxie Avenue as shown on the aforesaid recorded plat" by deed from John Sandrock dated 28 February 1966, and recorded 8 March 1966 in Book 1161, at page 53, of the Cumberland County Public Registry.

Neither the deed to the plaintiffs nor the deed to the defendants refers to or incorporates therein any restrictions or covenants with regard to the use of the respective parcels of land. In Book 690, at page 294, of the Cumberland County Public Registry, there appears an instrument (hereinafter referred to as Sandrock Instrument) bearing date 14 July 1955, recorded 24 July 1956, in words and figures as follows:

"NORTH CAROLINA
CUMBERLAND COUNTY

Know all men by these presents:

That we, John Sandrock and wife, Katie Lee Sandrock, of said County of Cumberland, do hereby covenant and agree to and with all persons, firms and corporations now owning or hereafter acquiring any of those certain lots as shown on a plat of Bordeaux Subdivision Section V of record in Book of Plats 18, page 61, Cumberland County Registry, (*) are hereby subjected to the following restrictions as to the use thereof, and are covenants running with said property by whomsoever owned, to wit:

1. All lots in the tract shall be known and described as residential lots.

2. No structure shall be erected, altered, placed, or permitted to remain on any residential building plot other than one detached single-family dwelling and a private garage and other out-buildings incidental to residential use of the plot.

3. No building shall be located nearer to the front lot line or nearer to the side line than the building setback lines shown on the recorded plats. In any event, no building shall be located on any residential building plot nearer than thirty-five feet to the front lot line, nor nearer than ten feet to any sideline.

4. No noxious or offensive trade or activity shall be carried on upon any lot nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood.

5. No trailer, basement, tent, shack, garage, barn, or other outbuilding erected in the tract shall at any time be used as a residence temporarily or permanently, nor shall any structure of a temporary character be used as a residence.

6. No dwelling costing less than Eighty Five Hundred Dollars ($8500.00), based on current construction costs, or not *(sic)* house containing less than nine hundred (900) square feet of living area shall be permitted on any lot in the tract.

7. No structure to be built with exterior finish of concrete, cinder block or comparable block unless stucco finished with a minimum three-fourths inch masonry base.

8. A protective screening area three feet wide is established on any lot along the property line of said lot where said lot abuts the commercial area as shown on the plat. Planting, fences or walls shall be maintained throughout the entire length of such areas by the owner or owners of the lots at their own expense to form an effective screen for the protection of the residential area. No building or structure except a screen fence or wall or utilities or drainage facilities shall be placed or permitted to remain in such areas. No vehicular access over the areas shall be permitted except for the purpose of installation and maintenance or screening, utilities and drainage facilities.

These covenants shall run with the land and shall be binding on all parties and persons claiming under them until January 1, 1975, at which time said covenants shall be automatically extended for successive periods of ten years unless by vote of a majority of the then owners of the lots it is agreed to change said covenant in whole or in part.

If the parties hereto or any of them, or their heirs or assigns, shall violate any of the covenants herein, it shall be lawful for any other person or persons owning any real property situated in said development or subdivision to prosecute any proceedings at law or in equity against the person or persons violating or attempting to violate any such covenant, and either to prevent him or them from so doing or to recover damages as other dues for such violation.

Invalidation on any of these covenants by judgment or court order shall in nowise affect any of the other provisions which shall remain in full force and effect.

In testimony whereof, we have hereunto set our hands and several seals the 14th day of July, 1955.

John Sandrock (Seal)
Katie L. Sandrock (Seal)"

The plaintiffs contend that by virtue of this Sandrock Instrument all property shown on the recorded plat is restricted to use for residential purposes only and that the defendants cannot use their property for commercial purposes, such as a service station or any other purpose other than for a residence.

The defendants, on the other hand, assert that the Sandrock Instrument is invalid and ineffective for that certain words have been omitted which would have given it meaning and that in the absence of those words the instrument is ineffective for any purpose whatsoever. The defendants assert that their motion for judgment as of nonsuit should have been sustained and that the trial court was in error in failing to do so.

The question presented is whether the Sandrock Instrument, insofar as the piece of property owned by the defendants is concerned, is effectual to create a plan for a residential development or is said instrument completely ineffectual for that purpose. We are not concerned with and make no ruling as to property designated as lots by number shown on said plat.

The piece of land owned by the defendants bears no number as shown on the plat; it is not of sufficient size to have a building erected thereon in compliance with paragraph numbered three of the Sandrock Instrument and it obviously is not a residential lot.

Paragraph numbered eight of the Sandrock Instrument refers to "commercial areas" but no such areas are designated on the recorded plat.

In the preamble of the Sandrock Instrument at the point where we have marked an asterisk, it is obvious that some words were omitted which would have given more meaning to the instrument.

The Sandrock Instrument is ambiguous when applied to the parcel of land owned by the defendants and it cannot be said that the restrictions contained therein are "clear and unequivocal expressions of restrictions applicable thereto."

> "Restrictive covenants are not favored and are to be strictly construed against limitation on use. In the absence of clear and unequivocal expressions, restrictive covenants are not to be expanded and all doubts are to be resolved in favor of the free use of the property." *Hullett v. Grayson,* 265 N.C. 453, 144 S.E. 2d 206.

The Sandrock Instrument, insofar as applicable to the land of the defendants, "is of such doubtful meaning that the court, in the exercise of its equity jurisdiction, could not in good conscience grant the relief sought in this action." *Hullett v. Grayson, supra.* The motion for judgment as of nonsuit should have been allowed.

Reversed.

BRITT and MORRIS, JJ., concur.

MRS. GUSSIE ZUM v. CHARLIE FORD.

(Filed 10 July 1968.)

1. Appeal and Error § 57; Judgments § 34—

The trial court's findings on a motion to set aside a judgment by default and inquiry are conclusive on appeal if supported by competent evidence.

2. Judgments § 25—Findings held sufficient to support order setting aside judgment by default and inquiry.

On motion to set aside a judgment against defendant by default and inquiry, findings by the court that the day after being served with summons and complaint defendant took the suit papers to an attorney who had represented him in an action arising out of this same accident against the driver of the automobile in which plaintiff was a passenger, that the prior action was settled in defendant's favor, that the attorney agreed to represent defendant and to protect his interests in the present action, that the attorney immediately mailed the suit papers to defendant's liability insurer, and that the papers were never received by the insurer but were lost in the mail, *are held* sufficient to support the court's conclusions that any neglect of the attorney is not imputed to defendant and that defendant has a meritorious defense, which in turn support the court's order setting aside the judgment.

APPEAL by plaintiff from *Carr, J.*, 15 January 1968 Session ROBESON County Superior Court.

Plaintiff instituted this action on 21 July 1967 in Robeson County Superior Court to recover damages for personal injury allegedly inflicted upon her by the negligent operation of a motor vehicle by the defendant on 2 March 1965.

The summons and copy of the complaint were served on the defendant 26 July 1967. On 27 July 1967 the defendant took the summons and copy of complaint to Mr. F. L. Adams, Attorney at Law, Rowland, North Carolina, and discussed the matter with him. Mr. Adams, along with Mr. Robert Weinstein, Attorney at Law,

Lumberton, North Carolina, had previously represented the defendant in another action growing out of the same automobile collision. Mr. Adams took the suit papers to Mr. Weinstein's office where they discussed the case and decided to forward the summons and complaint to defendant's liability insurance carrier. On 27 July 1967 Mr. Adams forwarded the summons and complaint along with a cover letter to defendant's liability carrier, Grain Dealers Mutual Insurance Company, P. O. Box 6625, Greensboro, North Carolina, 27405. No answer or other pleading was filed on behalf of defendant.

On 30 August 1967 a judgment by default and inquiry was entered against the defendant by the Assistant Clerk of Superior Court. On 9 October 1967 the issue of damages was submitted to and answered by a jury in the sum of $7,500.00; and judgment was entered thereon by McKinnon, J., awarding the plaintiff the sum of $7,500.00 and court costs.

On 10 October 1967 counsel for plaintiff wrote a letter to Grain Dealers Mutual Insurance Company, defendant's liability carrier, making demand for payment of the judgment. Thereafter defendant filed a motion under G.S. 1-220 to set aside the judgment by default and inquiry, and the verdict and judgment upon the inquiry, upon the grounds that they were entered against him through mistake, inadvertence, surprise, and excusable neglect, and because defendant had a meritorious defense to the action.

The motion was heard upon affidavits, testimony, and argument of counsel. From Judge Carr's Order vacating the judgments, plaintiff appeals assigning as error the findings of fact and conclusions of law.

W. Earl Britt for plaintiff appellant.

Smith, Moore, Smith, Schell and Hunter by McNeil Smith for defendant appellee.

BROCK, J. The decisive findings of fact by Judge Carr are as follows:

> "The automobile accident out of which this suit arises occurred on March 2, 1965. The plaintiff was riding with her husband, Charles Zum, in an automobile headed south on U. S. Highway 301 and ran into the rear of the defendant's car which was headed south in the lane next to the median, about to make a left turn. The defendant thereafter employed Mr. F. L. Adams, a reputable attorney who maintains an office for the practice of law in Rowland, Robeson County, North Carolina, where the defendant works and lives, to make a claim for the

defendant and his wife against Charles Zum, the operator of the other car. Mr. Adams associated for the purpose of bringing suit Mr. Robert Weinstein, a reputable member of the Bar with an office in Lumberton, the County seat of Robeson County, and on August 23, 1965 Mr. Weinstein filed separate suits in this Court against Charles Zum on behalf of Charlie Ford and his wife, Lucy Ford, to recover for personal injuries and property damage arising out of the accident of March 2, 1965. Service upon Charles Zum was obtained and thereafter Charles Zum was represented in these actions by John W. Campbell, an attorney at the Robeson County Bar with an office in Lumberton. No answers were ever filed by the defendant Zum in these suits, but after negotiations and in March, 1967 these two suits were settled by a payment of $350.00 to Charlie Ford and his wife, Lucy Ford, and they executed a release of their claims arising out of this accident. From time to time and on at least four occasions during the negotiations Mr. F. L. Adams consulted with Charlie Ford and his wife, as their attorney, and he supervised and witnessed the execution of the release in his law office and as attorney for Charlie Ford.

"In connection with this suit, the defendant brought the suit papers to Mr. Adams in Mr. Adams' capacity as an attorney at law and Mr. Adams, who had represented him as his attorney in his claims arising out of this same accident, undertook to represent him and protect his interest in this action as his attorney.

"Mr. Adams held himself out to the public as an attorney at law. He has been a licensed attorney in North Carolina since 1935 and has practiced law in Rowland, North Carolina, since that time. He has also in the intervening years operated an insurance agency, writing, among other things, automobile liability insurance and Grain Dealers Mutual Insurance Company is a company for whom he has written automobile liability insurance policies, including a policy issued some time prior to March 2, 1965 to Charlie Ford, the defendant in this case. There is no sign on Mr. Adams' office relating to the insurance agency.

"Mr. Adams agreed to represent him and to protect his interests. Mr. Adams was informed of the facts constituting his defense. Mr. Adams did take the summons and complaint to Lumberton and did go over the summons and complaint with Mr. Robert Weinstein and did on July 27, 1967 mail the sum-

mons and complaint in an envelope with the name and address: 'Grain Dealers Mutual Insurance Company, P. O. Box 6625, Greensboro, North Carolina, 27405,' on the envelope. This was the same way in which Mr. Adams had previously sent papers to Grain Dealers Mutual Insurance Company, using the same type of envelope with the same name and address upon it. It was not customary for the company to send any acknowledgement to Mr. Adams. On no previous occasion had papers mailed this way been lost.

"The copy of the summons and complaint which were mailed from Rowland, North Carolina, on July 27, 1967 to the Grain Dealers Mutual Insurance Company, Box 6625, Greensboro, North Carolina, was not received by any employee of said company empowered to act thereon and must be presumed to be lost in the United States mail or otherwise before reaching such employee. Grain Dealers Mutual Insurance Company has made a diligent search of its office at Greensboro and also of its home office at Indianapolis, Indiana, and neither the summons nor complaint could be found. Furthermore Grain Dealers Mutual Insurance Company had maintained a file in connection with this accident of March 2, 1965 and had in that file the above mentioned correspondence with Mr. Harry Fractenberg, attorney for Mrs. Gussie Zum, in April and May, 1965, but had heard nothing further from anyone about any claims of Mrs. Zum or of Charles Zum until receipt of a letter from the plaintiff's attorney dated October 10, 1967 to the effect that a default judgment had been entered in this case in the amount of $7,500.00. The plaintiff's attorney was immediately contacted and the motion to set aside the default judgment was thereafter promptly made."

Each of the foregoing findings is supported by competent evidence in the Record. The trial court's findings of fact are conclusive upon appeal, if such findings are supported by any competent evidence. 1 Strong, N. C. Index 2d, Appeal and Error, § 57, p. 223.

Judge Carr, *inter alia,* concluded as follows:

"The defendant, Charlie Ford, did all that reasonably could have been expected of him to do in the circumstances. He was served on July 26 and on the next day, July 27, he took the suit papers to Mr. F. L. Adams, the lawyer in Rowland where he lived and the lawyer who had represented him in connection with his claims and the claims of his wife arising out of this accident. He asked Mr. Adams what he should do and delivered

the summons and complaint to Mr. Adams and he relied upon Mr. Adams to protect his interest as his attorney. Under all the facts and circumstances he was justified in relying upon Mr. Adams to do what was necessary to take care of the matter. If there was any neglect on the part of Mr. Adams under the circumstances, either in not answering or not getting an extension of time or otherwise, such neglect, if any, under the circumstances is not imputable to the defendant.

"Mr. Adams under the circumstances may have acted in a dual capacity, not only as attorney for the defendant, but also as an agent of Grain Dealers Mutual Insurance Company. However, he was not dilatory in his handling of the suit papers, putting them in the United States mails on the very same day that he received them, addressed in the customary way and to the customary name and address of the insurer. To the extent that there was any neglect of the defendant, through Mr. Adams, this was excusable.

"The matter is one for trial and determination by a jury where the parties have an opportunity to appear and have their day in Court.

"The defendant in this action, Charlie Ford, has a meritorious defense to the present action brought by Mrs. Gussie Zum against him."

Judge Carr's conclusions are supported by facts found, and his conclusions support his Order vacating the judgments. No abuse of discretion appears.

Affirmed.

MALLARD, C.J., and PARKER, J., concur.

SALLY M. VAIL, HELEN V. ROUSE, MARGARET V. CAMPBELL, EVELYN V. COONRAD, DORIS V. YELVERTON AND LUTHER H. VAIL, JR., v. MATTIE P. SMITH.

(Filed 10 July 1968.)

1. Reference § 11—

In order for a party to a compulsory reference to preserve his right to a jury trial he must (1) object to the order of reference at the time it is made, (2) file specific exceptions to particular findings of fact made by

the referee within thirty days from the filing of the report, (3) formulate appropriate issues of fact raised by the pleadings and based on facts pointed out in the exceptions, tender these issues with the exceptions, and (4) in the exceptions demand a jury trial on each issue so tendered.

2. Same—

On motion for judgment on the referee's report on the ground that exceptions thereto were not filed within 30 days from the date the report was filed, the court has the discretion to allow exceptions which were filed after that time to be made a part of the record and to order that the issues set forth in the exceptions be submitted to the jury, and no abuse of discretion is shown where the motion was made more than two years after the exceptions were filed and the record is replete with procedural delays.

3. Evidence § 25—

A map not made pursuant to any official authority may be admitted as substantive evidence only when a witness testifies to its correctness from firsthand knowledge, and a private map not so authenticated is properly excluded as incompetent.

4. Reference § 11—

Failure of a party to a compulsory reference to object to the introduction of incompetent evidence at the hearing before the referee does not preclude the court from excluding such evidence upon objection at the trial.

5. Appeal and Error § 31—

Where neither the portions of the charge excepted to nor the questions sought to be presented are set forth in the assignments of error, and the portions of the charge excepted to are not specifically identified in the record, the exceptions will not be considered on appeal.

APPEAL by defendant from *Cowper, J.*, September-October 1967 Civil Session, Superior Court of WAYNE.

This action, originally instituted as a special proceeding to establish a boundary line under Chapter 38 of the General Statutes, was converted into an action to quiet title by virtue of the denial of both petitioners and respondent of the ownership of the other of the lands described in the petition and the response. However, the only issue arising from the evidence before the referee and the court was the location of the boundary line between plaintiffs and defendant. The original petition was filed 20 January 1960 and response thereto was filed 7 March 1960. A court surveyor was appointed by order dated 15 April 1960 to report on or before 13 May 1960, and, by subsequent orders, the time for reporting was extended to 27 November 1961. When the matter came on for hearing before the clerk on 28 June 1962, it was transferred to the civil issue docket for further proceedings. Thereafter, and on 13 March 1963, the court, on its own motion, referred the matter to a referee. Amend-

ments to pleadings were made, and the matter was heard by the referee on 2 and 3 July 1963. The referee's report was filed on 11 January 1965. Petitioners filed exceptions thereto on 8 March 1965. A proposed judgment based on agreement of the parties was presented by plaintiffs at May 1967 Session of Superior Court. After a hearing, the court refused to enter the judgment and set the case peremptorily for 29 May 1967. On 18 May 1967, defendant moved for judgment on the referee's report for that exceptions thereto were not filed within 30 days of the filing thereof. On the same date, plaintiffs moved to file a supplemental reply alleging a compromise and settlement as a plea in estoppel and as a plea in bar. The motion was allowed and the defendant's motion to confirm the referee's report was continued pending final disposition of the plea in abatement. Defendant filed answer to the supplemental reply. On 9 September 1967, the plea in abatement was heard and the jury found there had been no compromise agreement settling the dispute between the parties. On the same date an order was entered overruling defendant's motion that judgment be entered on the referee's report and objection to trial by jury and ordering that the exceptions to the referee's report are a part of the record and that the issues set forth therein be submitted to a jury. The action was tried, and the jury returned its verdict in favor of plaintiffs' contentions. From judgment entered thereon on 4 October 1967 defendant appealed.

Futrelle and Baddour by R. W. Futrelle for defendant appellant.

Dees, Dees, Smith and Powell by William W. Smith for plaintiff appellees.

MORRIS, J. Defendant contends the court erred in failing to grant her motion for judgment on the referee's report and in submitting issues to the jury. The referee's report was filed on 11 January 1965. Plaintiffs filed exceptions thereto on 8 March 1965. The record is silent as to the date plaintiffs had notice of the filing of the report. Defendant's motion for judgment on the report was filed on 18 May 1967 — more than 2 years after the exceptions to the report were filed.

Certain procedural requirements are to be followed in matters where a compulsory reference has been ordered so that a right to a jury trial may be preserved. The party whose interests are adversely affected by the order of the referee must (1) object to the order of reference at the time it was made, (2) file specific exceptions to particular findings of fact made by the referee within thirty days from the filing of the report, (3) formulate appropriate issues of fact

raised by the pleadings and based on the facts pointed out in his exceptions, and tender these issues with his exceptions, and (4) in his exceptions demand a jury trial on each issue so tendered. *Bartlett v. Hopkins,* 235 N.C. 165, 69 S.E. 2d 236.

There is no contention on defendant's part that plaintiffs have failed to comply with any of the procedural requirements except that his exceptions, though in proper form and complete compliance, were not filed within 30 days of the date of filing of the referee's report. When objection was raised, the court, in the exercise of its discretion, ordered "that the exceptions to the Report of the Referee filed in this action in March, 1965, be and are a part of this record and that the issues set forth in said exceptions to the Report of the Referee be submitted to a trial by jury". On the authority of *Godwin v. Hinnant,* 250 N.C. 328, 108 S.E. 2d 658, we hold that Judge Cowper had a right, in his discretion, to enter the order. In the *Godwin* case, defendant excepted in apt time to the referee's findings of fact. Subsequently, the matter was remanded to the referee to file a supplemental report, and in the order remanding defendant was allowed 20 days from the time of filing within which to file exceptions. Defendant failed to file additional or new exceptions within the time provided, which would have been 25 February 1958. At June Term 1958, plaintiff moved for an affirmance of the referee's report for that no exceptions had been filed thereto. The court overruled the motion and allowed defendant until 29 September within which to file exceptions. Plaintiff, on appeal, assigned as error the order of the court overruling his motion for an affirmance of the referee's amended report for that no exceptions had been filed thereto. The Supreme Court, speaking through Rodman, J., said:

> "Judge Fountain had a right, in his discretion, to extend the time for filing the exceptions. The time limited in Judge Paul's order was not intended to have greater force than the statutory provision limiting the time to file exceptions. G.S. 1-195. It did not impair the authority given to Judge Fountain by G.S. 1-152 to extend the time."

The defendant suggests that even if the court had authority, in its discretion, to enter the order, it should not have so acted. We find no abuse of discretion. The record in this case is replete with indications of procedural delays. The response was not filed within the time allowed by statute. Though the order appointing the referee required a report on or before 1 April 1963, the report was not filed until 11 January 1965. Defendant was allowed until 4 December 1967 to serve case on appeal. The record indicates it was served on

plaintiffs on 1 April 1968. Exceptions to the referee's report were filed 26 days after the time allowed by statute. We find no abuse of discretion in the court's allowing the exceptions to be a part of the record over objection raised for the first time more than two years later.

Defendant contends that the court erred in refusing to admit into testimony at the trial defendant's exhibit No. 4 which had been admitted into evidence before the referee without objection. The map is of record in Map Book 4, at page 153, Wayne County Registry, having been recorded in 1938. It does not appear that the purpose of the attempted introduction of the map was to illustrate the testimony of a witness. It does appear that defendant desired its introduction as substantive evidence. The map was not made pursuant to any official authority. The fact that it had been of record since 1938 does not make it official. *White v. Edenton,* 173 N.C. 32, 91 S.E. 601. A private map may be used only when a witness testifies to its correctness from first-hand knowledge. Stansbury, N. C. Evidence 2d, § 153 at pp. 381-382. The witness did not testify to its correctness from first-hand knowledge. Since the map was not properly authenticated, it was properly excluded as incompetent. See *Smith v. Starnes,* 1 N.C.App. 192, 160 S.E. 2d 547.

Defendant contends that, because plaintiffs made no objection to the introduction of the map at the hearing before the referee and no exception thereto in their exceptions to the referee's report, they cannot now be heard to object. This contention is without merit. The practical purpose of the reference is to develop and delimit the issues to be determined by a jury. *Coburn v. Timber Corp.,* 257 N.C. 222, 125 S.E. 2d 593. The jury, upon trial on the issues, is not to consider incompetent evidence to the introduction of which objection has been made. Failure to object at the hearing before the referee does not preclude the court from refusing to allow incompetent evidence to be considered by the jury at trial when objection is made to its admission. *Green v. Castlebury,* 70 N.C. 20.

Defendant further assigns as error portions of the charge of the court. The portions assigned as error are not set out in the assignments of error, nor are any questions sought to be presented thereby disclosed without the necessity of going beyond the assignment of error itself. The portions of the charge excepted to are not identified in the record by letters, parentheses, or any other manner. This is, of course, a patent failure to comply with our rules and does not present the exceptions for review. *Long v. Honeycutt,* 268 N.C. 33, 149 S.E. 2d 579. We have, nevertheless, carefully examined the charge of the court and find that the court properly gave the conten-

tions of the parties from the pleadings and the evidence and we do not find prejudicial error.

Affirmed.

MALLARD, C.J., and BRITT, J., concur.

CHARLES W. GILLIAM AND WIFE, HETTIE P. GILLIAM, v. BRUCE RUFFIN AND WIFE, PAULINE J. RUFFIN; CHARLES RUFFIN AND WIFE, JO ANN B. RUFFIN, RUFFIN & RUFFIN REALTY & CONSTRUCTION INC., A CORPORATION; R. G. HANCOCK AND WIFE, CORA E. HANCOCK; JERRY WILLIAMS AND BOFA, INC., A CORPORATION.

(Filed 10 July 1968.)

1. Pleadings § 18—

Where the causes of action set up in the complaint do not affect all parties, there is a misjoinder of parties and causes of action, and a demurrer to the complaint on this ground requires dismissal. G.S. 1-123(1).

2. Fraud § 9; Fraudulent Conveyances § 3—

Where the complaint sets up six causes of action alleging various fraudulent practices and transactions by several defendants, individual or corporate or both, relating to three pieces of realty owned by the plaintiffs, but the causes of action do not affect all the parties to the action, the complaint is demurrable for misjoinder of parties and causes of action.

APPEAL by plaintiffs from *Crissman, J.*, 11 March 1968 Session GUILFORD Superior Court.

This is a civil action heard on demurrers to plaintiffs' complaint. The complaint contains six causes of action, the allegations of which are briefly summarized as follows:

First cause of action: In June 1964, plaintiffs owned three pieces of property on Julian Street in the city of Greensboro. Plaintiffs are approximately 80 years of age and of limited education and business experience. Defendant Bruce Ruffin gained the confidence of plaintiffs and, at his suggestion, took over the management of their business affairs, collected their rents, deducted commissions and remitted the balance to them. While standing in a fiduciary relationship to plaintiffs, defendant Bruce Ruffin, acting for himself and the other individual and corporate defendants Ruffin, proposed to plaintiffs that they give him and his wife a deed to 830 Julian Street for a price of $40,000.00, though he well knew the property was not worth anything like that amount. He was to have transferred to them

property on Lamb's Road which he said was worth $13,000.00 with a first mortgage thereon of $7,000.00. He, or the corporate defendant Ruffin, would make the monthly payments on the Lamb's Road property and after the mortgage was paid, begin to pay plaintiffs $100.00 per month until the difference between $13,000.00 and $40,000.00 was paid. Plaintiffs did convey the Julian Street property to Ruffin and his wife and the Lamb's Road property subject to the mortgage was conveyed to plaintiffs. Defendant Bruce Ruffin and all other individual and corporate defendants have defaulted in the payments on the mortgage on the Lamb's Road property and no payments have been made to plaintiffs on the 830 Julian Street property.

Subsequently defendant Bruce Ruffin, acting for himself, the other defendants Ruffin and the corporate defendant Ruffin proposed to plaintiffs that they sell him the 902 Julian Street property for $40,000.00, knowing it was not worth that. Payment was to be made by construction of an addition to plaintiffs' residence for which the corporate defendant would receive a credit of $5,000.00 and thereafter the corporate defendant was to make monthly payments of $100.00 until the full purchase price was paid. A paper writing was given them, but they were assured no recording thereof was necessary.

Subsequently another proposal was made by him concerning the 901 Julian Street property. He "borrowed" this property to use as security for a $5,000.00 loan which the corporate defendant Ruffin was to repay in twelve months. Plaintiffs were given a deed of trust on Best Street Shopping Center securing a $5,000.00 note executed by defendant Ruffin. This was a second or third mortgage. The prior mortgages have been foreclosed and plaintiffs left with a worthless note.

After obtaining deeds for the three pieces of property on Julian Street, defendant Bruce Ruffin, acting for himself and the other defendants Ruffin and the corporate defendant Ruffin, borrowed a total of $23,000.00 on the three pieces of property and a deed of trust was recorded for each piece of property securing the note evidencing the indebtedness. At the time of filing of the complaint, payments on all three notes were in arrears.

The defendant Hancock was frequently in the office of Bruce Ruffin, had business dealings with him and the corporate defendant Ruffin and well knew the transactions between plaintiffs and Ruffin. He purported to lend to the corporate defendant $30,000.00 and as security for the payment thereof received a deed of trust covering the Julian Street property subject to the indebtedness

thereon. In order to conceal his participation in the fraud, Hancock purportedly placed the loan through another party and required the note evidencing the indebtedness to be payable to bearer.

Pursuant to entreaty of the brother of Charles Gilliam, the 901 Julian Street property was reconveyed to plaintiffs.

Subsequently, the defendants Ruffin and the corporate defendant Ruffiin found themselves in serious financial difficulty. They agreed with defendant Hancock to convey to him the Julian Street properties with other properties owned by them if Hancock would advance an additional $12,750.00. Hancock gave Bruce and Charles Ruffin an option to repurchase one year later upon payment of $83,814.28, this being the amount Hancock had computed as due him by the Ruffins. Bruce Ruffin informed the plaintiffs that unless they reconveyed to him the 901 Julian Street property so he could complete the transaction, the deeds of trust would be foreclosed and they would lose all three pieces of property. He promised to repay Hancock and free their property. They complied, and all three properties were conveyed to Hancock.

By reason of the fraud practiced on plaintiffs the individual defendants Ruffin, corporate defendant Ruffin and defendants Hancock are indebted to plaintiffs in the approximate sum of $16,356.62, the amount due on the indebtedness on the Julian Street properties, and liable jointly and severally for punitive damages in amount of $50,000.00.

Second cause of action: All of the allegations of the first cause of action are repeated and added thereto are these: That the deed to Hancock and option to Ruffin constituted a security transaction; that of the $83,814.28, $29,549.84 was interest and constituted usury; that the corporate defendant Ruffin paid the usurious interest and $15,923.01 on principal from a sale of some property; that subsequently another $2,000.00 was paid on the option agreement; that the corporate defendant Ruffin is entitled to recover from the Hancocks some $66,767.58 by reason of usurious interest charged and paid; that by reason of this liability of the Hancocks to the corporate defendant Ruffin, the option agreement has been satisfied; that the corporate defendant Ruffin should recover of Hancock an additional sum of $30,426.15, the overage after applying usurious interest to obligation; that plaintiffs can assert the claim of usury because by such usurious charges the defendants Hancock have wrongfully retained property which in equity belongs to plaintiffs.

Third cause of action: Repeats the allegations of the first cause of action with respect to the transactions between plaintiffs and Ruffin and Ruffin and Hancock and asks that the court reform the

option agreement to show due thereon some $18,000.00 and upon payment thereof require defendants Hancock to execute a deed to Charles and Bruce Ruffin; that the individual defendants Ruffin be declared trustees for plaintiffs of the Julian Street properties and required to execute deeds therefor to plaintiffs; that the court assess $50,000.00 punitive damages against the Hancocks, $50,000.00 punitive damages against the individual and corporate defendants Ruffin, and that the court assess as damages a sufficient amount to pay off the indebtedness on the Julian Street properties.

Fourth cause of action: Alleges that at the time the corporate defendant Ruffin conveyed 16 tracts of land to defendants Hancock, it was insolvent and indebted to plaintiffs in the amount of some $16,000.00; that defendants Hancock had knowledge of such insolvency and that the purpose of the conveyance was to defraud creditors. Plaintiffs ask that the conveyance to defendants Hancock be declared void and that all properties purportedly conveyed to defendants Hancock by Ruffin be subjected to the lien of any judgment in favor of plaintiffs against individual and corporate defendants Ruffin except the Julian Street properties.

Fifth cause of action: Alleges that 11 tracts of land were conveyed to defendant Williams by McLean and wife; that McLean and wife held a note of corporate defendant Ruffin secured by deed of trust; that foreclosure was imminent; that defendant Ruffin obtained sufficient funds to satisfy the deed of trust and directed that conveyance be made to Williams; that at the time the corporate defendant was insolvent and indebted to plaintiffs and plaintiffs ask that the deed be set aside and that property subjected to the lien of any judgment obtained by plaintiffs against corporate defendant Ruffin.

Sixth cause of action: That seven tracts of land included in the security instrument to the McLeans were conveyed by them to defendant BOFA, Inc. at the direction of Bruce Ruffin and for the purpose of defrauding creditors at a time when corporate defendant Ruffin was insolvent and indebted to plaintiffs. Plaintiffs ask that this conveyance be set aside and the seven tracts subjected to the lien of any judgment obtained by plaintiffs.

Defendants Hancock, defendant Williams, defendants Ruffin and defendant BOFA, Inc. each filed a written demurrer to the complaint. The demurrers of defendants Hancock, defendant Williams, and defendant BOFA, Inc., were allowed and the action dismissed as to them. The demurrer of defendants Ruffin was allowed, but the court in its discretion, allowed plaintiffs to amend their complaint as to defendants Ruffin and the corporate defendant Ruffin. From the judg-

ment entered, plaintiffs appealed. After judgment, settlement was made with defendant BOFA, Inc., and plaintiffs took a voluntary nonsuit as to it.

David M. Clark and Fred M. Upchurch for plaintiff appellants.

David I. Smith for individual defendants Ruffin and corporate defendant Ruffin, appellees.

Hoyle, Boone, Dees & Johnson by J. Sam Johnson, Jr., for defendants Hancock, appellees.

MORRIS, J. The sole question presented by this appeal is whether there is a misjoinder of parties and causes of action.

G.S. 1-123 provides that several causes of action may be united in the same complaint where they all arise out of "1. The same transaction, or transaction connected with the same subject of action."

Assuming *arguendo* that the six separately stated causes of action meet this provision of the statute, they do not comply with that portion of the statute providing as follows: "But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages *must affect all the parties to the action,* and not require different places of trial, and must be separately stated." (Emphasis supplied.)

The first cause of action asks for damages for fraud against defendants Ruffin. This cause of action does not affect defendant Williams or defendant BOFA. The second cause of action is for fraud and for usury. It asks that the corporate defendant Ruffin recover an amount representing usurious interest from Hancock. This cause of action does not affect either Williams or BOFA and the recovery sought is against one defendant in favor of another defendant. The third cause of action is to reform an option agreement affecting defendants Ruffin and Hancock, to require Hancock to execute a deed to the Julian Street property to plaintiffs, to have individual defendants Ruffin declared trustees thereof for plaintiffs, and to require individual defendants Ruffin to execute deeds for the property to plaintiffs. Plaintiffs also seek punitive damages against defendants Hancock and individual and corporate defendants Ruffin. This cause of action does not affect Williams or BOFA.

The fourth cause of action is to declare void all deeds giving defendants Hancock any interest in the Julian Street properties, to impress a trust on the Julian Street properties in favor of plaintiffs, and to subject other properties conveyed by defendants Ruffin to defendants Hancock to the lien of any judgment obtained in favor

of plaintiffs against individual and corporate defendants Ruffin. This cause of action does not affect either Williams or BOFA.

The fifth cause of action is to declare void a deed to Williams conveying 11 tracts of land (not including the Julian Street properties), to declare the corporate defendant Ruffin the owner of the 11 tracts of land, and to subject these tracts to the lien of any judgment in favor of plaintiffs against corporate defendant Ruffin. This cause of action does not affect BOFA, or the individual defendants Ruffin, or defendants Hancock.

The sixth cause of action alleges a conveyance to BOFA, Inc. of 7 tracts of land (not including the Julian Street properties) at the direction of defendants Ruffin at a time when defendants Ruffin were insolvent and indebted to plaintiffs. It asks for "relief in accordance with the law and facts as shall be found by the court and jury, and in accordance with the cause or causes of action as stated herein as shall be found by the court to be appropriate". This cause of action does not affect defendants Hancock or defendant Williams.

It is readily apparent that the causes of action do not affect all parties. There is, therefore, misjoinder of parties and causes of action. The demurrers were properly sustained and the action dismissed as to defendants Hancock, Jerry Williams, and BOFA, Inc. *Kearns v. Primm*, 263 N.C. 423, 139 S.E. 2d 697. The action of the trial court in allowing plaintiffs to amend their complaint as to the individual defendants Ruffin and the corporate defendant Ruffin is not before us since those defendants did not appeal therefrom.

Affirmed.

CAMPBELL and BRITT, JJ., concur.

DANIEL W. WILLIAMS, ADMINISTRATOR OF THE ESTATE OF JAMES DANIEL WILLIAMS, v. CALVIN COOLIDGE HALL AND DuBOSE LUMBER CORPORATION.

(Filed 10 July 1968.)

1. Negligence § 26—

A motion for judgment of nonsuit on the ground of contributory negligence will be granted only when plaintiff's own evidence, taken in the light most favorable to him, so clearly establishes the facts necessary to show contributory negligence that no other conclusion can be reasonably drawn therefrom.

2. Trial § 21—

Upon motion to nonsuit, plaintiff's evidence is taken as true and con-

sidered in the light most favorable to him, giving him the benefit of every fact and inference of fact pertaining to the issue which may be reasonably deduced from the evidence, and defendant's evidence which tends to impeach or contradict plaintiff's evidence is not considered.

3. Same—

Discrepancies and contradictions even in plaintiff's evidence are matters for the jury and not the judge.

4. Negligence § 26—

The burden of proof on the issue of *contributory negligence* is upon defendant.

5. Automobiles § 76—

Plaintiff administrator's evidence tending to show that defendant's disabled tanker truck was standing in his intestate's lane of travel at night without lights or flares, in violation of G.S. 20-161(a), that there was a slight drizzle-like rain at the time of the accident, that the intestate's vehicle collided into the rear of the truck, killing the intestate and his three companions, that the posted speed limit on the rural paved road was 55 miles per hour, and that the truck could not be seen at a distance of more than 50 to 80 feet away, *is held* insufficient to disclose contributory negligence on the part of plaintiff's intestate as a matter of law.

APPEAL by plaintiff from *Canaday, J.*, February 1968 Civil Session of HARNETT Superior Court.

This is a civil action instituted by plaintiff administrator against the defendants to recover for the wrongful death of plaintiff's intestate who was killed in a collision between a 1963 Chevrolet automobile operated by plaintiff's intestate and a 1958 Chevrolet tanker truck owned by the corporate defendant and operated by the individual defendant.

In his complaint, plaintiff alleges that on 8 August 1966, at around 9:15 p.m., his 22-year-old intestate was operating a 1963 Chevrolet in a southerly direction on rural paved road 1446 in Sampson County; that at said time and place, defendant Hall had stopped the corporate defendant's tanker truck on the southbound lane of the pavement of said road and had left the truck parked on the highway with no lights or flares, in violation of G.S. 20-161(a); that plaintiff's intestate ran into said truck and was killed instantly; that his death was proximately caused by the negligence of the defendants.

In their answer, defendants admit that the corporate defendant owned said truck, that defendant Hall was operating the same as the agent or servant of the corporate defendant, and that defendant Hall stopped the truck on a portion of the pavement of said public road. The answer further avers that the electrical system on the truck suddenly failed, that the driver was unable to remove the

truck from the pavement onto the shoulder of the highway, that the truck contained approximately 1,000 gallons of fuel oil in its tank weighing some 8,000 pounds, and that the truck and its load weighed approximately 13,000 pounds. The answer also alleges that there were several five-inch or six-inch reflectors on the rear of the truck; that after it stopped, defendant Hall placed a two-cell flashlight on the rear of the truck, then left and went several hundred yards to a service station to obtain help. Defendants allege that plaintiff's intestate was contributorily negligent in many respects, including excessive speeding, not keeping a proper lookout, and not keeping his vehicle under proper control.

Plaintiff's evidence most favorable to him tended to show: That around 9:00 p.m., plaintiff's intestate stopped at a service station approximately one mile from where the wreck took place; that he was accompanied by another man and two girls and purchased four soft drinks, after which he drove off in the direction of the site of the wreck; that intestate appeared to be normal at the time, and he drove off from the store in a normal manner. A witness at the store testified that he left the store about fifteen minutes after intestate left and that he passed by the wrecked vehicles. The investigating patrolman testified that rural paved road 1446 was a secondary road, paved with coarse asphalt, and was nineteen feet wide at the site of the wreck; that he arrived at the scene at about 9:45 p.m., at which time he found the oil truck sitting in the southbound traffic lane; that the Chevrolet convertible was sitting behind the tanker and plaintiff's intestate and his three companions were all dead; that there were no flares on the highway to the rear of the truck and no lights on the truck were burning. He further testified that there was a slight drizzle-like rain at the time of his investigation and that it was very dark at 9:00 that night; that the posted speed limit at the site was 55 miles per hour.

Another witness for plaintiff testified that he had occasion to pass the disabled truck about 9:00 p.m., before the wreck occurred; that he was driving south at about 30 miles per hour and had his lights on low beam; that it was drizzling rain; that there were no lights on or flares about the truck, and that he did not see the truck until he was about "50 to 75 to 80 feet" from it. He testified that when he was "right on it" he discovered two or three little reflectors.

Defendants' motion for judgment as of involuntary nonsuit at the conclusion of plaintiff's testimony was denied but was allowed at the conclusion of all the testimony. From judgment entered thereon, plaintiff appealed.

D. K. Stewart and Bryan, Bryan & Johnson by Robert C. Bryan, Attorneys for plaintiff appellant.

Holland & Poole by R. Maurice Holland, Butler & Butler by Edwin E. Butler, and Morgan & Jones by Robert B. Morgan, Attorneys for defendant appellees.

BRITT, J. Two questions are presented for our determination: (1) Was the evidence offered by plaintiff sufficient to make out a case of actionable negligence against the defendants? (2) Did the plaintiff's evidence, considered in the light most favorable to him, show that plaintiff's intestate was contributorily negligent as a matter of law?

In their brief and argument on this appeal, defendants apparently have conceded, and we agree, that there was sufficient evidence of negligence on the part of defendant Hall to take that issue to the jury. Plaintiff alleged that defendants violated the provisions of G.S. 20-161(a), and the evidence was more than sufficient to support the allegation.

Defendants contend, however, that their motion for nonsuit was properly allowed on the grounds that plaintiff's intestate was guilty of contributory negligence as a matter of law, and this contention is the principal question presented by this appeal.

In *Bass v. McLamb,* 268 N.C. 395, 150 S.E. 2d 856, in an opinion written by Branch, J., the following was said:

> "We recognize the well-established rule that 'A motion for judgment of nonsuit on the ground of contributory negligence will be granted only when plaintiff's own evidence establishes the facts necessary to show contributory negligence so clearly that no other conclusion can be reasonably drawn therefrom.' *Johnson v. Thompson, Inc.,* 250 N.C. 665, 110 S.E. 2d 306."

In *Galloway v. Hartman,* 271 N.C. 372, 156 S.E. 2d 727, we find the following:

> "Nonsuit on the ground of contributory negligence should be allowed only when plaintiff's evidence, taken in the light most favorable to him, so clearly establishes the defense that no other reasonable inference or conclusion can be drawn therefrom. *Waters v. Harris,* 250 N.C. 701, 110 S.E. 2d 283; *Hood v. Coach Co.,* 249 N.C. 534, 107 S.E. 2d 154. Further, nonsuit on the ground of contributory negligence should be denied if diverse inferences upon the question are permissible from plaintiff's proof. *Wooten v. Russell,* 255 N.C. 699, 122 S.E. 2d 603."

At the trial of this action, evidence was introduced by plaintiff

and the defendants, the motion for nonsuit being allowed at the close of all the evidence. Defendants stress the evidence of excessive speed on the part of plaintiff's intestate and contend that the judgment was justified primarily on the showing of excessive speed.

It is well established in this jurisdiction that upon motion to nonsuit, the plaintiff's evidence is taken as true and considered in the light most favorable to him, giving him the benefit of every fact and inference of fact pertaining to the issues which may be reasonably deduced from the evidence, and defendant's evidence which tends to impeach or contradict plaintiff's evidence is not considered. It is elementary that discrepancies and contradictions even in plaintiff's evidence are matters for the jury and not the judge. *Greene v. Meredith,* 264 N.C. 178, 141 S.E. 2d 287.

The burden of proof on the issue of contributory negligence is on the defendants. They contend that plaintiff's intestate was either exceeding the maximum speed limit or was driving faster than was reasonable and prudent under the conditions existing. Although there was elicited from plaintiff's witnesses evidence that would infer excessive speed, we are of the opinion that plaintiff's evidence did not show excessive speed or other negligence on the part of plaintiff's intestate sufficiently to constitute contributory negligence as a matter of law.

We hold that upon the evidence presented by plaintiff in the trial of this action, he was entitled to have the issues answered by the jury. The judgment of the Superior Court is

Reversed.

CAMPBELL and MORRIS, JJ., concur.

REDEVELOPMENT COMMISSION OF HIGH POINT v. GUILFORD COUNTY AND CITY OF HIGH POINT.

(Filed 10 July 1968.)

1. Taxation § 34—

A taxpayer may maintain an action to restrain the levy of a tax on the ground that the tax itself is illegal or invalid or that the tax is for an illegal or unauthorized purpose.

2. Taxation § 19—

Exemptions from taxation are to be strictly construed.

3. Municipal Corporations § 4—

The purpose of the Urban Redevelopment Act, G.S. 160-454 *et seq.*, is

to promote the health, safety, morals and general welfare of the citizens of municipalities by abolishing blighted areas.

4. Same; Taxation §§ 19, 21—

A municipal redevelopment commission created pursuant to the Urban Redevelopment Act, G.S. 160-454 *et seq.*, is a municipal corporation within the meaning of Art. V, § 5, North Carolina Constitution, and non-income producing property held by it is therefore exempt from county or municipal ad valorem taxation, but income producing property held by a municipal redevelopment commission is subject to ad valorem taxation.

APPEAL from *May, S.J.*, GUILFORD County Superior Court, High Point Division, April 1968 Regular Session.

In this case the plaintiff seeks to enjoin Guilford County and the City of High Point from collecting ad valorem taxes on property held by the plaintiff for redevelopment purposes. The defendants demurred to the complaint. Each demurrer was sustained for failure to state a cause of action, for that the plaintiff is not exempt from ad valorem taxes as a matter of law.

Plaintiff alleges that it is a body corporate and politic and is a Redevelopment Commission duly created, organized and existing under and pursuant to the provisions of G.S. 160-454, *et seq.* known as the "Urban Redevelopment Law." Plaintiff further alleges that it is now engaged in the execution of a redevelopment plan within the City of High Point and that pursuant thereto it has acquired four different types of real property: (1) improved income-producing property, (2) improved non-income producing property, (3) unimproved income-producing property, (4) unimproved non-income producing property. Plaintiff asserts that its real property is exempt from ad valorem taxation under and pursuant to the provisions of G.S. 105-296, and that the defendants have illegally assessed and levied and are attempting to collect ad valorem taxes upon this real estate. Plaintiff seeks to enjoin the defendants from collecting ad valorem taxes on this property.

Each demurrer asserts that the complaint does not state facts sufficient to constitute a cause of action, for: (1) that the plaintiff is not exempt from ad valorem taxes under G.S. 105-296, and (2) that plaintiff has not exhausted its administrative remedies and has failed to comply with the requirements of G.S. 105-40 (G.S. 105-40 obviously is not applicable and each of the defendants must have intended to refer to G.S. 105-406.)

Haworth, Riggs, Kuhn and Haworth by John Haworth and Walter W. Baker, Jr., Attorneys for plaintiff appellant.

David I. Smith, Attorney for Guilford County, defendant appellee.

CAMPBELL, J. At the outset we are confronted with the question as to whether a justiciable question is presented. *Development Co. v. Braxton,* 239 N.C. 427, 79 S.E. 2d 918.

"The remedy of injunction is available to a taxpayer when a tax levy or assessment, or some part thereof, is challenged on the ground (1) the tax or assessment is itself illegal or invalid, or (2) for an illegal or unauthorized purpose." *Wynn v. Trustees,* 255 N.C. 594, 599, 122 S.E. 2d 404. If the property of the plaintiff in the instant case is exempt from taxation as alleged by the plaintiff, then the remedy sought herein is available.

G.S. 105-281 provides: "All property, real and personal, within the jurisdiction of the State, not especially exempted, shall be subject to taxation."

Plaintiff in this case recognizes this doctrine but asserts that its property is exempt under the provisions of (1) G.S. 105-296 which exempts "real property lawfully owned and held by * * * cities," and (2) N. C. Const. art. 5, § 5 which provides: *"Property exempt from taxation.* — Property belonging to the State, counties and municipal corporations shall be exempt from taxation. * * * No taxing authority other than the General Assembly may grant exemptions, and the General Assembly shall not delegate the powers accorded to it by this section."

"In order to come within the constitutional orbit of tax exemption, a corporation must be an instrumentality, an agent, a department, or an arm of the State in the sense of being at least a subordinate branch of the State government or of a local subdivision thereof and subject to governmental visitation and control, so that ordinarily the interests and franchises pertaining to the corporation are either the exclusive property of the government itself or are under the exclusive control of some agency or political subdivision thereof." *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 64, 74 S.E. 2d 310.

"Taxation is the rule and exemption the exception. The rule has repeatedly been laid down by this Court, the exemptions from taxation are to be strictly construed." *Benson v. Johnston County,* 209 N.C. 751, 185 S.E. 6. This case held that where land was bought by a municipality to protect the town's tax liens and with the purpose of holding it until it could be sold as any private individual purchaser might have done, such property was taxable by the county. Taxation of real estate owned by a municipality for purposes not directly connected with the governmental functions of the municipality has been sustained in numerous instances. The divergent views of the law upon this subject were fully set forth in the case of *Warrenton v. Warren*

County, 215 N.C. 342, 2 S.E. 2d 463, where Justice Schenck wrote an opinion, Chief Justice Stacy wrote a concurring opinion, and Justices Barnhill and Winborne concurred in a concurring opinion, and Justice Clarkson wrote a separate concurring opinion and Justices Devin and Seawell each wrote a dissenting opinion. The law on this now seems to be established. See *Winston-Salem v. Forsyth County,* 217 N.C. 704, 9 S.E. 2d 381. Thus, even a municipality does not have an absolute exemption.

In the instant case one question to be determined is whether the plaintiff is a municipal corporation; because if not, it will have no exemption.

In *Wells v. Housing Authority,* 213 N.C. 744, 197 S.E. 693, the Court was called upon to construe a Housing Authority created under the Housing Authorities Act, G.S. 157-1, *et seq.* The Court said:

> "It is not questioned that it is a proper function of government to promote the health, safety, and morals of its citizens. The Housing Authorities Act depends for its validity, as a proper exercise of governmental authority, upon its declared objective in removing a serious menace to society, not disconnected with political exigency, in the populous areas to which it applies.
>
> It differs in one particular from the usual type of municipality — the ownership of the instrumentalities by which the public purpose is to be served. But we cannot see that such ownership detracts from the public or municipal character of the agency employed. * * *
>
> The State cannot enact laws, and cities and towns cannot pass effective ordinances, forbidding disease, vice, and crime to enter into the slums of overcrowded areas, there defeating every purpose for which civilized government exists, and spreading influences detrimental to law and order; but experience has shown that this result can be more effectively brought about by the removal of physical surroundings conducive to these conditions. This is the objective of the act, and these are the means by which it is intended to accomplish it."

The Court then proceeded to hold that this agency was a municipal corporation within the meaning of the provisions of the Constitution and that, as such a municipality, its property was exempt from State, county, and municipal taxation.

Thereafter, the Legislature amended the Housing Authorities Act to make it apply to rural areas in addition to urban areas. The va-

lidity of such a rural area housing authority was tested and the Court held it valid in the case of *Mallard v. Housing Authority,* 221 N.C. 334, 20 S.E. 2d 281.

In the instant case, the Legislature has enacted G.S. 160-454, *et seq.,* known as the "Urban Redevelopment Law." This enactment of the Legislature has for its general purposes and policies the same objectives as the Housing Authorities Act, namely: to promote the health, safety, morals, and general welfare of the citizens by abolishing blighted areas. This act was held constitutional and the divergent views pertaining thereto are set out in *Redevelopment Commission v. Bank,* 252 N.C. 595, 114 S.E. 2d 688.

While there are differences between a Housing Authority and an Urban Redevelopment Commission as pointed out by the defendants; nevertheless, when one looks at the general overall purpose to be accomplished, as shown by the acts themselves, one tracking the other, we conclude that there is no distinction between the general principles and policies of the two enactments insofar as pertinent to this matter. If a Housing Authority is a municipal corporation and exempt from ad valorem taxes as held in *Wells v. Housing Authority, supra,* then it follows, and we so hold, that a Redevelopment Commission is, likewise, a municipal corporation and exempt from ad valorem taxation.

Just as any other municipal corporation, however, is to be taxed for property held by it for purposes other than governmental as previously pointed out in this opinion, we hold that the plaintiff in the instant case is to be taxed for those properties which are held by it for income production pending disposal thereof. In other words, the properties owned by the plaintiff, both improved and unimproved, from which income is being derived are subject to ad valorem taxes by the defendants. It is only the non-income producing properties, both improved and unimproved, which are to be exempt from taxation. Compare *Seminary, Inc., v. Wake County,* 251 N.C. 775, 112 S.E. 2d 528.

Reversed.

BRITT and MORRIS, JJ., concur.

LOUISE SAYRE v. PAULINE WATKINS THOMPSON, ABE SAYRE AND CHARLES BRYAN COX

AND

WADE H. THOMPSON v. PAULINE WATKINS THOMPSON, ABE SAYRE AND CHARLES BRYAN COX.

(Filed 10 July 1968.)

1. Automobiles § 19—

While a motorist faced with a green light is warranted in moving into the intersection unless the circumstances are such as to indicate caution to a person of reasonable prudence, the duty rests upon him to maintain a reasonable and proper lookout for other vehicles in or approaching the intersection.

2. Same—

The amber or yellow light cautions the operator of a vehicle that a red light is about to appear and that it is hazardous to enter the intersection, and it affords to those who have entered or are entering the intersection on the green light the opportunity to proceed through the intersection before the crossing traffic is invited to enter.

3. Automobiles § 57—

Evidence tending to show that the automobile in which plaintiff was a passenger was faced with a green light as it approached the intersection from a westward direction, that just as it entered the intersection the light turned to yellow, and that defendant, who had stopped for the red light on the north side of the intersection, drove into the intersection and struck the rear left fender of plaintiff's automobile as it was approximately in the center of the intersection, *is held* sufficient to take the issue of defendant's negligence to the jury.

APPEAL in each case by defendant Charles Bryan Cox from *Hall, J.*, November 1967 Civil Session, Superior Court of COLUMBUS County.

These two civil actions were consolidated by consent of the parties for trial. They arise out of a collision on 20 October 1965 between a 1957 Pontiac automobile owned by the defendant Abe Sayre and operated by the defendant Pauline Watkins Thompson and a 1965 Buick automobile owned and operated by the defendant Charles Bryan Cox.

Plaintiff in each case is seeking to recover damages for injuries sustained in the collision.

The plaintiff in each case was a passenger in the Pontiac automobile owned by defendant Abe Sayre and operated by defendant Pauline Watkins Thompson.

In the case in which Louise Sayre is plaintiff the court submitted and the jury answered the following issues:

"(1) Was the plaintiff Louise Sayre injured by the negligence

of the defendant Pauline Watkins Thompson, agent of Abe Sayre, as alleged in the Complaint?

ANSWER: No.

(2) Was the plaintiff Louise Sayre injured by the negligence of the defendant Charles Bryan Cox, as alleged in the Complaint?

ANSWER: Yes.

(3) If so, what amount of damages, if any, is plaintiff Louise Sayre entitled to recover?

ANSWER: $3,000.00."

In the case in which Wade H. Thompson is plaintiff the court submitted and the jury answered the following issues:

"(1) Was the plaintiff, Wade H. Thompson, injured by the negligence of the defendant Pauline Watkins Thompson, agent of Abe Sayre, as alleged in the Complaint?

ANSWER: No.

(2) Was the plaintiff, Wade H. Thompson, injured by the negligence of the defendant Charles Bryan Cox, as alleged in the Complaint?

ANSWER: Yes.

(3) If so, what amount of damages, if any, is plaintiff, Wade H. Thompson, entitled to recover?

ANSWER: $3,500.00."

Judgment that plaintiff Louise Sayre have and recover of the defendant Charles Bryan Cox the sum of $3,000 and costs was entered in the Sayre case. Judgment that plaintiff Wade H. Thompson have and recover of the defendant Charles Bryan Cox the sum of $3,500 and costs was entered in the Thompson case. Defendant Cox excepted to each judgment and appealed.

Powell & Powell by Frank M. Powell for plaintiffs Louise Sayre and Wade H. Thompson, appellees.

Henry & Henry by Everett L. Henry for defendant Charles Bryan Cox, appellant.

MALLARD, C.J. Defendant Cox contends that the trial court committed error in failing to allow his motions at the close of the plaintiffs' evidence and again at the close of all the evidence for judgment of nonsuit.

Much of defendant's brief is related to the negligence of the de-

fendant Mrs. Thompson. There was ample evidence requiring submission to the jury of the issue as to the negligence of the defendant Thompson, and the jury answered that issue in the negative after the charge of the court, to which there was no exception.

The main question presented on these appeals is whether the evidence offered by plaintiffs considered in the light most favorable to them was sufficient to warrant submission thereof to the jury as to the alleged actionable negligence of the defendant Charles Bryan Cox.

The evidence against the defendant Cox, taken in the light most favorable to the plaintiffs as we are required to do, tends to show that on 20 October 1965 the plaintiffs were riding in the automobile of Abe Sayre operated by the defendant Pauline Watkins Thompson eastwardly on Washington Street in the Town of Whiteville. Traffic was controlled at the intersection of Washington Street with Highway #701 by an electric traffic control signal which was suspended over the center of the intersection. As the Sayre automobile approached the intersection, it was faced with a green light and just as it entered the light turned to yellow. At that time there was a red light facing the defendant Cox who was stopped for the red light on the north side of the intersection on Highway #701 headed South. As the Sayre automobile proceeded through the intersection on the yellow light, the defendant Charles Bryan Cox operated his automobile into the intersection and struck the left rear fender of the Sayre automobile with the front portion of his automobile. This collision occurred approximately in the center of the intersection.

The plaintiffs alleged, among other things, that the defendant Charles Bryan Cox failed to keep a proper lookout.

The evidence taken in the light most favorable to the plaintiffs would permit, although not require, the jury to find that the defendant Cox entered the intersection on a red light while the Sayre automobile was proceeding through the intersection on a yellow light, that the defendant Cox failed to keep a proper lookout by failing to see that the Sayre automobile was already in the intersection before he entered and that such failure was the proximate cause of the collision and injuries sustained by the plaintiffs, and that no collision would have occurred if the defendant Cox had been keeping a reasonably careful lookout for the vehicle already in, and in the process of crossing, the intersection.

The defendant contends he was faced with a green light, and it is true that if faced with a green light a driver is warranted in moving into the intersection, unless the circumstances are such as to indicate caution to one of reasonable prudence. Even though the driver

is faced with a green light, however, the duty rests upon him to maintain a reasonable and proper lookout for other vehicles *in* or *approaching* the intersection. *Hyder v. Battery Co., Inc.,* 242 N.C. 553, 89 S.E. 2d 124. The meaning of the amber or yellow light is that it cautions but not in the positive tones of the red light. It warns the operator of a vehicle that a red light is about to appear and that it is hazardous to enter the intersection. However, it affords those who have entered or are entering on the green light the opportunity to proceed through the intersection before the crossing traffic is invited to enter. *Wilson v. Kennedy,* 248 N.C. 74, 102 S.E. 2d 459; *Jones v. Holt,* 268 N.C. 381, 150 S.E. 2d 759.

The evidence in this case is distinguished from *Jones v. Schaffer,* 252 N.C. 368, 114 S.E. 2d 105, the case cited and relied on by the appellant. In the *Schaffer* case the uncontradicted evidence was to the effect that the traffic signal was red when Mrs. Schaffer approached and entered the intersection. In the instant case the evidence is contradictory.

We are of the opinion and so hold that the evidence for the plaintiffs when taken in the light most favorable to them required submission of the case to the jury to determine the facts.

The defendant also contends that the trial court committed error in refusing to set the verdict aside as being contrary to the weight of the evidence and law and in failing to enter judgment notwithstanding the verdict. These have been carefully considered and are found to be without merit.

In the trial we find

No error.

BROCK and PARKER, JJ., concur.

THOMAS B. WOODY AND WIFE, BEATRICE S. WOODY, v. W. M. CLAYTON AND WIFE, LAURA SWANSON CLAYTON.

(Filed 10 July 1968.)

1. Dedication § 1—

Dedication of an easement may be made by express language, reservation, or by conduct showing an intention to dedicate, which conduct may operate as an express dedication, as where land is sold by reference to a plat showing streets, alleys, or parks or where such a plat is referred to in the negotiations for the sale of land.

2. Same—

Where defendant contracted to purchase a lot from plaintiff before an

unrecorded plat was prepared showing a street adjacent to the lot purchased as being extended through the remaining portion of plaintiff's tract, defendant can claim no express dedication of an easement to have the street opened through the remainder of plaintiff's land by reason of the plat.

3. Same—

Where defendant contracted to purchase a lot from plaintiff in 1940, defendant may not now show an implied dedication of an easement to have a street adjacent to the lot extended through plaintiff's remaining land by testimony of oral statements made to defendant by plaintiff when the contract was entered and thereafter of plans to subdivide the remaining land and to extend the street in question.

APPEAL by defendants from *McKinnon, J.*, 12 February 1968 Session PERSON Superior Court.

Plaintiffs own a tract of land in the Town of Roxboro lying along the west side of North Main Street. On 22 August 1935 plaintiffs caused a survey and plat to be made subdividing into residential lots the portion of said tract which bordered on North Main Street; these lots varied in depth from about 200 feet to about 240 feet. In addition to the lots three streets were laid out extending from North Main Street in a westerly direction for distances equal to the depth of the lots; one of these streets was named Woody Street. This plat of 22 August 1935 was duly recorded.

On 14 December 1940 plaintiffs entered into a contract with defendants for the sale and purchase of a rectangular lot of the dimensions 200 by 100 feet. The contract, in part, described the lot as follows: ". . . adjoining the rear ends of a number of the front lots of said Burch property, map and subdivision prepared by T. C. Brooks, August 22, 1935, and lying south of and fronting on a proposed extension of Woody Street, on which street when so extended said lot will front 100 feet, and it will have a depth of 200 feet." Also in the contract the plaintiffs reserved the right to vary the course of Woody Street in the following language: "The right is reserved in extending said street to deflect either to the right or to the left, as the vendors may elect, but in any case said lot will be so laid off as to front 100 feet thereon, and extend 200 feet to the rear."

On 8 October 1941 plaintiffs caused a survey and a plat to be made subdividing the remaining portion of the tract of land into residential lots; the scale of the 1941 plat and the scale of the 1935 plat are the same, and the 1941 plat shows the streets, including Woody Street, extended to the full depth of the tract of land. This 1941 plat was never recorded and none of the streets were opened nor were any lots sold with reference to it.

On 18 March 1948, defendants having completed the payments

required by their 1940 contract with plaintiffs, a deed was executed conveying to defendants the 100 X 200 foot lot contracted for. The deed described the lot by metes and bounds, the front line being described as follows: "thence South 45° East 100 feet along south side of proposed extension of Woody Street to iron stake the point of beginning."

Woody Street is an unimproved street but is open from North Main Street to a depth extending the entire 100 foot frontage of defendants' lot. The remainder of the streets and lots shown on the unrecorded 1941 map have not been developed and plaintiffs do not intend to proceed with the additional subdivision. Defendants have complained to plaintiffs that they have an easement to have Woody Street open the full depth of the plaintiffs' tract of land as shown on the unrecorded 1941 map.

Plaintiffs instituted this action to remove the cloud from their title. Defendants counterclaimed, alleging that plaintiffs have caused a total destruction of their easement across the remaining portion of plaintiffs' tract of land, and seek actual and punitive damages.

Upon trial plaintiffs offered evidence to establish their title to the tract of land in question and rested.

On cross-examination of the plaintiff Thomas B. Woody, defendants elicited testimony relating to the unrecorded 1941 map and its contents. Also defendants offered evidence, in the absence of the jury, of oral statements made to defendants by Thomas B. Woody in 1940 and subsequent years to the effect that Woody Street would be opened according to the unrecorded 1941 map. Upon motion of plaintiffs the testimony given by Thomas B. Woody on cross-examination was stricken, and the defendant was not allowed to offer his testimony before the jury. The trial judge submitted the following issue to the jury: "Are the plaintiffs the owners of the land described in paragraph three of the complaint free and clear of any claim or an easement by the defendants?" and the judge gave the jury a peremptory instruction thereon.

Defendants appealed, assigning error.

Burns, Long and Wood by Charles B. Wood for plaintiff appellees.

Haywood, Denny and Miller by George W. Miller, Jr., for defendant appellants.

BROCK, J. Defendants assign as error that the trial judge refused to allow in evidence before the jury the testimony of defendant W. M. Clayton relative to oral statements made to him by plain-

tiff Thomas B. Woody in 1940 and subsequent years concerning plaintiffs' intention to subdivide the entire tract of land and to extend Woody Street to the western boundary of the tract.

Defendants argue in their brief that their right of easement was by express or implied dedication on the part of the plaintiffs by the language and conduct of Mr. Woody showing an intention to dedicate and that they relied thereon in initially contracting for and later purchasing their house and lot.

The authorities cited by defendants amply support the general proposition that "a dedication may be by express language, reservation, or by conduct showing an intention to dedicate; such conduct may operate as an express dedication, as where a plat is made showing streets, alleys, or parts, and the land is sold, either by express reference to such plat or by showing that the plat was used and referred to in the negotiations." *Green v. Barbee,* 238 N.C. 77, 76 S.E. 2d 307. However, the defendants cannot bring themselves within this principle because their contract to purchase was entered into approximately ten months before any survey or plat was made showing Woody Street extended. Even though plaintiffs may have told defendants of their future plans at the time of entering into the contract for purchase, defendants cannot compel plaintiffs to go through with a plan that was later abandoned by plaintiffs as undesirable. If defendants had desired to acquire a right of way or other easement over the remainder of the lands of plaintiff they should have insisted that the easement be declared in the contract for purchase. It would be a dangerous invasion of rights of property to impose an easement by implication or otherwise based upon the slippery memory of witnesses after many years have passed and circumstances have changed. *Milliken v. Denny,* 141 N.C. 224, 53 S.E. 867.

The case of *Spaugh v. Charlotte,* 239 N.C. 149, 79 S.E. 2d 748, relied upon by defendants, makes some statements that, when lifted out of context, seem to support defendants' position. However, in *Spaugh* the city was seeking to withdraw from dedication school property which the Board of School Commissioners had accepted from the city and used for many years. The language of the opinion must be read and understood in the light of the factual circumstances therein involved. Clearly there has been no acceptance and use by the defendants of an easement across the remainder of plaintiffs' property in this case.

The cases of *Somersette v. Stanaland,* 202 N.C. 685, 163 S.E. 804, and *Lee v. Walker,* 234 N.C. 687, 68 S.E. 2d 664, are clearly distinguishable in fact and principle from the present case.

Plaintiffs do not, and never have, disputed defendants' right to use Woody Street as a means of ingress and egress to and from defendants' property to North Main Street. This portion of Woody Street was surveyed and platted before defendants entered into their contract of purchase. Their easement to use that portion of Woody Street arises by implication, if not by express dedication. Also, defendants have an additional easement to have Woody Street extended westwardly for the 100 feet along the north boundary of defendants' lot; this easement arises by virtue of the wording of the contract and deed.

The defendants' remaining assignments of error stand or fall with the resolution of their first assignment of error, and, having determined that their first assignment of error is without merit, we overrule their remaining assignments of error.

Affirmed.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. OLETA STALNAKER.

(Filed 10 July 1968.)

1. Homicide § 16; Criminal Law § 89—

Where statement of the deceased which tended to exonerate defendant of the homicide was admitted into evidence, defendant was not prejudiced by the trial court's refusal to rule that the statement was a dying declaration, since such a ruling would have added no credibility or unusual dignity to the testimony of the witness or to the declaration itself.

2. Same—

A dying declaration by no means imports absolute verity; it is subject to impeachment or corroboration in the same manner as the testimony of a witness.

3. Same—

A dying declaration of the deceased which tends to exonerate the defendant of the homicide may be impeached or contradicted by the State by evidence that the deceased made a subsequent statement three hours later inconsistent with the declaration offered by the defendant, and whether the State's evidence qualifies as a dying declaration is immaterial.

4. Criminal Law § 115—

The provisions of G.S. 15-169 and G.S. 15-170 are applicable only when there is evidence tending to show that a defendant may be guilty of a lesser offense.

5. Homicide § 30—

Where the State's evidence is to the effect that defendant set fire to the deceased after verbally threatening to do so and after throwing burning paper in his direction on two occasions, and there is no evidence from which a reasonable inference can be drawn that the defendant was later burned accidentally, the trial court properly refused to submit to the jury the issue of defendant's guilt of involuntary manslaughter.

APPEAL by defendant from *Hasty, J.*, 23 October 1967, Schedule A Session, MECKLENBURG Superior Court.

Defendant was charged in a bill of indictment with the felony of second degree murder. The charge grew out of an investigation of the death by burning of defendant's husband, George Stalnaker. To the charge defendant pleaded not guilty.

The State's evidence tended to show the following:

On 30 July 1967 George Stalnaker was in his back yard. The defendant came to the back door of the residence and told her husband, George Stalnaker, to go somewhere and get him a room because she wasn't going to let him in the house, and that if he didn't leave, she was going to set him afire. Once or twice George Stalnaker went to the back door and knocked and would then go back and sit on the back porch. He sat there on his back porch most of the afternoon. On two occasions during the afternoon someone threw burning paper out of the back door in George Stalnaker's direction where he was sitting on the back porch. George Stalnaker turned and asked, "What are you trying to do — set me afire?" At about dark George Stalnaker was seen standing in the back yard with his arms raised and was burning from about his waist up and was hollering for help. Defendant did not come out of the house.

Neighbors ran and wrapped blankets around him to smother the fire; the fire department and the police and the ambulance were called. George Stalnaker was taken to the hospital where he died some 30 days later.

The defendant's evidence tended to show the following:

During the day of 30 July 1967 George Stalnaker had been drinking and the defendant had locked him out of the house, put out some clean clothes and told him to go get himself a room, get cleaned up and sober enough to come back and get the rest of his stuff because she could not stand it any longer. The defendant was alone in the house and she lay on the couch in the living room and watched television during the afternoon and was watching television when she heard George holler out in the back. She went to the back window and saw one of the neighbors standing there with a blanket and she went back in the living room and got the blanket in there and threw it out the window to him. She did not throw fire

on her husband and she didn't know what was going on because she thought he was just drunk out there in the back yard.

The jury found the defendant guilty of manslaughter, and from the verdict and judgment entered thereon, defendant appealed.

T. W. Bruton, Attorney General by William P. Briley, Trial Attorney, for the State.

Guy E. Possinger for defendant appellant.

BROCK, J. The defendant offered the testimony of a niece of the defendant that while deceased was lying on the ground in his back yard after being burned, she asked him, "George, what happened?" George looked up at her and said, "Leta didn't do this."

Upon objection by the State, the trial judge overruled the objection and allowed the testimony; but the trial judge ruled that George Stalnaker's statement was not a dying declaration. The trial judge ruled that since the defense opened the door to hearsay evidence, the State could explore the whole area of hearsay evidence. The defendant assigns as error that the trial judge refused to rule that the statement was a "dying declaration."

The defendant was in no way prejudiced by the ruling of the trial judge that the statement was not a dying declaration; the testimony of the statement was allowed in evidence over objection anyway. A ruling that it was a dying declaration would have added no credibility or unusual dignity to the testimony given by the witness, nor to the declaration itself. "A dying declaration by no means imports absolute verity." *Carver v. U. S.*, 164 U.S. 694, 41 L. Ed. 602. And a dying declaration is subject to impeachment or corroboration in the same manner as the testimony of a witness. Stansbury, N. C. Evidence 2d, § 146. The defendant had the full benefit of the testimony of the witness as to the declaration of the deceased.

The defendant further assigns as error that the trial judge ruled that the State could explore the whole area of hearsay testimony since the defense had opened the door. From the Record on Appeal and the brief of the defendant it is clear that this ruling was made in chambers and not in open Court. Also it is obvious that the trial judge was merely stating the correct law of evidence concerning impeachment if the declaration was offered by defendant and allowed into evidence. The State would be entitled to impeach the declaration whether allowed as a dying declaration or not. Stansbury, N. C. Evidence 2d, § 146, p. 363. Whether impeaching or inconsistent declarations are admissible as dying declarations or not is immaterial, since they are admissible as tending to impeach the declaration of the deceased which was already admitted. *Carver v. U. S., supra.*

The defendant assigns as error that the trial judge allowed the State, on rebuttal, to introduce evidence that the deceased made a statement about three hours later that was inconsistent with the declaration offered by the defendant. The defendant argues that the defendant's evidence should have qualified as a dying declaration, and the State's evidence did not so qualify; therefore the State should not have been allowed to place in evidence the inconsistent statement of the deceased. Without undertaking to rule upon whether the defendant's or the State's evidence actually qualified as dying declarations, it is sufficient to say that the admission of defendant's evidence of a declaration by deceased was the equivalent of ruling that it qualified as a dying declaration. But, whether the State's evidence of a declaration qualified as a dying declaration is immaterial, because in either event it was admissible to impeach or contradict defendant's evidence of a declaration. Stansbury, N. C. Evidence 2d, *supra; State v. Debnam,* 222 N.C. 266, 22 S.E. 2d 562.

The defendant further assigns as error that the trial judge submitted the case to the jury upon only three possible verdicts: guilty of murder in the second degree, guilty of manslaughter, or not guilty. Defendant urges that the lesser offense of involuntary manslaughter should have been submitted to the jury also.

The State's evidence in this case is to the effect that defendant set fire to deceased after having verbally threatened to do so, and after throwing fire at him on two occasions; no reasonable inference could be drawn that it was later done accidentally. The only evidence to the contrary is that defendant did not know anything about the fire, that she was lying on the couch inside the house watching television. There is therefore no reasonable inference from the evidence in this case which would support a verdict of involuntary manslaughter. The provisions of G.S. 15-169 and G.S. 15-170 are applicable only when there is evidence tending to show that a defendant may be guilty of a lesser offense. *State v. Jones,* 249 N.C. 134, 105 S.E. 2d 277. The case of *State v. Smith,* 268 N.C. 167, 150 S.E. 2d 194, cited by defendant in support of this assignment of error holds the same as *State v. Jones, supra.* The first headnote by the reporter of *Smith* seems to be in error, and apparently misled counsel.

We have carefully examined all of defendant's assignments of error. In the trial of defendant we find

No error.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. ROBERT LEE MITCHELL.

(Filed 10 July 1968.)

1. Criminal Law § 159—

Where appellant files with the clerk of the Court of Appeals a stenographic transcript of the evidence in the trial tribunal, the failure to provide an appendix to the brief setting forth "in succinct language with respect to those witnesses whose testimony is deemed to be pertinent to the questions raised on appeal, what he says the testimony of such witness tends to establish with citation to the page of the stenographic transcript in support thereof" subjects the appeal to dismissal by the Court *ex mero motu.* Court of Appeals Rule No. 19(d)(2).

2. Criminal Law § 117—

Where a request is made for a specific instruction as to the rule of scrutiny in the event of an accomplice testifying for the prosecution, which instruction is correct in itself and supported by evidence, the trial judge, while not required to parrot the instruction in the exact and identical words of counsel, must charge the jury in substantial conformity to the prayer.

3. Same—

There is no error in an instruction that the jury should scrutinize the testimony of an accomplice with care and caution, and that if after such scrutiny the jury deem the evidence worthy of belief they should give the testimony the same weight and credibility as they would any other witness found to be worthy of belief.

4. Same—

Where there is no evidence to support such an instruction, the trial court may properly refuse defendant's requested instruction that the jury must consider whether an accomplice who testified for the State has received any promise or indication of favorable treatment.

APPEAL by defendant from *Hobgood, J.,* at February "R" 1968 Criminal Session of WAKE Superior Court.

Criminal prosecution upon a bill of indictment containing three counts against the defendant Mitchell, Levester Aaron Sims, and Bobby Dewberry.

The first count charges that on 15 November 1967 defendant and Sims and Dewberry unlawfully, willfully, and feloniously did break and enter the building occupied by William C. Vick Company, Inc., with intent to steal, take and carry away the merchandise, chattels, money, valuable securities, and other personal property of said corporation; the second count charges that on the same date defendant together with Sims and Dewberry, after having unlawfully, willfully, and feloniously broken into and entered the building occupied by William C. Vick Company, Inc., a corporation, located at 3930 Western Boulevard, Raleigh, North Carolina, with intent to steal,

take and carry away merchandise, chattels, money, valuable securities and other personal property located therein, did steal, take and carry away various itemized articles, including three described shotguns, a rifle, one Stanly half-inch drill, serial number 160540; one Dejur dictating machine and other items specifically described of the value of $1,100. The third count charges that the defendant together with Sims and Dewberry did on same date feloniously receive and have the specifically described articles of William C. Vick Company, Inc., a corporation, well knowing that same had been feloniously stolen, taken and carried away.

The record shows that, when the case was called for trial in Superior Court, defendants Sims and Dewberry each entered a plea of guilty and the defendant Robert Lee Mitchell entered a plea of not guilty.

The record also shows that thereupon the case against the defendant Mitchell proceeded to trial; that the State first offered evidence tending to show that the offenses described in the bill of indictment had been committed but that most of the articles of property particularly described in the bill of indictment belonged to William C. Vick personally and not to the corporation, with the exception of the Stanly half-inch drill and the Dejur dictating machine. The State introduced as witnesses Sims and Dewberry who testified to their own participation and implicated the defendant in the commission of said offenses. The State also introduced evidence as to finding the dictating machine and Stanly drill in the trunk of the automobile belonging to the defendant.

The defendant did not testify, but he offered the testimony of other witnesses to the effect that he was at home on the night in question and that he had loaned his automobile to Dewberry on that occasion.

At the close of the evidence, the trial court entered a judgment as of nonsuit on the third count in the bill of indictment and the case was presented to the jury as to the first two counts.

The jury returned a verdict of guilty as to both counts.

Judgment: Commitment to the State Department of Correction to the custody of the Commissioner of Correction for a minimum period of not less than seven years and a maximum of not more than ten years on the charge of felonious breaking and entering and for a minimum period of not less than three years and a maximum period of not more than five years on the charge of felonious larceny; the two sentences to run consecutively.

Defendant excepted thereto and appeals therefrom to this Court and assigns error.

T. W. Bruton, Attorney General of North Carolina, and Bernard A. Harrell, Assistant Attorney General, for the State.

J. C. Proctor for defendant appellant.

CAMPBELL, J. The record sets out: "Evidence Submitted Under Rule 19 (d) (2)."

Rule 19(d) of this Court is as follows:

> "(d) *Evidence — How Stated.* The evidence in record on appeal shall be in one of the two following methods:
>
> (1) [This method provides for setting out the evidence in record on appeal in narrative form.]
>
> (2) As an alternative to the above method (as a part of the record on appeal but not to be reproduced), the appellant shall cause the complete stenographic transcript of the evidence in the trial tribunal, as agreed to by the opposite party or as settled by the trial tribunal as the case may be, to be filed with the clerk of this Court and then the appellant in an appendix (emphasis added) to his brief shall set forth in succinct language with respect to those witnesses whose testimony is deemed to be pertinent to the questions raised on appeal, what he says the testimony of such witness tends to establish with citation to the page of the stenographic transcript in support thereof. The opposite party in case of disagreement as to any portion of the appendix in appellant's brief may set forth in an appendix to his brief in succinct language what he says the testimony of a witness establishes with citation to the page of the stenographic transcript in support thereof."

In the instant case, there was no appendix attached to the brief and this Court will, therefore, *ex mero motu*, dismiss the appeal.

Nevertheless, we have made a voyage of discovery through the entire record and considered each of the eighty-three exceptions taken by the defendant, and we find no merit in any of them.

The defendant made numerous written requests for special instructions and took thirty-one exceptions to the failure of the trial court to give instructions as requested. We have examined each of the requested instructions and find that where applicable and supported by evidence, the court did give in substance each of said instructions. "It is a well established rule with us that if a request is made for a specific instruction as to the rule of scrutiny in the event of an accomplice testifying for the prosecution, which is cor-

rect in itself and supported by evidence, the trial judge, while not required to parrot the instructions 'or to become a mere judicial phonograph for recording the exact and identical words of counsel,' must charge the jury in substantial conformity to the prayer." *State v. Bailey,* 254 N.C. 380, 386, 119 S.E. 2d 165.

In the instant case the defendant in apt time requested the trial court to charge the jury:

"(1) The testimony of an accomplice or co-conspirator must be weighed with great care and be scrutinized closely, carefully and cautiously. This testimony, which is subject to great suspicion, must be viewed with distrust and acted on only after due and careful deliberation.

(2) The testimony of an accomplice or co-conspirator is testimony from a tainted source.

(3) In determining the weight and consideration of the testimony of an accomplice or co-conspirator, you must consider whether there has been any promise to him or indication of favorable treatment for him or actual benefit conferred, promised or indicated by the circumstances of the case."

To the refusal of the trial court to give those requested instructions, the defendant took an exception.

The court actually charged the jury in the following words:

"Now, when you consider the evidence of an accomplice, the Court instructs you that you should scrutinize it with care and caution, and after giving it careful scrutiny and caution, if you then deem that the evidence of the accomplice is worthy of belief, you would give that testimony the same weight and credibility as you would any other witness you found to be worthy of belief."

We think this instruction complied with the requirements of law and that it was not error for the trial court to use this language and not the specific language requested by the defendant. *State v. Smith,* 267 N.C. 659, 148 S.E. 2d 573. In fact, it would have been error to give the number three requested instruction, for there was no evidence to support it.

We find that the defendant had a fair trial, free of any prejudicial error and that the charge of the trial court was adequate and sufficient.

No error.

BRITT and MORRIS, JJ., concur.

N. A. DUNN, III, v. ROSALIE JOHNSON DUNN.

(Filed 10 July 1968.)

1. Divorce and Alimony § 21—

A contract under which the husband agrees to pay the wife specified sums for her support may not be enforced by contempt proceedings even though the agreement is approved by the court, but where a court having jurisdiction of the parties and the cause of action orders the husband to make specified payments for the wife's support, his wilful failure to comply with the court's judgment subjects him to contempt proceedings notwithstanding the judgment was based upon the parties' agreement and was entered by consent.

2. Same—

Where the husband filed for an absolute divorce and the wife cross-claimed for alimony, a judgment entered by the court with the consent of the parties requiring the husband to make support payments to the wife is enforceable by contempt proceedings.

3. Divorce and Alimony §§ 16, 19—

Where a divorce action was instituted by the husband prior to the effective date of G.S. 50-16.9(b), the wife cross-claimed for alimony, an order was entered requiring the husband to make periodic payments for the wife's support, and the husband was subsequently granted an absolute divorce, G.S. 50-16.9(b) does not relieve the husband from making such support payments upon the wife's remarriage since the statute does not apply to litigation pending at its effective date. Chapter 1152, § 9, Session Laws of 1967.

4. Divorce and Alimony § 23—

An order giving the husband custody of the children of the marriage and providing that at the times the children visit the wife for periods of 24 hours or longer the husband shall pay the wife $10.00 for their support, *is held* to require the husband to pay only $10.00 for each visit by the children which lasts at least 24 hours regardless of how long beyond that time the visit lasts and not to require the payment of $10.00 per day during each visit.

APPEAL by plaintiff from *Carr, J.,* 26 March 1968 Session of WAKE Superior Court.

This civil action was instituted on 3 September 1963. In his complaint, plaintiff prayed for absolute divorce on the ground of two-years separation; he alleged that five children were born to the marriage and were in plaintiff's custody pursuant to an order of the Wake County Domestic Relations Court. Defendant filed answer in which she pled a cross-action for alimony.

On 25 November 1964, a judgment consented to by the parties and their attorneys was entered by Copeland, J., requiring the plaintiff to pay defendant $4,000 in full satisfaction of his obligation and duty to support the defendant; the judgment provided that the

$4,000 would be payable in certain annual installments, with the last installment being due on or before 1 January 1969. The judgment also provided that plaintiff would have the custody of the five children with defendant having certain visitation rights and contained the following provision: "At the times that the said children visit with Rosalie Johnson Dunn for periods of 24 hours or longer, Nathaniel Alonzo Dunn, III, shall pay to Rosalie Johnson Dunn $10.00 for their support and, in the event that only part of the children are visiting the support shall be prorated accordingly."

On 26 November 1964, defendant withdrew her further answer and cross-action and plaintiff was awarded an absolute divorce.

On 27 September 1967, defendant filed a motion in the cause, asking that plaintiff be required to show cause why he should not be punished for contempt for violating the terms of the 25 November 1964 judgment. In an affidavit attached to her motion, defendant set forth various dates on which the children had visited her and the amount she contended plaintiff owed her. She contended that the proviso in the judgment quoted above regarding payments of $10.00 for periods of 24 hours or longer should be construed to mean that plaintiff would pay her $10.00 for each 24 hours that the children spent with her. She alleged that plaintiff owed her $570.00.

An order to show cause was entered by Canaday, J., on 27 September 1967, and on 3 October 1967, plaintiff filed a demurrer to the motion to show cause for the reason that the motion was based on a consent judgment and, therefore, not punishable by contempt. Plaintiff also filed a reply and countermotion to the motion to show cause in which he alleged that defendant has twice married since the parties were divorced and that defendant is now living with her third husband. In his reply, plaintiff prayed that the contempt citation be dismissed, that he be relieved of making further payments on the $4,000 provided for defendant in the original judgment for the reason that defendant has remarried, that he be relieved of making visitation weekend support for the children, and that he recover judgment against the defendant for $1,000 paid her since her remarriage.

Following a hearing, Carr, J., entered an order on 27 March 1968 in which he overruled plaintiff's demurrer, postponed determination as to whether plaintiff was in contempt, denied plaintiff's motion that he be relieved of further payments to defendant on the $4,000, and adjudged that the clause "for a period of 24 hours or longer" in the original judgment means support "for each full 24-hour period" that the children visit the defendant. Judge Carr found that plaintiff owed defendant $570.00 for the weekend visit support of the children, but provided that plaintiff could purge him-

self of possible contempt by paying the defendant $300.00 within thirty days from the date of the order; he also modified the 25 November 1964 judgment by relieving plaintiff of the requirement of making payments for the support of the children while visiting the defendant on weekends, holidays, and at any other time.

Plaintiff assigned errors and appealed.

Vaughan S. Winborne, Attorney for plaintiff appellant.
No Counsel for defendant appellee.

BRITT, J. Plaintiff's first assignment of error poses the question: Is violation of the judgment signed by Judge Copeland punishable by contempt proceedings? Plaintiff contends that it is not for the reason that the judgment is a mere contract between plaintiff and defendant, sanctioned by the court. The question must be answered in the affirmative, and plaintiff's assignment of error relating thereto is overruled.

In *Mitchell v. Mitchell,* 270 N.C. 253, 154 S.E. 2d 71, we find the following:

> "A contract between husband and wife whereby he agrees to pay specified sums for her support may not be enforced by contempt proceedings even though the agreement has the sanction and approval of the court. *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118; *Stanley v. Stanley,* 226 N.C. 129, 37 S.E. 2d 118; *Brown v. Brown,* 224 N.C. 556, 31 S.E. 2d 529. When, however, a court having jurisdiction of the parties and the cause of action adjudges and orders the husband to make specified payments to his wife for her support, his wilful failure to comply with the court's judgment will subject him to attachment for contempt notwithstanding the judgment was based upon the parties' agreement and entered by consent. *Bunn v. Bunn,* 262 N.C. 67, 136 S.E. 2d 240; * * *"

The judgment provides that "* * * BY CONSENT, IT IS ORDERED, ADJUDGED AND DECREED" that the plaintiff make certain payments to the defendant. We hold that the judgment is enforceable by appropriate contempt proceedings.

Plaintiff's next assignment of error relates to the unpaid balance of the $4,000 which he was ordered to pay the defendant. He contends that, by virtue of G.S. 50-16.9(b) as rewritten by the 1967 General Assembly, because of defendant's remarriage, he is relieved from paying alimony after her remarriage. The cited subsection reads as follows:

"If a dependent spouse who is receiving alimony under a judgment or order of a court of this State shall remarry, said alimony shall terminate."

The change in G.S. 50-16 made by the 1967 General Assembly is contained in Chapter 1152 of the 1967 Session Laws. Section 9 provides that "this action shall not apply to pending litigation." The action before us has been pending since 3 September 1963; therefore, the 1967 legislative change does not apply to it. Plaintiff's assignment of error No. 2 is overruled.

Plaintiff also assigns as error the interpretation placed by Judge Carr on the provisions in the judgment providing for payments by plaintiff to defendant when the children would spend weekends with her. This assignment of error is well taken, and we hold that the construction adopted by Judge Carr was erroneous.

The proviso in question is fully quoted above but, in substance, it provides that at the times the five children visit defendant for periods of 24 hours or longer, plaintiff will pay to defendant $10.00 for their support and, in the event only part of the children visit on a weekend, the support will be prorated accordingly. We hold that plaintiff would owe defendant $10.00 for a weekend visit by the five children, provided the visit lasted at least 24 hours but regardless of how long beyond 24 hours the visit lasted. Section (F) (a) of Judge Carr's order is vacated, and this cause is remanded to the Superior Court of Wake County for a determination as to whether plaintiff owes defendant anything for weekend visits of the children prior to 26 March 1968, the date of Judge Carr's order, and for other proceedings not inconsistent with this opinion.

Error and remanded.

CAMPBELL and MORRIS, JJ., concur.

MAC CONSTRUCTION COMPANY, INC., v. THRASHER CONTRACTING COMPANY.

(Filed 10 July 1968.)

1. Contracts § 1—

Persons *sui juris* have a right to make any contract not contrary to law or public policy.

2. Contracts § 12—

The court can only interpret a contract and cannot make a new one for the parties.

3. Contracts § 3— Unambiguous excavation contract does not permit an interpretation that parties contemplated a different result.

A subcontract for the excavation and clearing of a drainage canal which provided that the "exact location of such clearing shall be such as is pointed out to the subcontractor herein by the contractor" is clear and unambiguous and leaves no room for interpretation or doubt as to the meaning thereof, and where the defendant contractor directs the plaintiff subcontractor to clear the canal channel and a ten-foot right of way on one side of the canal but does not allow plaintiff to clear in addition the fifty-foot right of way on the other side of the canal, plaintiff may not complain that the parties contemplated a different division of the work or that the impracticability of using machinery on the ten-foot right of way only would render the clearing operation economically prohibitive.

APPEAL from *Hall, J.*, 4 December 1967, Civil Session, BRUNSWICK County Superior Court.

Defendant had a contract with Wayne County dated 11 June 1966 providing for channel improvement within the Bear Creek Watershed. Some years before, a drainage canal had been constructed, but it had grown up with underbrush, trees, and debris of various kinds. Defendant's contract with Wayne County provided for the clearing of the canal itself, the deepening of the canal bed, and the clearing of the canal right of way. On one side of the canal, the right of way extended about ten feet from the top of the bank of the canal. On the other side, the right of way extended fifty feet from the top of the bank of the canal. These distances varied at different places along the canal which extended for several miles. The debris removed from the right of way and from the bed of the canal itself was to be placed along the outer edge of the side with the fifty foot right of way or shoulder. This side of the canal was known as the "soil side."

The contract between the defendant and Wayne County provided for the defendant to be paid a unit price per cubic yard for excavation and a unit price per acre for clearing. There was a time limit of 396 days and a penalty clause of $112 per day for each additional day beyond that time.

Under date of 28 July 1966, the defendant entered into a contract with the plaintiff, pursuant to which a portion of the work to be done by the defendant under its contract with Wayne County was to be subcontracted to the plaintiff. The contract between the plaintiff and the defendant referred to the principal contract between the defendant and Wayne County and particularly to the specifications.

It is the subcontract between the plaintiff and the defendant which is involved in this action. The subcontract provided for the plaintiff to do up to $25,000 in gross volume of the excavation work

and stated: "It being understood that the work is to commence at station 605 + 48, but thereafter the work will be done at such locations as are designated" by the defendant. The subcontract further stated:

> "It is further agreed and understood that the 'subcontractor' herein hereby shall have contract rights to perform up to Twenty-five Thousand ($25,000.00) Dollars in gross volume of work in clearing acreage of trees and shrubbery and stumps at a unit price of Two Hundred Fifty ($250.00) Dollars per acre. The exact location of such clearing shall be such as is pointed out to the 'sub-contractor' herein by the 'contractor.' This work must also proceed according to the time schedule; time being of the essence in this sub-contract and the failure of the 'sub-contractor' herein to maintain a schedule of completion as is set forth by the 'contractor' herein shall operate to give the 'contractor' herein the right to cancel this contract with the 'sub-contractor' and proceed to the completion of this job by other means * * *."

The subcontract further provided that the plaintiff would commence work within ten days after receiving written notification from the defendant to proceed.

Pursuant to such notification, Mr. W. J. McLamb, Sr., president of the plaintiff, met Mr. Thrasher of the defendant at the job site on 22 October 1966 for the purpose of being shown where the plaintiff would perform its part of the contract.

At that meeting Mr. Thrasher, on behalf of the defendant, pointed out to Mr. McLamb that the plaintiff would be expected to clear the canal channel and the ten foot shoulder and would not have anything to do with clearing the fifty foot shoulder. At the same time the plaintiff received notice to commence work.

Plaintiff did not commence work within the ten day period after receiving notice to do so and instead claimed that it would be "impossible from a practical standpoint for Mac Construction Company to do this work on these terms." Upon failure of the plaintiff to commence work within the ten day period, the defendant declared the contract breached and proceeded with the work by other means.

Plaintiff instituted this action for damages. At the close of plaintiff's evidence, judgment of nonsuit was entered and plaintiff appealed.

Herring, Walton, Parker & Powell by Ray H. Walton, Attorneys for plaintiff appellant.

Taylor, Allen, Warren & Kerr by W. F. Taylor, Attorneys for defendant appellee.

CAMPBELL, J. The plaintiff takes the position that it would be prohibitive cost-wise and impractical for it to be confined to clearing only the bed of the old canal and the ten foot shoulder; that this work would entail mostly hand work, the removal of the debris from the ten foot shoulder across the canal bed, and the debris out of the canal bed up and across and to the outer edge of the fifty foot shoulder. Very little of this work could be done by machinery because of the terrain and location; whereas, all of the clearing on the fifty foot shoulder could be done by machinery and at a much cheaper cost per acre. The plaintiff contends that the parties contemplated by their contract a division of the work whereby the plaintiff would commence work "at station 605 + 48" but would proceed from that point for such distance as might be designated, but from and to the outside boundaries of the right of way, thereby giving the plaintiff not only the ten foot shoulder and the canal bed but also an equal proportion of the fifty foot shoulder. The defendant, on the other hand, contends that no such provision was made in the contract and that the contract itself provided: "The exact location of such clearing shall be such as is pointed out to the 'sub-contractor' herein by the 'contractor.'"

Mr. McLamb, president of the plaintiff testified: "Yes, but I didn't expect him to divide it no such a way as he divided it."

The plaintiff tendered evidence to show the relative costs of clearing the various types of terrain involved which ranged from $500 per acre for the ten foot shoulder and the bed of the old canal to $75 per acre for the fifty foot shoulder of the right of way. The trial court refused to permit this testimony and at the conclusion of the plaintiff's evidence entered a judgment of nonsuit.

"Persons *sui juris* have a right to make any contract not contrary to law or public policy." *Fulcher v. Nelson,* 273 N.C. 221, 159 S.E. 2d 519.

In the instant case the contract was in writing and both the plaintiff and the defendant were competent to enter into the contract into which they did enter, and if plaintiff expected a different division of work, plaintiff should have had it inserted in the contract. The court can only interpret a contract and cannot make a new contract for the parties. The words of the contract are clear and "(t)he exact location of such clearing shall be such as is pointed out to the 'sub-contractor' herein by the 'contractor'" leaves no room for interpretation or doubt as to the meaning thereof. The defendant had the right to point out where the clearing should be performed by the plaintiff and did so. The fact that this may have been improvident or impractical to perform from a cost standpoint was a

matter that should have been contemplated by the plaintiff and its president, an experienced grading contractor.

In the trial, we find

No error.

BRITT and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. ALLEN CADE LANE.

(Filed 10 July 1968.)

1. Assault and Battery § 14—

Evidence tending to show that the defendant threw a whiskey bottle at the prosecuting witness, striking him in the face and causing damage to his nose and teeth, is sufficient to be submitted to the jury as to defendant's guilt of assault with a deadly weapon.

2. Assault and Battery § 5—

In order to be a deadly weapon it is not required that the instrument be a deadly weapon *per se*, but it is sufficient if, under the circumstances of its use, it is an instrument which is likely to produce death or great bodily harm, having regard to the size and condition of the parties and the manner in which the weapon is used.

3. Same—

In an assault with a deadly weapon, no actual intent to do physical harm need be shown if gross carelessness or criminal negligence is proved to exist.

4. Same—

In an assault with a deadly weapon, the jury may infer from the evidence that the weapon is deadly.

5. Assault and Battery § 17—

An indictment alleging a felonious assault will support a conviction of assault with a deadly weapon since the offense of felonious assault includes the lesser offense of assault with a deadly weapon.

6. Assault and Battery § 11—

An indictment charging that the defendant did unlawfully, wilfully and feloniously assault the prosecuting witness with a certain deadly weapon, to wit: whiskey bottle, with the felonious intent to kill and murder him, inflicting serious injuries not resulting in death, charges a felonious assault under G.S. 14-32.

7. Indictment and Warrant § 9—

An indictment alleging a statutory offense which follows the language of the statute as to its essential elements meets the requirements of law.

8. Criminal Law § 163—

An exception to the charge not set out in the record on appeal will not be considered. Rule of Practice in the Court of Appeals, No. 21.

9. Criminal Law § 166—

Assignments of error not carried forward and argued in appellant's brief are deemed abandoned. Rule of Practice in the Court of Appeals, No. 28.

APPEAL by defendant from *Braswell, J.*, 23 October 1967 Criminal Session of JOHNSTON.

Criminal prosecution tried on a bill of indictment charging assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death.

At the close of the State's evidence defendant's motion for judgment as of nonsuit on the charge of felonious assault was allowed thereby reducing the charge to assault with a deadly weapon, a misdemeanor. The jury returned a verdict of guilty.

From a judgment that defendant be imprisoned in the county jail of Johnston County for a term of one year to be assigned to work under the supervision of the State Department of Corrections, defendant appealed.

T. Wade Bruton, Attorney General, by Ralph Moody, Deputy Attorney General, and Andrew A. Vanore, Jr., Staff Attorney, for the State.

Knox V. Jenkins, Jr., for defendant appellant.

MORRIS, J. Defendant assigns as error the action of the trial judge in denying his motion for nonsuit made at the close of the State's evidence. Defendant offered no evidence.

Considering the evidence in the light most favorable to the State, as we must do on the motion for nonsuit, the following is shown:

Clarence B. Hines, Jr. testified that he had been a resident of Selma, North Carolina, for approximately twenty years and that he knew the defendant, Allen Cade Lane. On 17 September 1966, he saw the defendant in Selma both that afternoon and that evening. During the evening of 17 September, he saw the defendant standing in front of the Public Oil Company in Selma. James Dixon was standing behind the defendant and Maynard David Bruce was standing approximately twenty or twenty-five feet from the defendant. The area at that time was well lighted both by street lights, the lights from his place of business and the lights from Public Oil Company. At this time he was standing in front of his place of busi-

ness approximately sixty or sixty-five feet from the defendant. He then stated that he saw the defendant take "what looked like a liquor bottle" and throw it at Bruce, striking him in the face. Bruce, after he had been struck by the bottle, "went down on his knees". The defendant immediately "turned around and ran up the street". Witness then went into his place of business and called the police.

Maynard David Bruce testified that he had been a resident of Selma for approximately thirteen years. That on the evening of 17 September 1966, at about 8:40 p.m., he arrived at the Public Oil Company in Selma and went inside. About fifteen minutes later he went outside and walked toward the gas pumps and was waiting for his neighbor to pick him up. When he turned around he "saw this big red flash and felt this sort of pop pain in my face. I felt around and I found a sliver of glass was sticking in my nose". He was then taken to the hospital and it was determined that his "face was mashed, left nostril completely caved in, and the cartilage caved in, and I had four of my front teeth knocked out". He did not see the person throw the object which struck him.

Paul Harris testified that on 17 September 1966 he was employed by the town of Selma as a police officer. He stated that he investigated this incident and saw the prosecuting witness after he had been struck. He went on to say that "his face looked like it was in bad shape. I could look at it and tell that his face was pretty badly hurt . . . and I advised him to go to the hospital. He needed medical care, and he did go."

The motion for nonsuit was properly denied. There is ample evidence presented to take the case to the jury on the charge of assault with a deadly weapon. "In order to be a deadly weapon it is not required that the instrument be a deadly weapon *per se*, but it is sufficient if, under the circumstances of its use, it is an instrument which is likely to produce death or great bodily harm, having regard to the size and condition of the parties and the manner in which the weapon is used." 1 Strong, N. C. Index 2d, Assault and Battery, § 5, p. 298. No actual intent to do physical harm need be shown if gross carelessness or criminal negligence is shown to exist. *State v. Eason*, 242 N.C. 59, 86 S.E. 2d 774.

Here, we have an assault. The jury could infer from the evidence that the weapon was deadly. As stated in *State v. Matthews*, 231 N.C. 617, 627, 58 S.E. 2d 625:

> "Defendants were tried for an assault with a deadly weapon and no special evidence was required beyond the intent to commit the unlawful act, and this would be inferred or presumed from the act itself."

The fact that the indictment charged a felonious assault and defendant was convicted of assault with a deadly weapon is permissible since an indictment charging an assault with a deadly weapon, with intent to kill, inflicting serious injury, not resulting in death, includes the lesser offense of assault with a deadly weapon. *State v. Weaver,* 264 N.C. 681, 142 S.E. 2d 633.

We have carefully examined the indictment in this case and find no merit in defendant's contention that the indictment does not charge a felonious assault under G.S. 14-32. Here, the indictment charged that Allen Cade Lane "did unlawfully, willfully and feloniously assault Maynard Bruce with a certain deadly weapon, to wit: whiskey bottle with the felonious intent to kill and murder the said Maynard Bruce inflicting serious injuries not resulting in death . . ." An indictment which follows substantially the language of the statute as to its essential elements meets the requirements of law. *State v. Randolph,* 228 N.C. 228, 45 S.E. 2d 132. The indictment in the instant case includes every element required by the statute. It properly charged a felonious assault.

Defendant, in his brief, takes exception to the trial judge's charge to the jury. No exception is set out in the record on appeal, nor is the charge of the court included therein. The rules of this Court require that all exceptions shall be set out in the record on appeal and that they be "briefly and clearly stated and numbered". "No exceptions not thus set out, or filed and made a part of the record on appeal, shall be considered by this Court . . ." Rule 21, Rules of Practice in the Court of Appeals of North Carolina. For the reason set out above, this assignment of error is not considered. Other assignments of error set out in the record on appeal were not carried forward and argued in defendant's brief. We deem these to have been abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

In the trial below, we find

No error.

CAMPBELL and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. LONNIE DEAN FRYE.

(Filed 10 July 1968.)

1. Homicide § 21—

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

2. Homicide § 30—

Where, in a prosecution for homicide, the case is submitted to the jury upon the charge of manslaughter, and the defendant is entitled to a verdict of guilty of either voluntary or involuntary manslaughter or of not guilty, a verdict of "guilty of manslaughter" should be set aside for ambiguity.

3. Homicide § 27—

An instruction in a homicide prosecution which charges that the jury could return a verdict of guilty of either voluntary or involuntary manslaughter or of not guilty, but which later charges that the jury could return a verdict of guilty of manslaughter or of not guilty, and which, in addition, fails to apply the law to the evidence relating to involuntary manslaughter, G.S. 1-180, is apt to confuse the jury and is error.

4. Homicide § 23—

Where the defendant pleads not guilty in a prosecution for homicide, it is the duty of the trial court to instruct the jury as to every essential element of the crime charged, including that of proximate cause.

5. Criminal Law § 24—

A plea of not guilty puts in issue every essential element of the crime charged.

6. Homicide § 26—

Where the question of defendant's guilt of the crime of voluntary or involuntary manslaughter is submitted to the jury, the defendant pleading not guilty, the court must instruct the jury that they should return a verdict of not guilty if the State failed to satisfy them from the evidence beyond a reasonable doubt that the blows inflicted upon the deceased by the defendant proximately caused his death, and the failure to do so is prejudicial error.

APPEAL by defendant from *Falls, J.*, 29 January 1968 Mixed Session of Superior Court of CATAWBA County.

Defendant was tried upon a bill of indictment charging him with murder of Eugene C. Combs on 14 October 1967. Upon the call of the case for trial, the solicitor announced that he would not ask for a verdict of guilty of murder in the first degree but would ask for a verdict of guilty of murder in the second degree or manslaughter.

The evidence tends to show that on 14 October 1967 the defendant and Eugene C. Combs, the deceased, were in the Longview section of Hickory inside a service station, and after having had an argument, they engaged in a fight. The deceased had threatened to kill the defendant and picked up a bottle which was taken away from him. The defendant had picked up a bottle crate and threatened to hit the deceased on the head with it but did not and put it down. Shortly thereafter while the argument continued, the deceased Combs took a step toward the defendant with one hand in his pocket, whereupon the defendant struck the deceased in his side, knocking

him down. As the deceased fell, he struck the counter and fell to the floor. The defendant then struck the deceased three times on the back of his neck as he lay upon his face on the floor before he was pulled away. Neither of them at the time of the actual fight had a weapon. This occurred in late afternoon and before 7:15 p.m. The defendant died before midnight on that date. The medical witness, Dr. John Reece, who performed the autopsy, testified that the death of the deceased resulted from extensive hemorrhage of the brain produced by trauma resulting in fractures at the base of the brain and that external blows to the head, face and neck could have produced the extensive hemorrhage of the brain causing his death.

At the close of the State's evidence, upon motion of the defendant, the charge of second degree murder was dismissed, and the case was submitted to the jury upon the charge of manslaughter. From a verdict of "guilty of manslaughter" and a sentence of imprisonment, the defendant appeals to the Court of Appeals.

Attorney General T. W. Bruton and Assistant Attorney General Bernard A. Harrell for the State.

Joe P. Whitener and Larry W. Pitts for the defendant.

MALLARD, C.J. Defendant made sixteen assignments of error based on over thirty exceptions and brings forward and argues fifteen of the assignments of error in his brief.

Since a new trial is ordered, we do not deem it necessary to the decision in this case to discuss all of the assignments of error, some of which are without merit.

We deem it proper to say, however, that there was ample evidence in this case for the jury to pass upon the guilt or innocence of the defendant as to the crime of manslaughter. The defendant's motion for judgment as of nonsuit made at the close of all the evidence was properly overruled.

The jury returned a verdict of "guilty of manslaughter." In this case the defendant was entitled to have the jury specify whether it was voluntary or involuntary manslaughter. The verdict should have been set aside for ambiguity. *State v. Fuller,* 270 N.C. 710, 155 S.E. 2d 286.

There are also errors in the charge 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 the different verdicts that the jury might return:

> "I instruct you, however, that you have the right under the evidence in this case to render one of three verdicts. You may

find the defendant guilty of manslaughter; you may find the defendant guilty of involuntary manslaughter, or, you may find him not guilty. So your charge is to say, by your verdict, whether the defendant is guilty of manslaughter, either voluntary or involuntary, or, not guilty of any offense, is a matter solely for you to determine and say by your verdict which of these offenses, if any, he be guilty of."

Later in the charge the court instructed the jury with respect to its different verdicts, as follows:

"Therefore, members of the jury, it becomes your duty to determine by your verdict whether the defendant is guilty of manslaughter or whether he is not guilty."

We are of the opinion that the above conflicting statements with respect to what verdict the jury could return was confusing and is error.

The court gave definitions of voluntary manslaughter and involuntary manslaughter, to which there was no exception, and omitting the element of proximate cause, applied the law to the evidence relating to the crime of voluntary manslaughter, which was sometimes referred to only as "manslaughter." The court did not apply the law to the evidence relating to involuntary manslaughter. G.S. 1-180. We are of the opinion that these references by the judge to voluntary manslaughter, involuntary manslaughter, and manslaughter, without accurately distinguishing the three terms, may have confused the jury.

It was the duty of the judge to instruct the jury as to every essential element of the crimes of voluntary manslaughter and involuntary manslaughter, including the essential element of proximate cause. A plea of not guilty puts in issue every essential element of the crime charged. The jury was not instructed that they should return a verdict of not guilty if the State failed to satisfy them from the evidence beyond a reasonable doubt that a blow, or blows, inflicted upon Combs by the defendant Frye proximately caused his death. G.S. 1-180; *State v. Ardrey,* 232 N.C. 721, 62 S.E. 2d 53; *State v. Ramey,* 273 N.C. 325, 160 S.E. 2d 56.

Defendant contends, and we agree, that the court's failure to charge on the essential element of proximate cause, and to apply the law to the evidence relating to involuntary manslaughter was error. On account of such prejudicial error, defendant is entitled to a

New trial.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. BILLY KEITH FOWLER.

(Filed 10 July 1968.)

1. Criminal Law § 91—

The inclusion of a case on a trial calendar filed by the solicitor in accordance with G.S. 7-73.1 constitutes notice to defendant and his counsel that the case is set for trial.

2. Same—

Continuances are not favored and ought not to be granted unless the reasons therefor are fully established, and therefore a motion for continuance should be supported by an affidavit showing sufficient grounds.

3. Same— No abuse of discretion found in denial of continuance.

Where counsel was appointed to represent defendant in 31 cases pending against him 130 days before the instant case was called for trial, 30 of the cases having been calendared for trial on that date, and defendant's counsel having discussed with the solicitor which cases he proposed to try, the denial of defendant's motion for a continuance *is held* proper, the inclusion of the case on the trial calendar constituting notice to defendant and his counsel that the case was set for trial, and there being no showing by defendant why his counsel did not have time to prepare and present his defense in the time after his appointment or that he had witnesses who were unavailable when the case was called for trial.

4. Burglary and Unlawful Breakings § 2—

The misdemeanor of nonfelonious breaking or entering is a lesser included offense of the felony of breaking or entering with intent to commit a felony as described in G.S. 14-54.

5. Burglary and Unlawful Breakings § 7—

In a prosecution for felonious breaking and entering and for larceny, failure of the court to submit the question of defendant's guilt of nonfelonious breaking or entering is not error where the evidence tends to show that the building was entered by breaking a glass window and that tires and a station wagon were stolen therefrom, there being no evidence of a nonfelonious breaking or entering.

6. Burglary and Unlawful Breakings § 6—

In a prosecution for felonious breaking and entering and for larceny, an instruction that the jury "might note that this offense is linked with the crime of burglary in which the technical break in may be effected by the lifting of a latch or the turning of a knob, the building being otherwise closed," *is held* not erroneous, the offense of breaking and entering defined in G.S. 14-54 being a less degree of the offense of first degree burglary.

APPEAL by defendant from *Bailey, J.*, February 1968 Criminal Session of ALAMANCE County Superior Court.

Criminal prosecution upon an indictment containing two counts charging defendant with the felonies of breaking and entering and larceny on 27 July 1967 at Madden's Esso Station in Alamance County.

Trial of the defendant, upon his plea of not guilty, was by jury. The verdict was guilty as charged. The Court imposed judgment of imprisonment for ten years on the charge of breaking and entering and imprisonment for ten years on the charge of larceny. The sentence on the larceny charge is to begin at the expiration of the sentence imposed on the charge of breaking and entering. The defendant gave notice of appeal to the Court of Appeals.

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

H. Clay Hemric for the defendant.

MALLARD, C.J. Defendant at the 16 October 1967 Session of the Superior Court of Alamance County had thirty-one cases calendared. In fifteen of them the defendant was charged with breaking and entering and larceny, in nine he was charged with breaking and entering, in three he was charged with larceny of truck, in three he was charged with "safe burglary," and in one he was charged with "safe breaking."

On 20 October 1967 H. Clay Hemric was appointed counsel for the defendant in each of the thirty-one cases. Shortly thereafter, information was obtained by Mr. Hemric from the defendant relative to all of the various charges made against him. During the week of 23 October 1967 defendant's counsel conferred with the solicitor about the preparation of the cases for trial by defendant's counsel. Prior to, and again upon the convening of the criminal session of Court beginning 26 February 1968, defendant's counsel talked with the solicitor about which case or cases he proposed to try. There were thirty cases against the defendant on the trial calendar for Wednesday, 28 February 1968. Defendant's counsel contends he was not advised that this particular case would be tried until 28 February 1968 at which time he made a motion to continue it, and the trial court continued it until 9:30 a.m. on 29 February 1968.

The defendant as his first assignment of error contends that the defendant did not have sufficient time to prepare and present his defense.

G.S. 7-73.1 requires the solicitor to file a trial calendar with the Clerk of Superior Court at least one week before the beginning of any session of court, *and this calendar shall contain the cases he intends to call.* This case was on the calendar for trial on Wednesday, 28 February 1968. The defendant does not contend that the solicitor did not make and file this calendar as required. The fact that it was on the calendar was notice to defendant and his counsel that it was set for trial.

"Continuances are not favored and ought not to be granted unless the reasons therefor are fully established, and therefore a motion for a continuance should be supported by an affidavit showing sufficient grounds. . . ." 2 Strong, N. C. Index 2d, Criminal Law, § 91, p. 621.

Defendant does not in his brief assert that he had witnesses that were unavailable. Defendant's counsel does not now assert specifically why he did not, if in fact he did not, have time to prepare and present his defense in the 130 days or more after his appointment.

In making the motion for continuance, Mr. Hemric simply said to the Court, "The first motion is for continuance." He did not give any reason for his motion. He did not tell the judge that he had not had time to prepare or present the defendant's defense. The first time this is asserted is in the brief filed in this Court. In fact, in the stenographic transcript the defendant did not except to the ruling of Judge Bailey denying his motion to continue, and the first time such exception appears is in that part of the record on appeal entitled, "Statement of Case on Appeal," which appears to be an introductory paragraph and not a record of the proceedings.

There is nothing in this record to show that there was an abuse of discretion by the judge or that by failing to continue the case, the defendant was deprived of a fair trial. *State v. Moses*, 272 N.C. 509, 158 S.E. 2d 617; *State v. Stinson*, 267 N.C. 661, 148 S.E. 2d 593. The trial judge's ruling on the motion for continuance will not be disturbed.

Defendant contends in his assignments of error numbered two and four that the trial judge committed error in failing to instruct the jury that they might find the defendant guilty of the lesser offense of nonfelonious breaking or entering. The misdemeanor of nonfelonious breaking or entering, *if there is evidence to support it*, is a lesser included offense of the felony of breaking or entering with intent to commit a felony as described in G.S. 14-54. *State v. Worthey*, 270 N.C. 444, 154 S.E. 2d 515. In this case the evidence tends to show that the door to the building was locked by the operator of the business. Entry was made by breaking a glass window; property was stolen therefrom. Two accomplices testified that one of the accomplices broke the glass window, and he and the defendant entered the building and stole some tires and a 1955 Chevrolet station wagon which were situated therein. In this record there is no evidence of a nonfelonious breaking or entry, and it was not error to fail to so charge. *State v. Jones*, 267 N.C. 434, 148 S.E. 2d 236; *State v. Jones*, 264 N.C. 134, 141 S.E. 2d 27.

Defendant contends that the trial judge committed error in charg-

ing the jury, "You might note that this offense is linked with the crime of burglary in which the technical break in may be effected by the lifting of a latch or the turning of a knob, the building being otherwise closed . . ." Defendant does not cite any authority in support of this contention. He asserts that linking the crime with burglary was error. This contention is without merit. In *State v. Perry,* 265 N.C. 517, 144 S.E. 2d 591, the Supreme Court said, "The statutory offense set forth in G.S. 14-54 is a less degree of the offense of burglary in the first degree set forth in the indictment and as defined in G.S. 14-51."

Defendant's fifth and last assignment of error is to "signing the judgment as set forth in the record." This assignment of error is also without merit.

In the trial, we find

No error.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. BILLY KEITH FOWLER.

(Filed 10 July 1968.)

1. Criminal Law § 91—

A motion for continuance is addressed to the sound discretion of the trial court, and the denial of such a motion will not be disturbed on appeal except upon a showing of abuse of discretion or that defendant has been deprived of a fair trial.

2. Burglary and Unlawful Breakings § 7—

In a prosecution for felonious breaking and entering and larceny, failure of the court to submit the question of defendant's guilt of nonfelonious breaking and entering is not error where the evidence was that defendant and an accomplice entered a building by breaking a lock from a door with a crowbar, that they removed a safe therefrom, and that they broke open the safe and divided the money found therein, there being no evidence to support a verdict of nonfelonious breaking and entering.

3. Criminal Law §§ 86, 117—

An instruction to the effect that the jury should carefully consider and scrutinize the testimony of the defendant and an accomplice, that in passing upon such testimony they should take into consideration the interest such witness has in the results of the case, but that if they find the witness told the truth they should give his testimony the same weight as that of a disinterested and unbiased witness *is held* to be without error.

STATE *v.* FOWLER.

APPEAL by defendant from *Bailey, J.*, February 1968 Criminal Session of ALAMANCE Superior Court.

At the October 1967 Session of Alamance Superior Court defendant was indicted under a bill of indictment, proper in form, for feloniously breaking and entering on 11 April 1967 the premises of FCX Farm and Garden Supplies, Inc., in Burlington, and for the larceny of a Mosler Safe therefrom. On 20 October 1967 the court appointed H. Clay Hemric, Esq., of the Alamance Bar to represent the defendant in this and in thirty other criminal cases then pending against the defendant in Alamance Superior Court. This case was called for trial on 6 March 1968, at which time defendant's counsel moved for a continuance on the grounds that the Solicitor had not advised him that he intended to try this particular case until 5 March 1968, which was one day preceding the trial date, and that he had not had sufficient time to prepare for trial. The motion for continuance was denied. The defendant was tried upon his plea of not guilty, the jury returned a verdict of guilty as charged, and from active prison sentence thereupon imposed, the defendant appealed.

T. W. Bruton, Attorney General, by James F. Bullock, Deputy Attorney General, for the State.

H. Clay Hemric for defendant appellant.

PARKER, J. Defendant's first assignment of error is directed to the refusal of the trial court to grant his motion for continuance. Granting or denying a motion for continuance rests in the sound discretion of the trial judge and his decision will not be disturbed on appeal, except for abuse of discretion or a showing that the defendant has been deprived of a fair trial; see opinions filed this date by Mallard, C.J., and by Britt, J., in *State v. Fowler,* 1 N.C.App. 546, 162 S.E. 2d 37, and *State v. Fowler,* 1 N.C.App. 552, 162 S.E. 2d 36, two other cases involving this same defendant. As in those cases, the defendant has here failed to show any abuse of discretion on the part of the trial judge or to show that he has been in any way prejudiced in presentation of his defense or been deprived of a fair trial by reason of the trial court's refusal to grant his motion for continuance.

Defendant next assigns as error the trial court's failure to submit to the jury as a possible verdict that they might find the defendant guilty of the lesser offense of non-felonious breaking and entering. While wrongful breaking and entering without intent to commit a felony or other infamous crime is a lesser included offense of the felony of breaking or entering with intent to commit a felony under

G.S. 14-54, there is here absolutely no evidence to support the submission of the lesser offense to the jury. The State submitted the evidence of an accomplice who testified that he and the defendant had driven in an automobile to the FCX Garden Supply in Burlington, that the defendant had there taken a crowbar and broken the lock off of the front door, that the defendant and the witness had then entered the store and removed therefrom a safe which they loaded into the trunk of the automobile, that they had then driven into the country, had unloaded and broken open the safe, divided the money found therein, and had buried the safe in the ground, where it was later found by the police. Defendant's contention that it would be possible for the jury to find from this evidence that he might have formed an intent to participate in the larceny only after entry was made into the building stretches credulity past the breaking point. There was no error in the trial court's refusal to submit to the jury as a possible verdict a finding that defendant was guilty of a non-felonious breaking and entering.

Defendant next assigns as error the following portion of the trial court's charge to the jury dealing with the consideration the jury should give to the testimony of the defendant and to the testimony of the accomplice:

> "Now, Ladies and Gentlemen of the Jury, when you come to consider the evidence and the weight you will give to the testimony of the different witnesses, the Court instructs you it is your duty to carefully consider and scrutinize the testimony of the defendant when he has testified on his own behalf, and also the testimony of those who are closely related to him. You should also carefully consider and scrutinize the testimony of an accomplice. In passing upon the testimony of such witnesses you ought to take into consideration the interest the witness has in the results of the action, but the Court instructs you that the law requiring you to do so does not require you to reject or impeach such evidence."

Immediately following this portion of the charge to which appellant now takes exception, the court added the following instruction:

> "If you believe such witness has sworn to the truth, you will give to their testimony the same weight as you give to the testimony of a disinterested and unbiased witness."

With this additional sentence, the charge fully conforms to the requirements laid down by the Supreme Court. *State v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606; *State v. Green,* 187 N.C. 466, 122 S.E. 178.

In *State v. Green, supra,* Clark, C.J., speaking for the Court, said:

> "There is no hard and fast form of expression, or consecrated formula, required, but the jury should be instructed that, as to the testimony of relatives or parties interested in the case and defendants, that the jury should scrutinize their testimony in the light of that fact; but if, after such scrutiny, the jury should believe that the witness has told the truth, they should give him as full credit as if he were disinterested."

In the trial, we find
No error.

MALLARD, C.J., and BROCK, J., concur.

STATE OF NORTH CAROLINA v. BILLY KEITH FOWLER.

(Filed 10 July 1968.)

Criminal Law—

A motion for a continuance is addressed to the sound discretion of the presiding judge, and the denial of such a motion will not be disturbed on appeal except upon a showing of an abuse of discretion or that defendant has been denied a fair trial.

APPEAL by defendant from *Bowman, S.J.,* January 1968 Criminal Session ALAMANCE Superior Court.

At the October 1967 Session, defendant was indicted under a bill of indictment, proper in form, for feloniously breaking and entering the premises of Superior Furniture Galleries, Inc., and the larceny of certain property therefrom on 1 August 1967.

On 20 October 1967, the court appointed H. Clay Hemric, Esq., of the Alamance Bar to represent the defendant, not only in this case but in thirty-one cases pending. Defendant's counsel consulted with his client immediately after his appointment. The thirty-one cases pending against defendant were calendared for trial at the January 1968 Criminal Session of Alamance Superior Court, which convened on 15 January 1968. When this case was called for trial on 17 January 1968, defendant's counsel moved for a continuance but the motion was denied. A jury found the defendant guilty as charged and from active prison sentence imposed, defendant appealed.

T. Wade Bruton, Attorney General, by Mrs. Christine Y. Denson, Staff Attorney, for the State.

H. Clay Hemric, Esq., Attorney for defendant appellant.

BRITT, J. Defendant first assigns as error the failure of the trial court to grant his motion for continuance. He contends that although his counsel was appointed on 20 October 1967 to represent him in the thirty-one cases, he did not learn until two days before the trial which of the thirty-one cases pending against him would be tried on the date calendared.

There is no merit in this assignment of error. "Granting or denying a motion for continuance rests in the sound discretion of the presiding judge and his decision will not be disturbed on appeal, except for abuse of discretion or a showing the defendant has been deprived of a fair trial." Bobbitt, J., speaking for the Supreme Court of North Carolina in *State v. Ferebee,* 266 N.C. 606, 146 S.E. 2d 666, and quoting from *State v. Ipock,* 242 N.C. 119, 86 S.E. 2d 798. Defendant has failed to show abuse of discretion or that he has been deprived of a fair trial.

Defendant also assigns as error certain portions of the trial court's charge to the jury. We have carefully considered the charge in its entirety and find that it is without prejudicial error; therefore, defendant's assignments of error relating thereto are overruled.

Although defendant's counsel did not comply with our Rule 19(d)(2), we have carefully reviewed the entire record. Defendant had a fair trial, free from prejudicial error. The judgment of the Superior Court is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

RUTH C. YATES, NEXT FRIEND OF THOMAS HENRY YATES, JR., v. HAJOCA CORPORATION AND MARYLAND CASUALTY COMPANY.

(Filed 10 July 1968.)

1. Master and Servant § 62— Evidence held sufficient to support finding that accident between employer's office and claimant's home occurred in course of employment.

Evidence tending to show that claimant was employed by defendant as an outside salesman, that he maintained an office in his home, that defendant employer furnished him an automobile for use in his work,

that one day each week claimant traveled from his home and office to his employer's office in another city in connection with his employment, that on the day in question claimant made his customary trip to the employer's office in the automobile furnished him by the employer, that after attending to the usual business at the employer's office and after having supper with a fellow employee, claimant began the return trip to his home and was involved in an automobile accident, *is held* sufficient to support a finding by the Industrial Commission that claimant was injured in an accident arising out of and in the course and scope of his employment.

2. Master and Servant § 57—

Where a claim for compensation is resisted on the ground that the injuries were occasioned by claimant's intoxication, defendant has the burden of proving such defense. G.S. 97-12.

3. Same—

Where there is competent evidence to support contrary conclusions as to whether claimant's injuries were occasioned by his intoxication, by making an award the Commission has found that defendant failed to carry the burden of proof that the injuries were caused by claimant's intoxication, and such finding is binding on appeal.

APPEAL by defendants from order and award of the Industrial Commission filed 5 January 1968.

Commissioner William F. Marshall, Jr., after hearing, made findings of fact, conclusions of law, and an award to plaintiff. Defendants appealed to the full Commission. The Commissioner and the full Commission upon appeal found that Thomas Henry Yates, Jr., was an employee of the defendant Hajoca Corporation and was injured on 16 December 1965 by accident arising out of and in the course and scope of his employment, resulting in and causing permanent and total disability. From the award of the full Commission, the defendants Hajoca Corporation, Employer, and Maryland Casualty Company, Carrier, appealed to the Court of Appeals.

Mason, Williamson & Etheridge by Kennieth S. Etheridge for claimant-appellee.

Henry & Henry by Everett L. Henry for defendants-appellants.

MALLARD, C.J. The appellants contend that the Hearing Commissioner and the full Commission of the North Carolina Industrial Commission committed error in finding as a fact and concluding that Thomas Henry Yates, Jr., was injured by accident arising out of and in the course and scope of his employment.

Counsel for the parties agreed that the provisions of Rule 19 (d) (2) of the Rules of Practice in the Court of Appeals of North Carolina shall apply to this appeal. In accordance with this rule, they filed the stenographic transcript. They did not file an appendix

to their briefs setting forth in succinct language with respect to those witnesses whose testimony is deemed to be pertinent on appeal, what they say the testimony of such witness tends to establish with citation to the page of the stenographic transcript in support thereof. However, counsel for each party does set out what he contends the facts are and does at times cite pages of the record in the following different ways: "Durham, R p 4"; "R p 4"; "R p 18—Fur"; etc. It would be clearer if counsel, when referring to the *record on appeal, would use* "R p ....." (giving the correct page) and when referring to the *stenographic transcript would use* "T p ....." (giving the correct page). To further confuse the record in this case, there are 20 pages numbered from 1 to 20 of the record on appeal, 69 pages numbered from 1 to 69 of one part of the stenographic transcript, 12 pages numbered from 1 to 12 of another part of the transcript, 24 pages numbered from 1 to 24 of another part of the transcript, plus certain exhibits attached to the stenographic transcript.

Thomas Henry Yates, Jr., was employed by the defendant Hajoca Corporation as an outside salesman on 16 December 1965. He lived in Hamlet, North Carolina, and had his office in his home. He performed his duties as a salesman, which included soliciting orders from plumbing and heating contractors in the territory south and east of Charlotte, including Southern Pines, Rockingham, Hamlet, and over to Lancaster. The defendant employer furnished him with a 1965 Falcon station wagon and credit cards to buy gas and oil for use in his work, and he kept this vehicle at his home and office in Hamlet. He came to Charlotte from his office and home in Hamlet almost every Thursday to turn into the office of the defendant employer all orders received, moneys collected, and to discuss deliveries and procedure for billing the orders he received. On Thursday, 16 December 1965, Thomas Henry Yates, Jr., as was his custom, went to Charlotte on business for his employer, driving the automobile furnished him by the defendant employer. After attending to the usual business there at the employer's Charlotte office and after eating supper with a fellow employee, he left Charlotte about 9:00 p.m. to return to his office and home in Hamlet. It was a dark foggy night, and before 11:00 p.m., the employer's automobile operated by Thomas Henry Yates, Jr., left the highway in a curve and struck a tree, resulting in the injury which has caused him to be and remain completely and totally disabled. There was also evidence that immediately after the wreck there was a whiskey bottle and two beer cans in the front seat of the automobile.

In regard to traveling home from work, our Supreme Court has

stated in *Alford v. Chevrolet Co.*, 246 N.C. 214, 97 S.E. 2d 869 (1957), at pp. 216 and 217, the following:

> "If it be conceded the course of employment included the travel home, then certainly there must be reasonable continuity between the employment and the travel. When travel is contemplated as part of the work the rule is stated in 58 Am. Jur., p. 722, Sec. 214, as follows: '. . . the employment includes not only the actual doing of the work but also a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done, when the latter is expressly or impliedly included in the terms of the employment.' Citing *Brick Co. v. Giles*, 276 U.S. 154; *Guiliano v. Daniel O'Connell's Sons*, 105 Conn. 695. In the latter case the Court said: 'The period of employment covers the working hours . . . and such reasonable time as is required to pass to and from the employer's premises.'"

We are of the opinion and so decide that there was ample competent evidence for the Hearing Commissioner and the full Commission to find as a fact that the said Thomas Henry Yates, Jr., at the time of the accident, was acting in the course of and scope of his employment. *Brewer v. Trucking Co.*, 256 N.C. 175, 123 S.E. 2d 608.

The appellants also contend that the Commissioner and the full Commission committed error in failing to find that the injuries sustained by Thomas Henry Yates, Jr., were occasioned by his intoxication. The burden of proof as to this was on the defendants. G.S. 97-12. The appellee contends that the evidence was not sufficient to make such a finding. There was competent evidence to support the contention of both the plaintiff and defendants upon this question. By making an award in this case, the Commission has found that the defendants failed to carry the burden of proof that the plaintiff's injury was caused by his intoxication, and we are bound by such finding. *Gant v. Crouch*, 243 N.C. 604, 91 S.E. 2d 705.

The order, opinion and award of the Industrial Commission is without error of law, and the same is

Affirmed.

BROCK and PARKER, JJ., concur.

ODIS FLETCHER KENDRICK v. GLENN WINFRED CAIN AND GEORGE E. HADDOCK.

(Filed 10 July 1968.)

1. Appeal and Error § 42—

Where the "Statement of Case on Appeal" contains a statement that the action is for the loss of services of plaintiff's minor son, but the complaint alleges a cause of action for personal injuries and the wrongful death of the son, the allegations of the complaint are controlling as to the nature of the action.

2. Death § 3—

A father may not maintain an action in his individual capacity for the wrongful death of his minor son, and demurrer to a complaint alleging such a cause of action is properly sustained.

3. Parent and Child § 4—

If a minor child is injured by the wrongful act or omission of another and death is instantaneous, the father may not recover damages for the loss of services of the child.

4. Pleadings § 33—

A defective statement of a good cause of action may be cured by amendment, but a statement of a defective cause of action may not.

5. Same; Death § 3—

A complaint by a father in his individual capacity seeking to recover for the wrongful death of his minor son states a defective cause of action and not a defective statement of a good cause of action, since such an action may only be brought by a personal representative, G.S. 28-173, and plaintiff's motion to amend his complaint to allege loss of services and funeral expenses is properly denied.

6. Pleadings §§ 26, 33—

Where there is a defective statement of a good cause of action, the complaint is subject to amendment and the action should not be dismissed until the time for obtaining leave to amend has expired, G.S. 1-131, but where there is a statement of a defective cause of action, final judgment dismissing the action should be entered.

APPEAL by plaintiff from *Exum, J.*, 2 January 1968 Civil Session of RANDOLPH Superior Court.

Plaintiff, in his individual capacity *as father* of a 20-year old minor, seeks to recover of the defendants for the alleged wrongful death of Jimmy Ray Kendrick, his minor son. Plaintiff also alleges that his son suffered extensive head injuries and lacerations of the face and forehead "which would have caused him extreme pain," and plaintiff seeks to recover for personal injuries to his son.

Defendant Cain before answering filed a written demurrer, asserting that plaintiff in his individual capacity does not have a right to sue and therefore does not allege a cause of action.

Defendant Haddock before answering filed a written demurrer, asserting that plaintiff has alleged no cause of action and does not have a right to sue. Defendant Haddock further asserts that "Odis Fletcher Kendrick, Administrator of the Estate of Jimmy Ray Kendrick" in a wrongful death action against these two defendants, which was tried 3 April 1967, recovered of the defendant Haddock a judgment for $10,000 which has been paid.

From a judgment sustaining the demurrers, dismissing the action, and denying plaintiff's motion to amend the complaint, plaintiff appeals to the Court of Appeals.

John Randolph Ingram for plaintiff-appellant.

Jordan, Wright, Henson & Nichols by William B. Rector, Jr., for defendant-appellee Glenn Winfred Cain.

Smith, Moore, Smith, Schell & Hunter by Stephen Millikin and Larry B. Sitton for defendant-appellee George E. Haddock.

MALLARD, C.J. The pertinent allegations of the complaint, briefly stated, are that plaintiff's minor son, Jimmy Ray Kendrick, on 8 December 1965 died as the result of injuries sustained in a collision between a pickup truck, in which he was a passenger, being operated by the defendant Haddock and an automobile being operated by the defendant Cain; and that alleged negligence on the part of each of the drivers constituted a proximate cause of the accident. Jimmy Ray Kendrick was pronounced dead on arrival at Randolph Hospital. Plaintiff further alleges that at such time the decedent was twenty years of age, lived with his father and mother and had average monthly earnings in the sum of $332.00. The complaint contains no other allegations in connection with loss of prospective earnings; no allegation whatever is set forth with respect to funeral expenses.

On page two of this record there appears a "Statement of Case on Appeal," the first sentence reading, "This is a civil action instituted by the plaintiff for the *loss of services* of a minor son growing out of the wrongful death of Jimmy Ray Kendrick arising out of an automobile collision." This statement seems to be contradicted by paragraph XVII of plaintiff's complaint which reads:

> "As a proximate result of defendants' negligence, plaintiff has suffered damages and loss for the personal injury and wrongful death of his minor son in the amount of twenty-five thousand and no/100 ($25,000.00) dollars for the personal injury and wrongful death of his minor son, Jimmy Ray Kendrick."

The attorneys for the parties entered into the following stipulation which appears at the end of the record on appeal:

> "It is stipulated and agreed that the foregoing shall be and is the statement of case on appeal to the Court of Appeals of North Carolina."

In this stipulation the term "statement of case on appeal" relates to the entire record on appeal instead of relating to the single paragraph on page two of the record entitled, "Statement of Case on Appeal."

The "Statement of Case on Appeal" on page two of the record appears to be used as a brief introduction to the record on appeal. This is not required under Rule 19(a) of the Rules of Practice in the Court of Appeals.

In this case this "Statement of Case on Appeal" appearing on page two of the record on appeal contains a statement as to the nature of the cause of action which is not supported by the complaint. We hold that the allegations in the complaint are controlling and that the cause of action alleged is one for personal injuries to, and for the wrongful death of, Jimmy Ray Kendrick. The plaintiff, in his individual capacity as father of the deceased, cannot maintain this action.

The Court did not commit error in allowing the demurrers of the defendants. G.S. 28-173; *Horney v. Pool Company,* 267 N.C. 521, 148 S.E. 2d 554; *White v. Comrs. of Johnston,* 217 N.C. 329, 7 S.E. 2d 825.

Even if we could view the complaint as alleging a cause of action for loss of services of his minor son, the allegation that the son was dead on arrival at the hospital after sustaining injuries would defeat a recovery. It is the law in North Carolina that if a minor child is injured by the wrongful act or omission of another, and death is instantaneous, the father does not have the right to recover damages for the loss of services of such child. *White v. Comrs. of Johnston, supra.*

Plaintiff contends that his motion to amend his complaint to allege loss of services and to recover funeral expenses should have been allowed. In North Carolina it is well settled that there is a distinction between a defective statement of a good cause of action, which may be amended, and a statement of a defective cause of action, which may not be amended. We hold that the plaintiff has stated a cause of action that only a personal representative could bring under the provisions of G.S. 28-173, and therefore, he has stated a defective cause of action and not a defective statement of

a good cause of action. It follows and we so decide that the judgment of Judge Exum denying the motion to amend is correct. In *Mills v. Richardson,* 240 N.C. 187, 81 S.E. 2d 409, Justice Bobbitt, speaking for the Court, said, "Where there is a defective statement of a good cause of action, the complaint is subject to amendment; and the action should not be dismissed until the time for obtaining leave to amend has expired. G.S. 1-131. *But where there is a statement of a defective cause of action, final judgment dismissing the action should be entered.*" (Emphasis added.)

The judgment of the court sustaining the demurrers, dismissing the action, and denying plaintiff's motion to amend is

Affirmed.

BROCK and PARKER, JJ., concur.

JAMES C. UNDERWOOD v. RALPH L. HOWLAND, COMMISSIONER OF MOTOR VEHICLES OF THE STATE OF NORTH CAROLINA.

(Filed 10 July 1968.)

1. Automobiles § 2— Complaint properly alleged that revocation under G.S. 20-28.1 was not mandatory.

In an action by the holder of an operator's license to review the revocation of his license by the Commissioner, plaintiff alleged that he was convicted on 31 January 1968 of the offense of operating a motor vehicle without a license on 28 August 1966 while his license was in a state of suspension from 13 July 1966 to 13 October 1966, that subsequent to his conviction defendant notified him that, effective 4 March 1968, his license would be revoked under G.S. 20-28.1 for a period of one year as a result of his conviction of a moving violation committed while driving during a period of suspension. *Held:* The complaint alleges sufficient facts to show that (1) the revocation of plaintiff's license by defendant was not mandatory under G.S. 20-28.1, since the statute provides that revocation must become "effective on the date set for termination of the suspension or revocation which was in effect at the time of such offense," and that (2) plaintiff is entitled to a review of defendant's order in the Superior Court pursuant to G.S. 20-25.

2. Pleadings § 12—

Upon demurrer the facts alleged in the complaint must be accepted as true.

3. Statutes § 5—

Where the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning and are without power to interpolate or to superimpose provisions and limitations not contained therein.

4. Automobiles § 2—

Contention of defendant Commissioner that a literal interpretation of G.S. 20-28.1 would lead to absurd results, and that the statute should be interpreted to mean that where notice of licensee's conviction is received after the termination date of the initial suspension the revocation should be prospective in nature, presents a question for the legislature and not the courts, the language of the statute being clear and unambiguous.

APPEAL by plaintiff from *Fountain, J.,* April-May 1968 Session of WAYNE Superior Court.

Pertinent allegations in the complaint in this civil action are summarized as follows: On 27 February 1968, plaintiff was the holder of an operator's license; on said date, he received a notice of revocation from defendant advising that pursuant to G.S. 20-28.1 said license would be revoked for one year from and after 4 March 1968; the purported reason of revoking plaintiff's license was that defendant had been notified that plaintiff was convicted in the Wayne County Court on 31 January 1968 of operating a motor vehicle on the public highway on 28 August 1966, and that plaintiff's operator's license was in a state of suspension from 13 July 1966 to 13 October 1966. Pursuant to the notice, plaintiff surrendered his operator's license to defendant and on 8 March 1968 requested that his license be returned for the reasons hereinafter stated.

Defendant failed to return plaintiff's license and this suit was instituted. Defendant demurred to the complaint, contending that it does not state facts sufficient to constitute a cause of action.

Following a hearing on the demurrer, Judge Fountain entered judgment sustaining the demurrer and dismissing the action. Plaintiff appealed.

Herbert B. Hulse, Attorney for plaintiff appellant.

T. Wade Bruton, Attorney General, by William W. Melvin, Assistant Attorney General, and T. Buie Costen, Staff Attorney, for the defendant appellee.

BRITT, J. First, we must decide if, in the light of G.S. 20-25, the Superior Court may consider this action. Pertinent provisions of the statute are as follows: "Any person denied a license or whose license has been cancelled, suspended or revoked by the Department, except where such cancellation is mandatory under the provisions of this article, shall have a right to file a petition within thirty (30) days thereafter for a hearing in the matter in the superior court. . . ."

For the purpose of this appeal, the crucial clause in the statute

is "except where such cancellation is mandatory under the provisions of this article."

In view of defendant's demurrer, we must accept as true the facts alleged in the complaint. *Coble v. Reap,* 269 N.C. 229, 152 S.E. 2d 219. Therefore, it becomes necessary to determine if the defendant, under the facts alleged in the complaint, was under statutory mandate to revoke plaintiff's operator's license for the period from 4 March 1968 to 4 March 1969. This brings us to a consideration of G.S. 20-28.1, pertinent provisions of which are as follows:

> "Conviction of moving violation committed while driving during period of suspension or revocation of license. — (a) Upon receipt of notice of conviction of any motor vehicle moving violation committed while driving a motor vehicle, such offense having been committed while such person's operator's or chauffeur's license was in a state of suspension or revocation, the Department shall revoke the person's license *effective on the date set for termination of the suspension or revocation which was in effect at the time of such offense.* (Emphasis added.)
>
> "(b) When a license is subject to revocation under this section, the period of revocation shall be as follows:
>
> "(1) A first such revocation shall be for one year;"

In his complaint, plaintiff alleges that the termination date of his original suspension was 13 October 1966; that he was indicted for operating a motor vehicle on the highway without a license on 28 August 1966 but was not convicted until 31 January 1968; that because of said conviction defendant has ordered plaintiff's license revoked for one year beginning 4 March 1968.

Plaintiff contends that on the facts alleged in his complaint, any order of defendant under G.S. 20-28.1 revoking his license would have to become "effective on the date set for termination of the suspension or revocation which was in effect at the time of such offense," and that said date was 13 October 1966.

Plaintiff's contention is well-founded. We hold that the complaint alleges sufficient facts to show that the revocation of plaintiff's license by defendant was not mandatory under the provisions of Article 2 of Chapter 20 of the General Statutes, and the sustaining of defendant's demurrer by the Superior Court was error.

In his brief, defendant contends that a literal interpretation of G.S. 20-28.1 would lead to absurd results; that the statute should be interpreted to mean that the revocation should date from the termination of the initial suspension "if notice of conviction is received

before such termination date," and that where "notice of conviction is received after such termination date, the revocation should be prospective in nature."

We cannot adopt defendant's contention. Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give its plain and definite meaning; *Davis v. Granite Corp.*, 259 N.C. 672, 131 S.E. 2d 335; and the courts are without power to interpolate, or superimpose provisions and limitations not contained therein. *Board of Architecture v. Lee*, 264 N.C. 602, 142 S.E. 2d 643.

It is our duty to adjudicate, not legislate; to interpret the law as written, not as we would have it. We are compelled to interpret the statutes, including G.S. 20-28.1, as written, leaving to the General Assembly the responsibility of writing and amending statutes.

The judgment of the Superior Court sustaining defendant's demurrer is

Reversed.

CAMPBELL and MORRIS, JJ., concur.

GEORGE J. BUFFKIN v. J. C. GASKIN, T/A G. & G. AUTO SERVICE
AND
FLOSSIE B. ANDERSON v. J. C. GASKIN, T/A G. & G. AUTO SERVICE.

(Filed 10 July 1968.)

1. Appeal and Error § 41—

Where appellant submits the evidence in the record on appeal under Rule 19(d)(2) of the Rules of Practice in the Court of Appeals but fails to affix an appendix to the brief summarizing the testimony that he relies upon to support his exception to denial of motion for judgment as of nonsuit, the Court of Appeals, *ex mero motu*, will refuse to consider the evidence and will deem the assignment of error to be abandoned.

2. Negligence § 26—

Nonsuit on the ground of contributory negligence is allowed only when the plaintiff's evidence considered in the light most favorable to him establishes the plaintiff's negligence as a proximate contributing cause of the injury so clearly that no other conclusion reasonably can be drawn therefrom.

3. Automobiles §§ 71, 73—

Conflicting evidence in this case *is held* sufficient to be submitted to the jury on the issue of defendant's negligence in towing a disabled auto-

mobile on a foggy morning without lights on either the wrecker or the automobile, and on the issue of plaintiff's contributory negligence in colliding into the towed vehicle.

4. Trial § 34—

Defendant cannot complain of an instruction which required the plaintiffs to establish defendant's negligence "beyond a reasonable doubt" rather than "by the greater weight of the evidence."

APPEAL from *Clark, J.*, February-March 1968 Civil Session, COLUMBUS Superior Court.

These two civil actions were consolidated for trial by consent of the parties.

The two actions arose from an automobile collision which occurred at approximately 8:15 P.M., 13 March 1965, on North Carolina Highway No. 904 near Tabor City.

On the occasion in question the plaintiff George J. Buffkin was driving a 1964 Ford automobile owned by the plaintiff Flossie B. Anderson. Buffkin and Mrs. Anderson were first cousins. Mrs. Anderson did not drive an automobile and on this occasion had asked her cousin, Buffkin, to drive her in her automobile to Tabor City for the purpose of grocery shopping.

Buffkin was driving the Anderson automobile in a southeasterly direction towards Tabor City. The plaintiffs contended that there were patches of fog on the road and that the surface of the road was damp and wet from previous rains. They were proceeding at approximately 45 miles per hour and had the headlights on low beam in order to have better visibility in the foggy conditions. As they, thus, proceeded, they came upon an object which Buffkin and Mrs. Anderson saw at about the same time. Buffkin applied the brakes but was unable to stop until the Ford he was driving crashed into the object. The object turned out to be a 1958 Ford which was attached to the rear of a wrecker truck being operated by the defendant. The defendant had gone to this location for the purpose of pulling the 1958 Ford out of a ditch on the northerly side of the road. The defendant had arrived and had attached the crane of his wrecker to the 1958 Ford and had then pulled it from the ditch and partially across the northerly half of the highway and onto the southerly half of the highway. The defendant had the wrecker headed in an easterly direction on the southerly side of the highway which was the side of the highway on which the plaintiff Buffkin was driving the Anderson automobile. The defendant had stopped to attach a tow bar to the disabled Ford and the wreck occurred while the defendant was stopped.

The evidence was sharply conflicting, both as to the weather conditions and the lighting on the wrecker.

The plaintiffs' evidence was to the effect that there were no lights on either the wrecker or the 1958 Ford which was connected to it. The defendant claimed that the wrecker was well lighted with red blinker lights and other lights.

The evidence revealed that the 1958 Ford was attached to the wrecker by a hoist and the front was several feet off the ground. There was no evidence as to any lights on the 1958 Ford which was connected to the wrecker.

The jury awarded damages in the amount of $4,250 to Buffkin for personal injuries and in the amount of $6,000 to Mrs. Anderson for personal injuries and $1,200 to Mrs. Anderson for damages done to her Ford.

From judgment in favor of the plaintiffs based upon the jury verdict, the defendant appealed.

John A. Dwyer and D. Jack Hooks, Attorneys for plaintiff appellees.

Henry & Henry by Everett L. Henry, Attorneys for defendant appellant.

CAMPBELL, J. This appeal presents two questions. One, should the case have been dismissed upon motion for judgment as of nonsuit? Two, did the trial court commit error in the charge?

The evidence was submitted under Rule 19(d)(2) but the appellant did not comply with the rules of this Court in that no appendix was affixed to the brief summarizing the testimony that the defendant relies upon to sustain the motion for judgment as of nonsuit. For failure to comply with the rules of this Court in this regard, this Court, *ex mero motu,* will refuse to consider the evidence and will deem this assignment of error as abandoned. Despite this ruling, we engaged upon a voyage of discovery and went through the transcript of the record. There was ample evidence to sustain a finding of negligence on the part of the defendant. Nonsuit on the ground of contributory negligence of the plaintiff is allowed only when the plaintiff's evidence considered in the light most favorable establishes the plaintiff's negligence as a "proximate contributing cause of the injury so clearly that no other conclusion reasonably can be drawn therefrom." *Hughes v. Vestal,* 268 N.C. 450, 150 S.E. 2d 752; *White v. Mote,* 270 N. C. 544, 155 S.E. 2d 75.

While the evidence was sharply conflicting, we think that the case was properly submitted to the jury on the issues of negligence and contributory negligence.

The defendant assigns as error the charge to the jury by the trial court:

> "All the evidence in this case tends to show that it was after dark or at night within the meaning of the statute. Now, I further instruct you, members of the jury, that this requirement of the statute is applicable to towed vehicles. Such tail lights on the rear of a wrecker or a towing vehicle does not constitute a sufficient compliance with the statute. To comply with the statute, a motorist must have such visible tail lights on the towed vehicle. I instruct you, members of the jury, that the operation of a motor vehicle at night without such visible tail lights on the towed vehicle in violation of the statute is negligence *per se*, or negligence in itself, or negligence as a matter of law. * * *
>
> Finally as to this first issue, members of the jury, I instruct you that if the plaintiffs have satisfied you from the evidence and beyond a reasonable doubt that on the night of March the 13th, 1965, at about 8:00 o'clock P.M. on Highway 904 about two or three miles west of Tabor City, North Carolina, that the defendant, Mr. Gaskin, did operate his wrecker on said highway and did with said wrecker tow another motor vehicle and that the towed vehicle did not have on its lamps exhibiting a red light plainly visible under normal atmospheric conditions for a distance of 500 feet to the rear of such towed vehicle, then I instruct you that the defendant would be negligent; and if you further find from the evidence and by the greater weight of the evidence that such negligence was one of the proximate causes of the collision between the vehicles and resulting injury to the plaintiffs, then it would be your duty to answer this first issue in favor of the plaintiffs, that is 'yes.' If you fail to so find, members of the jury, then it would be your duty to answer this issue in favor of the defendant, that is 'no.' "

We find no error in this instruction insofar as the defendant is concerned. As a matter of fact, the instruction placed a greater burden on the plaintiffs than the law requires, for that the trial court required the plaintiffs to establish this fact "beyond a reasonable doubt" rather than "by the greater weight of the evidence." This undue burden placed upon the plaintiffs cannot be taken advantage of by the defendant.

We have reviewed all of the assignments of error and find no error in the trial of this case.

Affirmed.

BRITT and MORRIS, JJ.. concur.

STATE OF NORTH CAROLINA v. FORREST LEE JETTON.

(Filed 10 July 1968.)

1. Criminal Law § 88—

Objection to a question by defense counsel on cross-examination seeking to elicit testimony which had previously been given by the witness is properly sustained, defendant not being prejudiced by the court's refusal to allow the witness to repeat his testimony.

2. Criminal Law § 73—

Testimony by a police officer as to what another witness had told him in defendant's presence, the other witness previously having testified as to what he had told the officer, is properly admitted for the purpose of corroboration.

3. Criminal Law § 104—

Upon motion for nonsuit, the evidence must be taken in the light most favorable to the State, giving the State the benefit of every reasonable inference which arises from the evidence.

4. Larceny §§ 5, 7—

Evidence of the State tending to show that the automobile in question was owned by and was in the lawful possession of a credit corporation, that the automobile was taken from the premises of the credit corporation without its consent, that when apprehended a few days later defendant had possession and control of the automobile, and that defendant had no evidence of ownership, *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of larceny, of the automobile upon instructions as to recent possession of stolen property.

5. Criminal Law § 166—

Exceptions and assignments of error not brought forward and argued in the brief are deemed abandoned. Rule of Practice in the Court of Appeals No. 28.

APPEAL by defendant from *Snepp, J.*, 3 October 1967, Schedule C Session, MECKLENBURG Superior Court.

Defendant was charged in a bill of indictment with the felonious larceny of an automobile of Commercial Credit Corporation. The defendant entered a plea of not guilty.

The State's evidence consisted of the testimony of three witnesses. The defendant offered no evidence.

Danny Cowan, Finance Manager for Commercial Credit Corporation, 1300 South Tryon Street, Charlotte, North Carolina, testified that a repossessed 1965 four-door, beige, Chevrolet Bel Air automobile of a value of approximately $1,300 to $1,400 was removed from Commercial Credit Corporation's lot at 1301 South Tryon Street, Charlotte, North Carolina, between 6:00 p.m. Friday, 4 August 1967, and 8:30 a.m. Monday, 6 August 1967, and that said automobile was removed from the premises of Commercial Credit

Corporation without permission. That the automobile in question belonged to Commercial Credit Corporation. That the police were notified.

L. M. Hatchell, an officer with the Charlotte Police Department, testified that on 10 August 1967 he stopped the defendant, who was driving a 1965 four-door, beige, Chevrolet Bel Air automobile. That defendant could not produce a North Carolina driver's license, nor the registration card for the automobile being driven and that defendant gave him a driver's permit in the name of Douglas Falls. That he checked the daily theft bulletin and determined that the automobile in question was one reported as stolen from the Commercial Credit Corporation, and the serial number on the automobile driven by defendant matched the serial number on the daily theft bulletin. That he carried the defendant to the police station where, at a later time, defendant was identified by Officer T. N. Kiser as Forrest Lee Jetton, and that Forrest Lee Jetton, the defendant appearing in Court was the same person that identified himself as Douglas Falls.

T. N. Kiser, Detective, Charlotte Police Department, testified that he talked with Officer Hatchell and looked at the automobile in question. That he also talked to "Douglas Falls," whom he recognized as Forrest Lee Jetton, as he knew Jetton personally.

From a verdict of guilty as charged, and the judgment entered thereon, the defendant appealed.

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

Charles B. Merryman, Jr., for defendant appellant.

BROCK, J. Defendant assigns as error that the trial judge restricted his cross-examination of the State's witness Danny Cowan as to the ownership of the stolen vehicle.

In his cross-examination the defendant's counsel sought to elicit a second time that the title to the vehicle in question was registered in the name of some person in South Carolina.

The witness had already testified that the vehicle title was registered in the name of someone in South Carolina, and the trial judge stated that he was sustaining the objection to the second inquiry because of repetition. Clearly the defendant was not prejudiced by not being allowed to have the witness repeat his testimony. It is the duty of the trial judge to restrict counsel from unnecessary examination or cross-examination of witnesses. This assignment of error is without merit and is overruled.

The defendant assigns as error that the trial judge restricted his cross-examination of the State's witness L. M. Hatchell with respect to his identification of the defendant as the driver of the vehicle.

Defendant's counsel had cross-examined the witness completely with respect to the occupants of the vehicle, and, when he undertook to do the same thing again, the trial judge sustained the solicitor's objection. This assignment of error is without merit and is overruled.

The defendant assigns as error that the trial judge allowed the State to offer hearsay testimony. The State's witness T. N. Kiser testified as to what the State's witness L. M. Hatchell had told him in the presence of the defendant in the interrogation. The witness Hatchell had already testified to the same thing and had been extensively cross-examined by defendant's counsel. Also, upon defendant's objection to the hearsay testimony the trial judge correctly instructed the jury that it was being admitted for corroborative purposes only. This assignment of error is without merit and is overruled.

The defendant assigns as error that the trial judge overruled his motion for judgment as of nonsuit. It is established in this State that, upon a motion for nonsuit in a criminal case, the evidence must be taken in a light most favorable to the State and the Court must give the State the benefit of every reasonable inference which arises from the evidence. *State v. Bridgers*, 267 N.C. 121, 147 S.E. 2d 555.

The State's evidence tended to show that the automobile in question was owned by and was in the lawful possession of Commercial Credit Corporation; that the automobile was taken from the premises of Commercial Credit Corporation without its permission or consent; that the defendant was in possession and control of the automobile in question when apprehended by the police; and that defendant had no evidence of ownership of the automobile in question. The case was submitted to the jury by the trial judge upon instructions concerning "recent possession." This assignment of error is overruled.

The defendant excepted to and assigned as error a portion of the judge's charge relative to lawful possession by Commercial Credit Corporation, but this exception and assignment of error is not brought forward and argued in his brief. It is therefore deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina. Nevertheless, we have examined the judge's charge in this respect and find it to contain no prejudicial error.

In the defendant's trial we find

No error.

MALLARD, C.J., and PARKER, J., concur.

G. K. LEWIS AND WIFE, L. P. LEWIS, v. GODWIN OIL COMPANY, INC.

(Filed 10 July 1968.)

1. Sales § 6—

The statute of limitations applicable to an action based upon breach of warranty of fitness and safety is three years. G.S. 1-52.

2. Limitation of Actions § 17—

Upon the plea of the applicable statute of limitations, the burden is on plaintiff to show that the action was instituted within the prescribed period.

3. Limitation of Actions § 4—

A cause of action accrues and the statute of limitations begins to run, in the absence of disability or fraud or mistake, whenever a party becomes liable to an action.

4. Same; Limitation of Actions § 18— Action upon breach of warranty of fitness of tobacco curer accrues either at its installation or first sign of damage and not at subsequent explosion.

Where plaintiff alleges that a tobacco curer which he purchased from defendant was installed on a certain date, that on a later date it exploded and destroyed plaintiff's tobacco barn and tobacco, that between the time of the installation and explosion three barns of tobacco had been cured, that the cured tobacco had an oil film on it, and that defendant was so advised and made adjustments to the curer, plaintiff's action based upon breach of warranty of fitness and safety accrued either at the time of installation or when plaintiff first discovered oil on the tobacco, and where it appears from the complaint that the action was not instituted until more than three years after those dates, judgment on the pleadings in favor of defendant is proper notwithstanding the action was brought within three years of the explosion, the damages from the explosion resulting from the first injury and being merely in aggravation of the original damages.

APPEAL by plaintiffs from *Clark, J.*, at the February 1968 Civil Session of BRUNSWICK Superior Court.

This is a civil action instituted by plaintiffs against defendant for recovery of damages sustained by plaintiffs as the result of a fire and explosion which destroyed their tobacco barn and a quantity of tobacco. Their action is based upon breach of warranty of fitness and safety of a tobacco curer purchased by plaintiffs from the defendant and installed by the defendant. Plaintiffs also claim damage to three barns of tobacco cured in the barn prior to its destruction.

The complaint alleges that on or about 20 July 1964, plaintiffs purchased a tobacco curer from the defendant and that the curer was installed by the defendant on 22 July 1964; that on several occasions between 22 July 1964 and 16 August 1964, pursuant to complaints by plaintiffs, defendant made adjustments on the curer, the last adjustment being on 14 August 1964, at which time defendant's

employee advised plaintiffs that if they had any further trouble with the curer to notify defendant and it would make corrections.

The complaint further alleges that on Sunday, 16 August 1964, plaintiffs attempted to contact defendant to advise that the curer was still not functioning properly, but were unable to make contact; that on said date, around noon, an explosion and fire occurred, destroying plaintiffs' tobacco barn and tobacco.

The complaint also alleges that three barns of tobacco were cured between the time the curer was installed and the barn was destroyed; that upon removal of each barn of tobacco after the curing process was completed, plaintiffs discovered that the cured tobacco had an oil film on it and defendant was advised of this fact. Plaintiffs allege specifically that the tobacco curer was defective in several respects and that it was improperly installed by the defendant.

Plaintiffs instituted their action on 16 August 1967. Defendant answered and by amendment to its answer pleaded the three-years statute of limitations.

When the case came on for trial, defendant moved for judgment on the pleadings. The motion was allowed for the reason that the complaint discloses that any cause of action plaintiffs may have had accrued or came into being on or about 22 July 1964, or prior to 16 August 1964, and plaintiffs' action instituted on 16 August 1967 was commenced more than three years after the accrual of the alleged cause of action.

From the judgment dismissing the action, plaintiffs appealed.

Sullivan & Horne by Thomas E. Horne, Attorneys for plaintiff appellants.

James, James & Crossley by Joshua S. James, Attorneys for defendant appellee.

BRITT, J. The sole question presented on this appeal is: Was the cause of action alleged by plaintiffs barred by the three-years statute of limitations pleaded by defendant? We hold that it was.

The period prescribed for the commencement of this action is three years from the time the cause of action accrued. G.S. 1-52. Upon the plea of this statute the burden is on plaintiffs to show that they instituted their action within the prescribed period. *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E. 2d 508.

The decision of the Supreme Court of North Carolina in *Matthieu v. Gas Co.*, 269 N.C. 212, 152, S.E. 2d 336, is controlling in the case at bar. Branch, J., speaking for the court, said:

"A cause of action accrues and the statute of limitations begins

to run whenever a party becomes liable to an action, if at such time the demanding party is under no disability. This rule is subject to certain exceptions, such as torts grounded on fraud or mistake, none of which are applicable to the instant case. However, the more difficult question is to determine when the cause of action accrues. In the case of *Mast v. Sapp,* 140 N.C. 533, 53 S.E. 350, this Court said: 'Where there is a breach of an agreement or the invasion of an agreement or the invasion of a right, the law infers some damage. . . . The losses thereafter resulting from the injury, at least where they flow from it proximately and in continuous sequence, are considered in aggravation of damages. . . . The accrual of the cause of action must therefore be reckoned from the time when the first injury was sustained. . . . When the right of the party is once violated, even in ever so small a degree, the injury, in the technical acceptation of that term, at once springs into existence and the cause of action is complete.' "

In the instant case, plaintiffs' cause of action accrued prior to 16 August 1964. If it did not accrue on 22 July 1964, the day that defendant installed the tobacco curer, it definitely accrued several days later when plaintiffs completed curing their first barn of tobacco and discovered an oil film on the tobacco. The damage which resulted thereafter was in aggravation of the original damage and resulted from the first injury.

A judgment on the pleadings in favor of a defendant on defendant's plea in bar of the statute of limitations is proper when all the facts necessary to establish said plea are alleged or admitted in plaintiff's pleadings. *Reidsville v. Burton,* 269 N.C. 206, 152 S.E. 2d 147.

The judgment of the Superior Court is
Affirmed.

CAMPBELL and MORRIS, JJ., concur.

CHARLES McLEAN, ADMINISTRATOR OF ESTATE OF PIERCE LEE McLEAN, v. JOE E. WARD.

(Filed 10 July 1968.)

1. Negligence § 51—

It is not negligence for a person to maintain an unenclosed pond or pool on his premises.

2. Same—

When a person maintains an unenclosed pond on his property which is attractive to children of tender years and the owner knows or by the exercise of reasonable care should know that children frequently play there, and the owner does nothing to prevent such use but condones the children's use of the pond, it is incumbent upon the owner to provide such children reasonably adequate protection against injury.

3. Same—

Where there is no evidence that the owner of a private pond maintained for irrigation purposes permitted children to play around the pond, either expressly or impliedly, but the evidence shows that the owner had requested that they not be permitted to do so and had warned their parents to keep them away, the owner may not be held liable on the ground of negligence for the drowning of a small child in the pond.

APPEAL from *Clark, J.,* February 1968 Civil Session, COLUMBUS Superior Court.

At the close of the plaintiff's evidence, the defendant moved for judgment as of nonsuit. The motion was allowed.

On 16 June 1964 Pierce Lee McLean, the four year old son of Charles McLean and wife, Annie Mae McLean, lost his life by drowning in a pond located on the defendant's farm.

The pond was located from four to five-tenths of a mile from a main traveled public road. There was a private farm road that went down to the tenant house furnished by the defendant to the Charles McLean family. This private road went by the pond and at its nearest point was some fifty feet away.

Between the private road and the pond there were bushes and undergrowth so that the pond itself could not be seen.

The pond was stocked with fish and the water from the pond was used for irrigation purposes. There was no fence or other barrier around the pond. The pond was something like 100 feet long and 50 feet wide. At its deepest point it was some 10 feet in depth.

Charles McLean, Jr., the ten year old brother of the deceased, testified as to the events:

"On this afternoon, my father told me something about a bait bucket. He told me to do down to the fish pond and get the bait bucket. I knew where the bait bucket was. The bait bucket was around on the back of the pond. When my father told me to go get the bait bucket, my little brother Pee Wee (the deceased) was with me. I remember at that time my father said something to Pee Wee. He told him to stay back to the house. After my father told me to get the bait bucket, I went on down there. My little brother went with me. I left him down there at the other end of the fish pond.

"When I left the house there was a path that went down to the

pond. Pee Wee and I took that path. I left Pee Wee there at the pond, and when I left him to go around and get the bait bucket he was throwing in the water. When he was throwing in the water, he was not standing in the little path. There was a clear space out there, and he was standing up in it. When I left to go around to get the bait bucket, he was about three and a half or four feet from the water. I left him there throwing things in the pond and I went around the pond to get the bait bucket. When I came back down to the end of the fish pond where he was he was in the water. I saw his hand in the water and it was up in the air. When I saw this I ran to the house and told my mama Pee Wee was drowned."

Williamson & Walton by Benton H. Walton, III, Attorneys for plaintiff appellant.

Hogue, Hill & Rowe by William L. Hill, II, Attorneys for defendant appellee.

CAMPBELL, J. In the case of *Hedgepath v. Durham,* 223 N.C. 822, 28 S.E. 2d 503, it was held that a person has the right to maintain an unenclosed pond or pool on his premises. It is not an act of negligence to do so. When, however, a person exercises this right, and children of tender years are attracted thereto, and it becomes a common resort of persons of tender years to go there to play, and the owner knows this or by the exercise of ordinary care should know this, and the owner does nothing to prevent it or forbid it and by his conduct and actions permits such an unenclosed pond or pool to be used by children of tender years, then it is incumbent upon such owner to provide reasonably adequate protection against injury. Failure to do so constitutes an act of negligence. *Barlow v. Gurney,* 224 N.C. 223, 29 S.E. 2d 681.

Where, however, the owner of a private pond or lake does not permit children to play in it and does not give permission to do so either express or implied, there is no actionable negligence from the mere ownership of such a pond or pool.

In the instant case, the pond was an ordinary farm pond maintained for irrigation purposes. The defendant owner did not give permission either expressly or impliedly for children to play about the pond. Charles McLean, the father of the deceased child, testified:

"I have seen Mr. Ward down in the area of the pond. I saw him down there almost every day. I have seen children playing, I mean, down there at the pond. I have never seen any children down there at any time when Mr. Ward went by. * * *

"Mr. Ward had said something to me about the children being down there. He had told me to keep them away from there. He told me to keep the children away from the pond. I would say that he told me that four or five times. I remember him telling me. At the time he told me that I do not remember whether or not there were any children at the pond when he was down there. No sir, there wasn't no children at the pond. As to what I would do to keep my children away from the pond, and in particular, this little boy, every time that I would catch them anywhere near the pond, I would whip them. I had whipped this child, Pierce Lee McLean, for going to the pond."

The mother of the deceased, likewise, testified that the defendant had told her when he had seen the children playing near the pond at a time when water was being taken from the pond for irrigation purposes, "(a)nd so Mr. Ward told us, says, Annie Mae, you and Charles keep them younguns from this pond because it is extremely dangerous."

All of the evidence tended to show that the defendant owner, not only did not permit children to play in or near the pond, but he expressly requested that they not be permitted to do so and had warned their parents to keep them away.

This case is controlled by the decision in *Burns v. Gardner,* 244 N.C. 602, 94 S.E. 2d 591, wherein it is stated:

"The drowning of the child upon stepping into the pond or lake stirs the sympathetic concern of all; but, upon the evidence offered, it does not appear that this tragedy can be attributed to actionable negligence on the part of the defendants."

Hence, the judgment of involuntary nonsuit must be

Affirmed.

BRITT and MORRIS, JJ., concur.

IN THE MATTER OF THE WILL OF WILLIAM T. HEAD.

(Filed 10 July 1968.)

1. Appeal and Error § 45—

Exceptions in the record not set out in the brief, or in support of which no reason or argument is stated or authority cited, will be deemed abandoned. Rule of Practice in the Court of Appeals No. 28.

2. Evidence § 46—

The genuineness or falsity of disputed handwriting may be proved by

a nonexpert witness who is found to be acquainted with the handwriting of the person supposed to have written it.

3. Trial § 36—

It is not mandatory on the trial judge to charge the jury as to their consideration of the testimony of interested witnesses, but it is permissible to do so, and where there is no request for such an instruction, failure of the court to so charge is not error.

4. Trial § 33—

The trial court is not required to give a verbatim recital of the testimony but must review the evidence only to the extent necessary to explain the application of the law thereto. G.S. 1-180.

5. Same—

If the court's statement of the evidence does not correctly reflect the testimony of a witness in any particular respect, counsel must call attention thereto and request a correction.

APPEAL by respondents from *Thornburg, J.*, 5 February 1968 Session POLK Superior Court.

Dr. William T. Head married Mrs. Laura Covington Cole, who at that time had two children by her former marriage: one is now Mrs. Evelyn Cole Bowers, and the other is Mr. John Robert Cole. Mrs. Bowers and Mr. Cole are the respondents in this proceeding.

One child was born of the marriage of Dr. William T. Head and Laura Covington Cole Head: she is now Mrs. Wilma Head Woolard. Mrs. Woolard is the caveator in this proceeding.

Dr. Head, a long time resident of Polk County, North Carolina, executed a will dated 23 August 1960 wherein he devised and bequeathed all of his property to his wife, and, in the event she predeceased him, he devised and bequeathed all of his property to his daughter, his step-daughter, and his step-son to be divided equally among them. His wife did predecease Dr. Head, leaving the three children as the beneficiaries under the said will.

Dr. Head died 9 July 1966 and the will dated 23 August 1960 was probated in common form 9 September 1966. On 12 September 1966 Mrs. Wilma Woolard, who was living in Florida, wrote to Mr. Robert Cole, who was living in South Carolina, advising him "if you don't withdraw your suit for probate I am going to file a caveat." On 4 November 1966 Mrs. Woolard filed a caveat to the will dated 23 August 1960, and propounded in lieu thereof an instrument allegedly executed by Dr. Head as his last will and testament on 1 December 1964 while he was in Florida. The instrument of 1 December 1964 devised and bequeathed all of Dr. Head's property to Wilma Head Woolard in fee; and provided that if she predeceased him all of his property was devised and bequeathed to Evelyn Cole

Bowers and John Robert Cole to be divided equally among them. The authenticity of this latter instrument is the subject of this proceeding.

Upon stipulated issues the jury found that the instrument dated 1 December 1964 was the last will and testament of William T. Head. From the verdict and the judgment setting aside the probate of the 23 August 1960 instrument, and admitting to probate in solemn form the instrument dated 1 December 1964 as the last will and testament of William T. Head, the respondents Evelyn Cole Bowers and John Robert Cole appeal.

Redden, Redden and Redden for the caveators appellees.

McCown, Lavender and McFarland, and Hamrick and Hamrick by J. Nat Hamrick for respondents appellants.

BROCK, J. Appellants present no reason or argument and cite no authority in support of their exceptions grouped under assignments of error numbers 1, 3, 4, 7 and 10. "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 Court of Appeals of North Carolina. Additionally, appellants have caused us considerable unnecessary tedious searching to relate the arguments in their brief to their assignments of error. We have determined that appellants argued in their brief their assignments of error numbers 2, 5, 6, 8, 9 and 11; but we made this determination only after comparing subject matter, because nowhere in the argument in their brief did appellants undertake to advise us which assignment of error the particular argument was in support of.

It is not essential that the assignments of error be argued in the brief in strict numerical order, but certainly counsel should indicate which assignment of error he proposes that the argument supports.

Appellants' assignments of error numbers 2, 5 and 6 relate to the admission of testimony of lay witnesses as to their opinion of the genuineness of Dr. Head's signature; and their testimony thereafter as to whether a person writes his signature the same way twice; and their testimony as to how they compare signatures. It is well established that genuineness or falsity of disputed handwriting may be proved by a witness, not an expert, who is found to be acquainted with the handwriting of the person supposed to have written it. Stansbury, N. C. Evidence 2d, § 197. The other questions propounded to the witnesses were competent to show the witnesses' familiarity with the subject of handwriting comparisons. These assignments of error are overruled.

Appellants' assignment of error number 9 relates to the failure of the Court to instruct the jury "that Wilma Head Woolard was an interested witness and that her testimony should be carefully scrutinized." From the record we can see that it was made clear to the jury that Mrs. Woolard was interested in their verdict; it was made clear to them by the testimony and exhibits that she was the sole beneficiary under the 1 December 1964 instrument. Also it is clear from the record that counsel made no request for such an instruction. It is not mandatory on the trial judge to charge the jury in this respect, but it is permissible to do so. *State v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606. It is the duty of a party desiring instructions on a subordinate feature of the case or greater elaboration on a particular point, to aptly tender a request for special instructions. 4 Strong, N. C. Index, Trial, § 38, p. 344. This assignment of error is overruled.

Appellants' assignment of error number 8 relates to alleged errors by the trial judge in recapitulating the testimony of the two subscribing witnesses to the instrument dated 1 December 1964. In reviewing the evidence, the trial court is not required to give a verbatim recital of the testimony, but only to the extent necessary to explain the application of the law thereto. G.S. 1-180. If the Court's statements of the evidence in condensed form does not correctly reflect the testimony of the witness in any particular respect, it is the duty of counsel to call attention thereto and request a correction. *Steelman v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829. The trial judge explicitly admonished the jury on several occasions to use its recollection of the evidence and not what the Court or counsel may have said the evidence was. This assignment of error is overruled.

Appellants' remaining assignment of error is a formal one and is overruled.

In their brief counsel for appellants make a strong "jury argument," but, even if we were inclined to determine the facts in their favor, our function is not that of a jury. Appellants have had full opportunity to develop their case and to have the jury consider their evidence and contentions. They fought a good fight and the taste of defeat may be bitter, but in the trial we find no prejudicial error.

Affirmed.

MALLARD, C.J. and PARKER, J., concur.

W. W. PORTER v. ELIZABETH CAHILL AND WILLIAM J. CAHILL.

(Filed 10 July 1968.)

Courts § 14—

In a small claim action assigned to a magistrate for trial pursuant to G.S. 7A-211, where notice of appeal is given in open court and the magistrate notes the appeal on the judgment and returns the file to the Clerk of Superior Court, the appeal is properly perfected, G.S. 7A-228, and the appeal may not be dismissed for failure of the Clerk to perform the duty imposed on him by G.S. 7A-305(c) to collect the facilities fee and the General Court of Justice fee required when an appeal is taken from a magistrate to the district court.

APPEAL by plaintiff from *Carter, Chief District Judge,* Twelfth District, 13 November 1967 Civil Session, District Court, CUMBERLAND County.

Plaintiff instituted this action in the District Court Division of the General Court of Justice by filing complaint on 26 July 1967, seeking to recover $185.00 in tort for property damage. Under G.S., Chap. 7A, Art. 19 (G.S. 7A-210 *et seq.*), by general rule of the District Court, Twelfth District, the case was assigned to a magistrate for trial. On 26 July 1967 a magistrate's summons was issued and was served on the defendants 2 August 1967. Thereafter defendants filed answer, denying negligence, and asserting a counterclaim against plaintiff for $150.00 for property damage. Upon trial before the magistrate, judgment in the sum of $120.00 was rendered in favor of the defendants upon their counterclaim.

The plaintiff gave notice of appeal in open court before said magistrate on 24 August 1967, and the magistrate made a notation to this effect on the Judgment and returned the Judgment and file to the Office of the Clerk of Superior Court. The plaintiff took no further action to have the appeal heard.

On 27 October 1967, the defendants, through their attorneys, filed a motion to dismiss the plaintiff's appeal on the grounds that it had not been perfected in accordance with the General Statutes. On 30 October 1967, the plaintiff filed a counter-motion opposing the motion for dismissal. Both motions were heard on 29 November 1967, before the Chief Judge of the District Court Division of the Twelfth Judicial District. Judgment was entered on that date, which found as a fact that the plaintiff had not paid the facilities fee, or the General Court of Justice fee as provided by G.S. 7A-305(c), and also finding as a fact that the plaintiff had not filed a pauper's oath. The Judgment ordered the dismissal of the appeal.

The plaintiff excepted to the signing of the Judgment and gave notice of appeal to the Court of Appeals.

Downing, Downing and David by Edward J. David for plaintiff appellant.

Quillan, Russ, Worth and McLeod by Joe McLeod for defendant appellees.

BROCK, J. At or about the time of filing his complaint, the plaintiff paid to the Clerk the sum of $8.00 for advance court costs. This is the total of the $2.00 facilities fee for cases heard before a magistrate, and the $6.00 fee for support of the General Court of Justice as provided by G.S. 7A-305, sections (a)(1) and (a)(2).

With regard to additional costs where an appeal is taken from a magistrate's judgment to the District Court, G.S. 7A-305(b) provides:

> "On appeal, costs are cumulative, and when cases heard before a magistrate are appealed to the district court, the General Court of Justice fee and the facilities fee applicable in the district court shall be added to the fees assessed before the magistrate; . . ."

It appears therefore that upon plaintiff's appeal from the magistrate to the district court the facility fee of $5.00 and the General Court of Justice fee of $6.00, which are applicable to this case in the district court, should be assessed in addition to the $8.00 already assessed before the magistrate. G.S. 7A-305(b), *supra;* G.S. 7A-305, secs. (a)(1) and (a)(2).

The question presented by this appeal is whether a deposit in advance of the additional $11.00 in fees by the plaintiff was mandatory in order to perfect his appeal from the magistrate to the district court.

The plaintiff appellant relies upon G.S. 7A-228, which reads as follows:

> "No new trial before magistrate; appeal for trial *de novo;* how appeal perfected; oral notice. — No new trial is allowed before the magistrate. The sole remedy for a party aggrieved is by appeal for trial *de novo* before a district judge. Appeal is perfected by serving written notice thereof on all other parties and by filing written notice with the clerk of superior court within 10 days after entry and indexing of the judgment on the civil judgment docket. Notice of appeal may also be given orally in open court upon announcement of or rendition of the judgment, and shall thereupon be noted in writing by the magistrate upon the judgment."

The defendants appellees rely upon G.S. 7A-305(c), which reads as follows:

> "The clerk of superior court, at the time of the filing of the papers initiating the action or the appeal, shall collect as advance court costs, the facilities fee and General Court of Justice fee, except in suits *in forma pauperis.*"

Under the provisions of G.S. 7A-305(c), *supra,* it is clear that the duty of collecting the additional costs at the time of the filing of the papers initiating an appeal is imposed upon the Clerk. But a failure of the Clerk to perform his duty in this respect should not operate to prejudice the appealing party.

It is abundantly clear from the record that the plaintiff gave notice of appeal in open court before the magistrate, and that the magistrate duly noted the appeal upon the judgment. This complies with the provisions of G.S. 7A-228. Notice of appeal having been given and duly noted, it is the duty of the Clerk to place the action upon the civil issue docket of the district court division. G.S. 7A-229.

If the additional costs have not been paid and the appellee feels aggrieved thereby, the appellee has a remedy. He can ask for execution upon the judgment appealed from and cause a stay bond to be posted or the execution satisfied, G.S. 7A-227; or he can make a motion before the district judge for a notice to the appellent to pay the additional costs or suffer a dismissal of the appeal.

The judgment of the District Court entered herein on 29 November 1967 dismissing the plaintiff's appeal is reversed, and this cause is remanded to the District Court, Cumberland County, with leave to plaintiff appellant to pay the additional fees within ten days after this opinion is certified to said court; and with leave to the defendants appellees to move the District Court for dismissal of the appeal if the fees are not paid within ten days after this opinion is certified to said court.

Reversed and remanded.

MALLARD, C.J., and PARKER, J., concur.

D. G. ETHERIDGE, EMPLOYEE, PLAINTIFF, v. VANCE BUTLER, JR., EMPLOYER; BITUMINOUS CASUALTY CORP., CARRIER; AND/OR GEORGIA-PACIFIC LUMBER CO., EMPLOYER; SELF-INSURER, DEFENDANTS.

(Filed 10 July 1968.)

1. Master and Servant § 93—

A finding of fact by the Industrial Commission, if supported by competent evidence, is binding on the Superior Court judge who reviews the case, and is likewise binding on appeal to the Court of Appeals.

2. Appeal and Error § 28—

An assignment of error to a finding of fact must indicate the page of the record where the finding of fact appears, and it is insufficient merely to refer to the page where the exception to the finding appears as an appeal entry.

APPEAL by defendants Vance Butler, Jr. and Bituminous Casualty Corporation from *Clark, J.*, 26 February 1968 Session COLUMBUS Superior Court.

This action originated before the North Carolina Industrial Commission in 1966, and the final award of the full commission was entered 27 April 1967. This final award having been entered prior to 1 October 1967, appeal was properly taken to the Superior Court.

On 4 June 1965, the plaintiff, Dowal Gray Etheridge, was working in the Ashpole Swamp area with his father, Joseph Etheridge. They had just commenced their work for the day and were gathering their tools in order to build or to repair the railroad which was used to transport logs out of the swamp area. While gathering these tools, the plaintiff, Dowal Gray Etheridge, was hit by a falling tree and sustained certain injuries which form the basis for this claim.

The evidence is in conflict with regard to the issue of employer-employee relationship. Plaintiff's evidence tends to show that both the plaintiff and his father were in the Ashpole Swamp area at the request of Vance Butler, Jr., to repair damaged railroad and to assist in relocating a skidder set. The defendants' evidence tends to show that the plaintiff and his father had been laying a new track in the area, that he had asked them to assist in relocating a skidder set, and that this task had been completed at the time of the accident.

During the proceedings before the Industrial Commission the Georgia-Pacific Lumber Company was made an additional party defendant.

The hearing commissioner found that claimant was injured on 4 June 1965 by accident arising out of and in the course of his employment; that at the time of his injury claimant was an employee of Vance Butler, Jr., and was not an employee of Georgia-Pacific

Lumber Company; and that claimant had an average weekly wage of $45.00.

On appeal to the full commission, the findings and conclusions of the hearing commissioner were adopted except that the full commission found that claimant had an average weekly wage of $60.00.

Upon hearing of the appeal in the Superior Court, Judge Clark made independent findings as to the jurisdiction of the Industrial Commission; changed finding of fact No. 4 which is not material to the outcome of the case; and affirmed the award of the full commission.

The defendants Vance Butler, Jr., employer, and Bituminous Casualty Company, carrier, appealed to the Court of Appeals.

D. Jack Hooks; and Powell, Lee and Lee by J. B. Lee for claimant appellee.

Marshall and Williams by A. Dumay Gorham, Jr., for Vance Butler, Jr. and Bituminous Casualty Corporation, appellants.

Powell and Powell by Frank M. Powell for Georgia-Pacific Lumber Company, appellee.

BROCK, J. The main contention of the appellants is that claimant was working for his father who was an independent contractor, and that neither claimant nor his father were employees of Vance Butler, Jr., at the time of the accident. The evidence was conflicting. A finding of fact by the Industrial Commission, if supported by competent evidence, is binding on the Superior Court Judge who reviews the case, and is likewise binding on this Court on appeal. *Pardue v. Tire Co.*, 260 N.C. 413, 132 S.E. 2d 747.

The appellants' assignments of error to Judge Clark's judgment do not help us in locating what is complained of. Appellants' assignment of error No. 3 is illustrative:

> "3. The Court erred in overruling defendants' exception and Assignment of Error #3, reading as follows:
>
> Finding of Fact No. 6 (adopted by the Full Commission) is erroneous for that it is not supported by the evidence. To the said Finding of Fact, these defendants except and assign error.
>
> Exception No. 3 (Rp. 23); Exception No. 30 (Rp. 33)."

The reference to Rp. 23 merely refers us to the page where Exception No. 3 appears as an appeal entry; nowhere are we shown where Finding of Fact No. 6 appears. The reference to Rp. 33 merely

refers us to the page where Exception No. 30 appears as an appeal entry; again, we do not know to what page of the Record it refers.

Assignments of error of this nature are of no help to us. In order to determine what appellant means we must search through the award of the hearing commissioner; the award of the full commission; and the judgment of the Superior Court.

Nevertheless, we have carefully read the transcripts of the hearings, and we are of the opinion that there is competent evidence to support the findings of fact as amended by the full commission and as amended by Judge Clark. We hold that the findings of fact support the conclusions of law, and the conclusions support the award of the full commission. The judgment appealed from is

Affirmed.

MALLARD, C.J., and PARKER, J., concur.

EDWARD B. MURRELL v. WILLIAM A. POOLE AND CAROLINA TURF COMPANY.

(Filed 10 July 1968.)

1. Appeal and Error § 41—

Where appellant caused to be filed with the clerk a stenographic transcript of the evidence in the trial tribunal, the failure to provide an appendix to the brief setting forth "in succinct language with respect to those witnesses whose testimony is deemed to be pertinent to the questions raised on appeal, what he says the testimony of such witnesses tends to establish with citation to the page of the stenographic transcript in support thereof" subjects the appeal to dismissal. Rule of Practice in the Court of Appeals No. 19(d)(2).

2. Evidence § 50—

Where a medical expert has testified without objection that plaintiff "will suffer" from an injury, it is not prejudicial error for him to be asked and to give as his opinion that he did not know how long this condition would continue, it being competent for a medical expert to give his opinion as to the duration of an injury.

APPEAL by defendants from *Hall, J.*, 11 December 1967 Civil Session of Superior Court of BRUNSWICK County.

Plaintiff alleged he was injured on 12 November 1966 when the bus he was driving was struck in the rear by a motor vehicle owned by defendant Carolina Turf Company and operated negligently by

its agent, the defendant Poole. Defendant admitted agency, denied negligence, denied plaintiff was injured, and alleged contributory negligence.

Plaintiff offered evidence which tends to show that on 12 November 1966 he was driving a passenger bus at a speed of approximately 55 miles per hour eastward on N. C. State Highway #211 when he observed a small automobile ahead of him making a "U" turn on the highway. He gradually applied his brakes so as to reduce his speed to approximately 30 to 35 miles per hour, and as he did so, the motor vehicle being operated by the defendant Poole, which had been following him, collided with the rear of the bus. The impact damaged the rear of the bus, the front of the motor vehicle (a station wagon) operated by the defendant Poole, and caused plaintiff's shoulders to be thrown against a metal bar back of the driver's seat causing injuries to his neck and shoulder.

The road at the place of collision was straight for a half a mile or more in each direction. The collision occurred at about 9:30 a.m. It was raining, and the highway was wet. Defendant offered no evidence. The court submitted the issues of negligence and damage which were answered in plaintiff's favor. Judgment was entered on the verdict, and defendant appealed to the Court of Appeals.

Herring, Walton, Parker & Powell by Ray H. Walton for plaintiff appellee.

Marshall & Williams by Daniel Lee Brawley for defendant appellants.

MALLARD, C.J. Appellant and appellee stipulate that "Rule 19 (d) (2) of the Rules of Practice in the Court of Appeals shall apply to this appeal." Pursuant to this rule, the stenographic transcript of the evidence was filed with the Clerk of the Court of Appeals. However, this rule also requires that "the appellant in an appendix to his brief shall set forth in succinct language with respect to those witnesses whose testimony is deemed to be pertinent to the questions raised on appeal, what he says the testimony of such witness tends to establish with citation to the page of the stenographic transcript in support thereof." The appellant does not comply with this latter requirement. Rule 48 of the Rules of Practice in the Court of Appeals provides that "(i)f these rules are not complied with, the appeal may be dismissed."

The deposition of the medical expert who examined and treated the plaintiff for his injuries was offered at the trial. He was asked and permitted to answer the following questions:

"Q. Doctor, if the Jury in this case should find from the evidence and by its greater weight that on or about the 14th day of November, 1966, Mr. Murrell was riding in a bus or motor vehicle which was struck from behind with such force that it threw his head back and pressed it against a metal bar at the back of his seat, do you have an opinion satisfactory to yourself as to whether or not this could have caused the condition that you have described?

A. Yes, that could have caused the onset and this be the aftermath of the injury.

Q. All right, sir. Doctor, now, as of the last time that you saw Mr. Murrell, what was your prognosis?

A. Well, he will be able to work. He will suffer at different times or if the weather changes or he is in a draft due to his work. He will suffer to some extent and have some soreness, however, he will be able to carry on his work and he can control this soreness with the use of analgesics.

Q. Doctor, do you have an opinion satisfactory to yourself as to how long this condition will continue to exist?

A. That is an unknown question. How long it will last. It may go on for several months, maybe a year, and it may stop tomorrow. That's the peculiarity of that type of condition."

Defendant did not bring forward in the brief his exception and assignment of error to the hypothetical question and answer and did not object or except to the doctor giving his prognosis. However, defendant contends that the court committed error in permitting the doctor to give his opinion as to how long the plaintiff's condition would continue to exist. This contention is without merit. The doctor had just testified, without objection, that the plaintiff *will suffer,* and this implies that the suffering will continue for some time. It was not prejudicial error under these circumstances for the doctor to be asked and to give as his opinion that he did not know for how long this condition would continue. In Stansbury, N. C. Evidence 2d, § 135, it is said, "The testimony of properly qualified medical experts may cover a wide range, their opinion having been received on questions of . . . the extent *and duration* of *an injury* or disease . . ." (emphasis added.)

Defendant also assigns as error certain portions of the judge's charge. When the charge is read as a whole, it correctly applies the law to the facts in this case.

Instead of dismissing the appeal for failure to comply with the rules, we have carefully examined and considered each assignment of error brought forward in appellant's brief and find no prejudicial error.

In the trial we find

No error.

BROCK and PARKER, JJ., concur.

K. G. GATES v. GEORGE C. McDONALD AND WIFE, ETHEL D. McDONALD.

(Filed 10 July 1968.)

1. Ejectment § 8—

In an action for the possession of real property, when an answer has been filed without the bond required by G.S. 1-111 and has remained on file for some time without objection, it is improper for the trial judge to strike the answer and render judgment for plaintiff without notice or rule to show cause, or without giving the defendant opportunity to file a defense bond.

2. Same—

The statutory requirement of bond in actions for the recovery or possession of real property may be waived unless seasonably insisted upon by plaintiff.

3. Same—

In an action for the possession of real property, plaintiff's motion at the trial that defendant's answer be stricken for failure to file the defense bond required by G.S. 1-111 is properly overruled, plaintiff not having moved that defendant be required to file the bond and not having given defendant notice of the motion to strike the answer.

APPEAL by plaintiff from *Thornburg, S.J.*, Regular March 1968 Civil "A" Session of BUNCOMBE Superior Court.

This civil action was instituted on 13 November 1967. Answer was filed by defendants on 2 January 1968, and reply was filed on 2 February 1968.

In his complaint, plaintiff alleges foreclosure of a deed of trust on certain lands belonging to defendants in Buncombe County, the purchase of the lands by plaintiff at the trustee's sale, and the delivery and recordation of deed from the trustee to plaintiff for the lands. Plaintiff prays for a writ of possession and a monetary judgment against defendants for rent.

In their answer, defendants denied plaintiff's title, denied that they executed the deed of trust referred to in the complaint, and alleged that the purported deed of trust was procured by fraud, deception, deceit, and connivance.

The case came on for trial on 29 March 1968. After a jury was selected and empaneled and the pleadings were read, plaintiff moved the court that defendants' answer be stricken for failure to file the bond required by G.S. 1-111. The motion was overruled, the parties proceeded with the trial, the jury answered the issues submitted in favor of defendants, and from judgment entered thereon, plaintiff appealed.

Carl W. Greene, Attorney for plaintiff appellant.

Robert S. Swain and Richard Ford, Attorneys for defendant appellees.

BRITT, J. The sole assignment of error brought forward in plaintiff's brief relates to the overruling of plaintiff's motion to strike the answer of the defendants because of their failure to file a bond for costs and damages as required by G.S. 1-111.

Section 1-111 of the General Statutes provides as follows:

> "In all actions for the recovery or possession of real property, the defendant, before he is permitted to plead, must execute and file in the office of the clerk of the superior court of the county where the suit is pending an undertaking with sufficient surety, in an amount fixed by the court, not less than two hundred dollars, to be void on condition that the defendant pays to the plaintiff all costs and damages which the latter recovers in the action, including damages for the loss of rents and profits."

Although the filing of a bond by defendant before he is allowed to plead in an action for the recovery or possession of real property appears to be a mandatory requirement, our Supreme Court has held that the requirement may be waived and has treated the statute with considerable leniency.

In *McMillan v. Baker,* 92 N.C. 111, an action involving the recovery or possession of real property, pleadings were filed, the case was tried in the Superior Court and appealed to the Supreme Court; a new trial was ordered and at the retrial, after the jury was selected and empaneled, plaintiff for the first time raised the question that defendant had failed to file the required bond and moved to strike the answer. The motion was allowed, plaintiff recovered judgment, and defendant appealed. In granting another new trial, the court, speaking through Merrimon, J., said:

"We think the court ought not to have allowed the motion to strike out of the record the defendant's answer, without first giving him an opportunity to give a proper undertaking to secure costs and damages. Under the circumstances of this case, he had the right to be allowed such opportunity. The undertaking required by the statute in such cases is for the benefit of the plaintiff, and it ought to be strictly required unless waived by him; but he may waive it if he sees fit to do so. It is very clear that the plaintiffs did so in this case, at least, and certainly until they should demand it.

* * *

"The court had the power to require the undertaking to be given at so late a period in the progress of the action, upon application of the plaintiffs; but the defendant had the right, after such waiver, to have opportunity to give it and, having given it as the court might require, to have his answer remain of record, and have the full benefit of it."

In cases coming within the purview of G.S. 1-111, when an answer has been filed without any bond and has remained on file for some time without objection, it would be improper for the trial judge to strike the answer and render judgment for plaintiff without notice or rule to show cause, or without giving the defendant opportunity to file a defense bond. *Cooper v. Warlick,* 109 N.C. 672, 14 S.E. 106. *Becton v. Dunn,* 137 N.C. 559, 50 S.E. 289.

The requirement that the defendant must "execute and file" a defense bond, or in lieu thereof a certificate and affidavit as provided by G.S. 1-112, may be waived unless seasonably insisted upon by the plaintiff. *Calaway v. Harris,* 229 N.C. 117, 47 S.E. 2d 796.

In the instant case, plaintiff did not move that defendants be required to file a bond but, without notice and as the case was in process of trial, moved that defendants' answer be stricken. The trial court properly overruled the motion.

The judgment of the Superior Court is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. CHARLES BROOKS.

(Filed 10 July 1968.)

1. Criminal Law § 88; Constitutional Law § 33—

In a prosecution for driving under the influence of intoxicating liquor, questions asked defendant on cross-examination about his consumption of beer *are held* proper, since defendant had testified on direct examination that he had consumed one beer, and since he had waived his privilege against self-incrimination by becoming a witness.

2. Criminal Law § 89; Automobiles § 126—

In a prosecution for driving under the influence of intoxicants, a question asked on cross-examination of a defense witness who was with defendant on the occasion in question as to whether the witness was "stoned" at that time *is held* not impertinent, insulting or prejudicial to defendant, one meaning of the word "stone" being to make numb or insensitive, as from drinks or narcotics, and the sobriety of the witness being a proper subject of cross-examination.

3. Criminal Law § 130; Jury § 5—

A motion for a mistrial on the ground that a juror who had been a probation officer of a domestic relations court had misrepresented himself in questioning by defense counsel as having no past or present connection with law enforcement is addressed to the discretion of the trial judge, and no abuse of discretion is shown in the denial of such motion where it is not clear whether the question propounded by defendant's counsel may have related only to the juror's present connection with law enforcement, and since service as a probation officer would not of itself make a juror incompetent.

APPEAL by defendant from *Thornburg, S.J.*, 15 January 1968 Session of Superior Court of GASTON County.

Defendant was tried on three different warrants, one charging him with failing to stop for a blue light and siren of a police officer's car on 25 October 1967, one charging him with operating a motor vehicle on the public highways while under the influence of intoxicating liquor on 26 October 1967, and one with operating a motor vehicle on the public highways at a speed of 70 miles per hour in a 55 mile per hour zone on 25 October 1967. The cases were consolidated in Superior Court for trial. Trial was by jury upon a plea of not guilty. The verdict of the jury was guilty in all the three cases.

From a judgment of imprisonment imposed in each case, the defendant appeals to the Court of Appeals.

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

Jeffrey M. Guller for the defendant.

MALLARD, C.J. Defendant's assignments of error numbered 1, 2, and 3 relate to questions about his consumption of beer which were asked the defendant on cross examination by the solicitor.

One of the charges against the defendant was driving while under the influence of intoxicating liquor. The State's evidence as to this tended to show that the defendant was driving an automobile on a public highway while under the influence of intoxicating liquor. The defendant testified on direct examination that he had consumed one can of beer. The questions asked did not assume any facts not in evidence. By becoming a witness, the defendant waived his privilege against self-incrimination, and it was proper to ask him questions concerning the offense charged as well as questions designed to discredit him as a witness. Stansbury, N. C. Evidence 2d, § 56, p. 115.

Assignment of error number 4 relates to a question asked defendant's witness on cross examination concerning the amount of alcoholic beverages he had consumed on the occasion under investigation. This assignment is overruled. The specific question asked was, "You were kinda stoned on the occasion weren't you?" The witness replied, "What do you mean stoned?" The solicitor then asked, "You had consumed a sufficient quantity of alcoholic beverages to where your mental and physical faculties were numb hadn't you?" To this the witness replied, "No, not that much I don't think. I had taken a drink of whiskey before I left home." The word "stoned" was apparently not understood by the witness. However, in Webster's Third New International Dictionary (1968) the word "stoned" is the past tense of "stone," and one of the meanings of the verb "stone" is "to make numb or insensible (as from drinks or narcotics)."

The sobriety of this witness Lail was a proper subject of inquiry on cross examination. The State's evidence tended to show that Mr. Lail was with the defendant at the time the defendant was arrested, and that Mr. Lail was also arrested for public drunkenness. The question was not impertinent, insulting, or prejudicial as defendant contends.

Defendant also contends that the Court committed error in denying his motion for a mistrial. The record reveals that the following occurred with respect to the defendant's motion for a mistrial:

> "MR. GULLER: Your Honor, I would like to move for a mistrial on the grounds that one of the jurors misrepresented himself in the answer to one of my questions — more specifically, when I asked the members of the jury whether or not any of them were associated at this time with law enforcement or had been associated with law enforcement previously, one juror raised his hand and said he had been a police officer (Mr.

Floyd C. Martin). It has now come to my attention that Mr. Thomas Rankin has been connected with the Domestic Relations Court as a probation officer.

THE COURT: Motion is denied.

MR. GULLER: Your Honor, may I call Mr. Rankin to the stand?

THE COURT: For the purpose of your motion, motion is denied.

SOL. WHITESIDES: I was listening to the questions he asked and the State would offer evidence that the question was whether or not anyone was now employed as a law enforcement officer or in any capacity of law enforcement and not whether they were employed at any time previously.

THE COURT: The Court overrules the motion, and for the purpose of the record, the statement was that the juror was employed at one time as a probation officer with one of the lower courts; that was the statement.

MR. GULLER: Yes, sir. Exception for the defendant."

It is not clear whether the question propounded by defendant's counsel related to the juror's present or past connections with "law enforcement." However, having served as a probation officer with a domestic relations court would not of itself make a juror incompetent.

We are of the opinion that the defendant's motion for a mistrial was addressed to the discretion of the trial judge. No abuse of discretion is asserted or shown. *State v. Sheffield,* 206 N.C. 374, 174 S.E. 105.

In the trial we find

No error.

BROCK and PARKER, JJ., concur.

POLLY SOUTHERN RING v. LAWRENCE DEWITT RING.

(Filed 10 July 1968.)

1. Appeal and Error § 41—

Where appellant caused to be filed with the clerk a stenographic transcript of the evidence in the trial tribunal, the failure to provide an

appendix to the brief setting forth "in succinct language with respect to those witnesses whose testimony is deemed to be pertinent to the questions raised on appeal, what he says the testimony of such witnesses tends to establish with citation to the page of the stenographic transcript in support thereof" subjects the appeal to dismissal by the Court of Appeals *ex mero motu*. Rule of Practice in the Court of Appeals No. 19(d)(2).

2. Divorce and Alimony § 21—

Evidence that defendant is gainfully employed and is earning a good income *is held* sufficient to support a finding that defendant is in wilful contempt of a court order requiring him to make specified support payments to his estranged wife, defendant having produced no evidence that he is unable to make such payments.

APPEAL by defendant from *Martin, S.J.*, September 25, 1967 Civil Session of FORSYTH.

This case began 25 April 1966 as an action seeking separate maintenance and counsel fees under G.S. 50-16. By a consent judgment entered 13 May 1966, it was "ORDERED, ADJUDGED AND DECREED that the defendant pay into the Domestic Relations Court of Forsyth County the sum of $30 per week, beginning on Friday, the 20th day of May, 1966, and continuing thereafter on each and every succeeding Friday until the plaintiff, Polly Southern Ring, dies or remarries, said sum to be disbursed by said court to Polly Southern Ring for her separate maintenance and support."

Defendant made the payments of $30.00 a week as required by the judgment of 13 May 1966, "until on or about October 6, 1966, when he stopped". On or about 2 November 1966, defendant returned to the home of plaintiff and stayed there until about 4 November 1966 when he left and did not return. On 28 December 1966, plaintiff filed an amended motion that defendant be attached for contempt for wilful failure to comply with the provisions of the judgment entered on 13 May 1966. Plaintiff alleged that defendant "at no time intended to fulfill" the marital obligations and that his only purpose and intent was to relieve himself of the burden of continuing to make payments as required by the judgment of 13 May 1966. Defendant demurred *ore tenus* to the amended motion and the court entered judgment sustaining this demurrer. Plaintiff excepted and appealed to the Supreme Court. In an opinion filed 12 April 1967, *Ring v. Ring*, 270 N.C. 113, 153 S.E. 2d 768, the Supreme Court stated, ". . . the judgment of the court below is vacated; and the cause is remanded for a plenary hearing on return of the order to show cause. From the evidence adduced at such hearing, the court will find the facts and enter judgment thereon".

On 25 September 1967, a show cause hearing was conducted by Judge Robert M. Martin. Both sides presented evidence and agreed

that an order disposing of the case could be signed by Judge Martin out of district and out of term. An order was entered on 6 January 1968, in which defendant was found to be in wilful contempt and ordered to pay $10.00 per week in addition to the regular payments until all arrearage was paid.

From the entry of this order defendant appealed.

H. Glenn Pettyjohn for plaintiff appellee.

Hayes and Hayes by James M. Hayes, Jr. and W. Warren Sparrow for defendant appellant.

MORRIS, J. In his appeal to this Court, defendant failed to comply with Rule 19(d)(2). Subsection (d) provides that the evidence in the record on appeal shall be in one of the two following methods:

> (1) In narrative form as required by the Supreme Court of North Carolina.
>
> (2) As an alternative to the above method (as a part of the record on appeal but not to be reproduced), the appellant shall cause the complete stenographic transcript of the evidence in the trial tribunal, as agreed to by the opposite party or as settled by the trial tribunal as the case may be, to be filed with the clerk of this Court and *then the appellant in an appendix to his brief shall set forth in succinct language with respect to those witnesses whose testimony is deemed to be pertinent to the questions raised on appeal, what he says the testimony of such witness tends to establish with citation to the page of the stenographic transcript in support thereof. The opposite party in case of disagreement as to any portion of the appendix in appellant's brief may set forth in an appendix to his brief in succinct language what he says the testimony of a witness establishes with citation to the page of the stenographic transcript in support thereof.* (Emphasis added.)

Defendant caused to be filed a stenographic transcript of the evidence presented before Judge Martin, but failed to provide an appendix to his brief setting forth "in succinct language with respect to those witnesses whose testimony is deemed to be pertinent to the questions raised on appeal, what he says the testimony of such witness tends to establish with citation to the page of the stenographic transcript in support thereof". For failure to comply with the above stated rule, we dismiss defendant's appeal *ex mero motu.*

However, we have carefully examined defendant's assignments of error and deem them to be without merit. There is ample evidence

in the record to support the findings of fact. Nowhere in the record does defendant assert as a matter of defense that he is incapable of making the payments. All the evidence reveals that he is gainfully employed and is earning a good income. The purpose of the show cause order was to allow him to purge himself of contempt. Any evidence he might have had of his inability to pay should have been presented at that time.

Affirmed.

CAMPBELL and BRITT, JJ., concur.

IN THE MATTER OF THE WILL OF JOHN THOMAS HONEYCUTT, DECEASED.

(Filed 10 July 1968.)

Wills § 22—

In a caveat proceeding, reference in the charge to "the will" and "the codicil" of decedent will not be held prejudicial error where the jury is emphatically instructed that it is the sole judge of the facts, and where it appears from the context of the instruction that the jury must have understood that the court was only referring to the writings themselves, although the better practice is to refer to the writings as the "purported will" and the "purported codicil."

APPEAL by caveator from *Seay, J.*, and a jury, at November 1967 Session of CABARRUS.

This is a proceeding for the probate in solemn form of a paper writing propounded as the Last Will and Testament of John Thomas Honeycutt, deceased. The paper writing was probated in common form by the clerk of the Superior Court of Cabarrus County. Upon the filing of a caveat to the probate, the proceeding was transferred to the civil issue docket of the Superior Court of Cabarrus County, as provided by statute.

John Thomas Honeycutt died a resident of Cabarrus County, North Carolina, on 20 September 1964. His will, dated 26 May 1961, and codicil, dated 26 October 1963, were probated in common form on 25 September 1964, on which date Cabarrus Bank and Trust Company and A. B. Palmer qualified as Executors. A. B. Palmer died on 3 February 1965. Cabarrus Bank and Trust Company continued the administration of the estate as sole Executor.

By item 10 of his will, the decedent bequeathed to B. G. King and wife, Margaret Towell King, a niece of decedent, all of his stock

in the King Kotten, Inc., a corporation engaged in the bottling of soft drinks. By item 11 of his will, he devised to B. G. King and wife, Margaret Towell King, a certain two-story brick building located on South Church Street in the city of Concord, North Carolina. Approximately two years later the decedent executed a codicil to his will in which he revoked the above-mentioned bequest and devise to B. G. King, and provided that at his death the real estate and stock should pass directly to his niece, Margaret Towell King.

On 21 September 1967, B. G. King filed a caveat to the codicil of the last will and testament of John Thomas Honeycutt alleging ". . . that at the time of the purported execution of said paper writing by the said John Thomas Honeycutt, he, the said John Thomas Honeycutt, was by reason of old age, disease, and both mental and physical weakness and infirmity not capable of executing a last will and testament which condition existed and continued until the death of the said John Thomas Honeycutt."

The proceeding was tried on its merits at the November 1967 Session of the Superior Court of Cabarrus County, and the trial resulted in a verdict in favor of the propounder. Judge Seay entered judgment establishing the paper writing dated 26 May 1961, and the paper writing dated 26 October 1963, as the will of the decedent. The caveator excepted and appealed, assigning error.

M. B. Sherrin, Jr. and R. L. Warren by R. L. Warren for caveator appellant.

E. T. Bost, Jr. and Williams, Willeford & Boger by John Hugh Williams for propounder appellee.

MORRIS, J. The caveator assigns as error several portions of the charge in which the trial judge inadvertently referred to "the will" and "the codicil" of the decedent. Since the trial judge instructed the jurors in most emphatic language in other parts of the charge that they were "the sole judges of the facts" and that they were not to consider anything the court may have said or done during the progress of the proceeding as the expression of any opinion on the facts, we are satisfied "that these trivial lapses of the judicial tongue did no injury to the caveator." *In re Will of Kemp*, 236 N.C. 680, 73 S.E. 2d 906. *In re Will of McDowell*, 230 N.C. 259, 52 S.E. 2d 807. Although the better practice would be to refer to the script as the "purported will" and the "purported codicil" of the decedent, it will not be held as an expression of the court upon the weight and credibility of the evidence contrary to the requirements of G.S. 1-180 when it appears from the context of the instruction that

the trial judge was only referring to the writing itself, and must have been so understood by the jury. *In re Will of Brockwell,* 197 N.C. 545, 149 S.E. 852.

An examination of the record in this appeal fails to disclose any error for which a new trial of the issue involved in this proceeding should be granted. The remaining exceptions to the charge are too tenuous to require discussion and are overruled. The charge as a whole comes well within the established practice. The caveators have failed to show prejudicial error. The judgment establishing the script in controversy as the last will of John Thomas Honeycutt must be upheld.

No error.

CAMPBELL and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. TOMMY HEFFNER.

(Filed 10 July 1968.)

1. Criminal Law § 168—

The charge of the court will be construed contextually, and segregated portions will not be held prejudicial error when the charge as a whole is free from objection.

2. Assault and Battery § 15—

In a prosecution for felonious assault, the charge of the court when reviewed as a whole properly instructed the jury as to (1) the elements of the offense of felonious assault, including the intent to kill, (2) the lesser offense of assault with a deadly weapon, and (3) the law of self-defense.

3. Criminal Law § 168—

When a charge presents the law fairly and clearly to the jury, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous.

APPEAL by defendant from *Snepp, J.,* 25 March 1968 Criminal Session of GASTON Superior Court.

Defendant was charged under two bills of indictment, proper in form, charging him with a felonious assault with a pocket knife on one Hazel Carter and a felonious assault with a butcher knife on his wife, Evelyn Heffner.

The defendant pled not guilty to the charges and testified in his own behalf, contending that he cut each of the prosecuting witnesses

in self-defense. The evidence disclosed that defendant was serving a prison sentence at the time of the alleged assaults and that he was home on a weekend visit.

The jury found the defendant guilty of assault with a deadly weapon in both cases and from sentence of two years in prison in each case, he appealed.

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

Lewis Bulwinkle, Attorney for defendant appellant.

BRITT, J. The only assignments of error brought forward in defendant's brief relate to those portions of the judge's charge to the jury, regarding the lesser offense of assault with a deadly weapon, as follows:

> ". . . and I instruct you that if you find from the evidence beyond a reasonable doubt, the burden being upon the State to so satisfy you that on the 3rd day of December, 1967, the defendant, Tommy Heffner, with a knife, cut the throat of the witness Hazel Carter, without intent to kill or without inflicting serious bodily harm upon her, then it would be your duty to find the defendant guilty of assault with a deadly weapon.
>
> * * *
>
> And:
>
> "I instruct you that if you find from the evidence beyond a reasonable doubt, the burden being upon the State to so convince you, that on the 3rd day of December, 1967, the defendant Tommy Heffner cut his wife, Evelyn, in various places with a butcher knife without any intent to kill or without inflicting any serious bodily harm not resulting in death . . . if you are so satisfied beyond a reasonable doubt, it would be your duty to return a verdict of guilty of assault with a deadly weapon."

Defendant contends that his rights were prejudiced by the quoted portions of the charge because "the trial judge failed to state that the jury was required to find intent in order to convict the defendant."

It has been held repeatedly by the Supreme Court of our State that "the charge of the court will be construed contextually, and segregated portions will not be held prejudicial error when the charge as a whole is free from objection." 3 Strong, N. C. Index 2d, Criminal Law, § 168, citing numerous cases. When his Honor's charge is reviewed as a whole, it is found to be free from prejudicial error.

Prior to giving the quoted instructions, the trial court defined the word assault according to the decisions of our Supreme Court and particularly as reviewed in 1 Strong, N. C. Index 2d, Assault and Battery, § 4. He then proceeded to give proper instructions regarding the other four elements of a felonious assault, including the element of intent to kill. On this element, he gave the following instruction:

> "Now, as to the third element, the intent to kill . . . no special intent is required beyond the intent to commit an unlawful act which may be inferred or presumed from the nature of the assault and the attendant circumstances. It is for you the jury to determine from the facts and circumstances whether the assault was committed with the specific intent to kill."

This was followed by instructions on the lesser offense of assault with a deadly weapon, and on this offense, he included the following instruction:

> "In order to convict of this offense, the State must prove from the evidence and beyond a reasonable doubt two things. First, that the defendant committed an assault upon another; and, second, that in so doing, the defendant used a deadly weapon. The instructions I have given you as to the definition of assault with a deadly weapon apply as to the lesser included offense of assault with a deadly weapon."

The defendant testified in his own behalf, admitted cutting the prosecuting witnesses, but contended that he did so in self-defense. The trial judge very properly gave instructions on self-defense following each of the portions of the charge complained of.

As was said by our Supreme Court in *State v. Hall,* 267 N.C. 90, 147 S.E. 2d 548: "When a charge presents the law fairly and clearly to the jury, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous. *State v. Exum,* 138 N.C. 599, 50 S.E. 283."

The defendant had a fair trial, free from prejudicial error, and the judgment of the Superior Court is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

LAWRENCE *v.* STEPHENSON.

S. F. LAWRENCE, LEON HARPER AND JAMES S. COLLINS, TRUSTEES, AND J. C. COLLINS, CLERK, OFFICERS OF THE TRUE CONGREGATION OF ANGIER PRIMITIVE BAPTIST CHURCH, AND THE S. L. LAWRENCE GROUP AND OTHERS UNITED IN INTEREST CONSTITUTING THE TRUE CONGREGATION OF ANGIER PRIMITIVE BAPTIST CHURCH v. T. H. STEPHENSON AND M. E. FISH, PURPORTED TRUSTEES, M. E. FISH, PURPORTED CLERK, AND L. B. CLAYTON AND M. E. FISH, PURPORTED DEACONS OF THE ANGIER PRIMITIVE BAPTIST CHURCH, AND THE JOEL T. LEWIS FACTION PURPORTING TO BE THE CONGREGATION OF ANGIER PRIMITIVE BAPTIST CHURCH.

(Filed 10 July 1968.)

1. Religious Societies and Corporations § 3—

The legal or temporal tribunals of the State have no jurisdiction over purely ecclesiastical questions and controversies, for there is a constitutional guarantee of freedom of religious profession and worship as well as an equally firmly established separation of church and state, but the courts do have jurisdiction as to civil, contract and property rights which arise from a church controversy.

2. Religious Societies and Corporations § 2—

The true congregation of a church consists of those members who adhere to the characteristic doctrines, usages, customs and practices of that particular church, recognized and accepted by both factions before the dissension between them arose.

3. Religious Societies and Corporations § 3— Instruction in church controversy case which weighed too heavily against one faction warrants new trial.

In an action between two factions of a congregation to determine the ownership of church property, there was no error in an instruction that the plaintiff faction must satisfy the jury by the greater weight of the evidence that the plaintiffs had remained faithful to and did not radically depart from church doctrines and practices which had theretofore been recognized and adhered to by both factions, although it would have been preferable to use the phrase "radically and fundamentally depart"; but an instruction that if plaintiffs satisfied the jury that the defendant faction had departed from the doctrines and practices of the church the issues must be answered in favor of the plaintiffs *is held* erroneous in not requiring a finding that the departure must be of a radical and fundamental nature.

APPEAL from *Godwin, S.J.*, 5 February 1968 Civil Session in the General Court of Justice, HARNETT Superior Court Division, from a judgment in favor of the plaintiffs, the defendants appeal.

This is a civil action to determine the true congregation of the Angier Primitive Baptist Church and to adjudicate the ownership of the church property. It was stipulated and agreed that the plaintiff should be known and designated as the "Lawrence Faction of the Angier Primitive Baptist Church" and the defendants as the "Lewis Faction of the Angier Primitive Baptist Church." Angier Primitive

Baptist Church was organized in 1912, and on 3 July 1965 and prior thereto it was an independent church with a congregational form of government. The church owned three parcels of land in Black River Township, Harnett County, North Carolina, a bank account and various articles of personal property.

The plaintiffs seek to be declared the true congregation of Angier Primitive Baptist Church, and as such awarded the full ownership, possession, and use of all the properties of the Church and assert that they have been expelled from membership in the church and denied use of the church property by the wrongful acts and conduct of the defendants.

The defendants deny any wrongful conduct on their part and aver that, as a majority of the membership of the church and in keeping with the customs and doctrines of Angier Primitive Baptist Church, they properly expelled the plaintiffs therefrom, and that they should be declared the true congregation of the church and entitled to the property thereof.

The jury answered the issues submitted in favor of plaintiffs, and from judgment entered thereon, defendants appealed.

Boyce, Lake and Burns by Eugene Boyce, Attorneys for plaintiff appellees.

W. A. Johnson, Attorney for defendant appellants.

CAMPBELL, J. It is well recognized that the legal or temporal tribunals of this State have no jurisdiction over, and no concern with, purely ecclesiastical questions and controversies, for there is a constitutional guarantee of freedom of religious profession and worship, as well as an equally firmly established separation of church and State. The courts do have jurisdiction as to civil, contract and property rights which are involved in, or arise from, a church controversy. It has been tersely expressed when said that religious societies have double aspects, the one spiritual with which legal courts have no concern, and the other temporal which is subject to judicial control.

The Angier Primitive Baptist Church is an autonomous congregational type church as opposed to a connectional form of church government. *c.f. Paul v. Piner,* 271 N.C. 123, 155 S.E. 2d 526.

The true congregation of the Angier Primitive Baptist Church consists of those members of its congregation who adhere to the characteristic doctrines, usages, customs and practices of that particular church, recognized and accepted by both factions before the dissension between them arose.

As stated in *Reid v. Johnston,* 241 N.C. 201, 85 S.E. 2d 114, the question presented is: Have the defendants, and those united with them, as against a faithful minority, diverted the property of the Angier Primitive Baptist Church to the support of usages, customs, doctrines and practices *radically* and *fundamentally* opposed to the characteristic usages, customs, doctrines and practices recognized and accepted by both factions of the congregation of this particular church before the dissension between them arose? The words "radically" and "fundamentally" used in the question presented require something more than a slight or minor deviation. They imply and require a substantial deviation from previous practices.

In the trial the defendants tendered issues which included the words "radically" and "fundamentally". The trial court, however, did not adopt the issues presented and tendered by the defendants but instead submitted the following issues:

"1. Did the plaintiffs (the Lawrence faction) prior to and on July 3, 1965 remain faithful to the doctrines and practices of the Angier Primitive Baptist Church recognized and accepted by plaintiffs and defendants (Lewis faction) prior thereto?

2. Did the defendants (Lewis faction) during or about June and July 1965 depart from the fundamental and characteristic doctrines, practices, usages and customs of the Primitive Baptist denomination in general and the Angier Primitive Baptist Church in particular as theretofore recognized by plaintiffs and defendants?"

In the charge to the jury, the trial judge with reference to the first issue charged the jury:

> "The burden of proof on this issue is on the plaintiff *(sic)* and I charge you that if the plaintiffs have fulfilled the responsibility cast upon them by the law and have satisfied you from the evidence and by its greater weight that prior to and on July 3, 1965 they remained faithful to and did not radically depart from the doctrines and practices of the Angier Primitive Baptist Church which doctrines and practices had theretofore been recognized and adhered to by both factions, the Lawrence and the Lewis Factions, you will answer the first issue 'yes.'"

While this charge used only the words "radically depart" and did not include the word "fundamentally" which would have been preferable, we think it complied sufficiently with the law and placed a proper burden upon the plaintiffs.

The second issue presented required the defendants to conform with the Primitive Baptist Denomination in general as well as the Angier Primitive Baptist Church in particular. This placed an undue burden upon the defendants. In the charge to the jury, when discussing this issue, the trial judge stated:

> "The burden of proof on this second issue is likewise upon the plaintiffs, and I charge you that if the plaintiffs have satisfied you from the evidence and by its greater weight that during or about June or July 1965 the defendants, by their actions and deeds, departed from the fundamental and characteristic doctrines, practices, usages and customs of the Primitive Baptist Denomination in general and the Angier Primitive Baptist Church in particular, as theretofore recognized by plaintiffs and defendants, and in accord with the legal meaning of those terms and words as I have previously defined them for you, you will answer the second issue in favor (of) the plaintiffs or, 'yes.' "

The vice in this portion of the charge was that it did not require a finding that the defendants had *radically* and *fundamentally* departed from the practices and customs of the Angier Primitive Baptist Church theretofore recognized by both plaintiffs and defendants before the dissension arose. In other words, the trial court applied a different yardstick to the plaintiffs from that applied to the defendants. We cannot say that this was not prejudicial to the defendants, and, therefore, a case which was otherwise well tried must be tried again.

New trial.

BRITT and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. VANCE LENDER EVANS.

(Filed 10 July 1968.)

1. Criminal Law § 159—

Where defendant submits the complete transcript of the evidence pursuant to Rule 19(d)(2) of the Court of Appeals but fails to attach an appendix to his brief setting forth in succinct language, with respect to those witnesses whose testimony he deems to be pertinent to the questions raised on appeal, what he says testimony of such witnesses would tend to establish, the Court will ordinarily dismiss such an appeal *ex mero motu.*

2. Burglary and Unlawful Breakings § 5; Larceny § 7—

Evidence that a quantity of merchandise consisting of cigarettes, beer, chewing gum, pickles and pigs feet had been stolen by breaking and entering the prosecuting witness' tavern, that on the same day a nearby restaurant purchased from defendant a quantity of items similar in kind to those taken from the tavern, but without evidence identifying them as the identical merchandise from the prosecuting witness' place of business, *is held* insufficient to be submitted to the jury on the question of defendant's guilt of breaking and entering and of larceny.

APPEAL by defendant from *Hobgood, J.*, February "R" 1, 1968 Session of WAKE Superior Court.

The defendant was tried on a bill of indictment charging that on 3 December 1967 the defendant feloniously broke and entered Gales Tavern, owned and occupied by Maryland Gales, located at 406 East Davie Street, Raleigh, and in a second count, that after having feloniously broken and entered said tavern, he did steal merchandise consisting of assorted brands of cigarettes, assorted cases of beer, one gallon of pigs feet, one gallon jar of pickles, and some chewing gum. All of the property had a value of $113. There was a third count charging the defendant with the crime of receiving stolen merchandise, knowing it to have been stolen. The State submitted to a nonsuit as to the third count, and the jury found the defendant guilty of the first two counts.

The evidence was to the effect that Gales closed and locked his tavern about midnight, Saturday, 2 December 1967, and the next morning about 10:00 a.m. he went by and found everything in order at that time. On Monday morning, about 8:00 a.m., 4 December 1967, when Gales went to his place of business to open up, he found that it had been broken into and about one-half of his merchandise, consisting of cigarettes, beer, pigs feet, pickles, hot sausage, and chewing gum, was missing. A flashlight and a hammer were also missing.

T. J. Demps operated a place of business known as High Light Restaurant in the same block in which Gales Tavern was located. He testified that on Sunday night, 3 December 1967, about 10:00 p.m. the defendant came to his place of business and inquired if he would be interested in buying some pigs feet, cigarettes, and beer. He refused to do so telling the defendant he was afraid the merchandise might be "hot". About an hour and one-half later, the defendant again came to Demps's place of business, and Demps paid him $40 for some cigarettes of various brands, a quantity of beer, pickles and Spearmint gum, as well as a quantity of pigs feet in a 2-½ gallon container.

Gales was unable to identify any of the merchandise when it was shown to him on the following Friday by the police officers.

The defendant testified and offered testimony to the effect that on Sunday, 3 December 1967, he was in the place of business operated by Demps; that he had something to eat there and listened to some music and while there a person he knew by the name of Wiggins came in and engaged him in conversation. Wiggins told him that a friend had some stuff in an automobile outside which he wanted to sell and that he, the defendant, merely acted as an agent in making the sale to Demps. For his part in the transaction, he received $10 of the $40 paid for the merchandise. He denied knowing anything about the source of the merchandise or that it was stolen.

The defendant assigns as error the failure of the court to dismiss the charges and enter a judgment of nonsuit at the close of all the evidence.

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

Vaughan S. Winborne and Gilbert B. Swindell, Attorneys for defendant appellant.

CAMPBELL, J. The defendant in this case submitted the complete transcript of the evidence under Rule 19(d)(2), but contrary to the provisions of that rule, the defendant did not attach an appendix to his brief setting forth in succinct language, with respect to those witnesses whose testimony he deemed to be pertinent to the questions raised on appeal, what he says the testimony of such witnesses would tend to establish. The defendant thereby imposed upon this Court the necessity of a voyage of discovery through the record. Ordinarily, this Court would dismiss such an appeal *ex mero motu* for failure to comply with the rules. Despite the failure to comply with the rules of this Court, we have reviewed the testimony and are of the opinion that the failure of the State's evidence to identify the merchandise sold to Demps as being the same merchandise taken from Gales Tavern places this case within the doctrine of *State v. Parker,* 268 N.C. 258, 150 S.E. 2d 428, and *State v. Foster,* 268 N.C. 480, 151 S.E. 2d 62. The motion for judgment as of nonsuit should have been allowed.

Reversed.

BRITT and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. JOE LEWIS SHAW.

(Filed 10 July 1968.)

1. Criminal Law § 117—

An instruction charging the jury that a State's witness, who has pled guilty to the charge of larceny, "is an admitted accomplice to the larceny and his interest in the case as such accomplice should be scrutinized by you" *is held* favorable to the defendant in cautioning the jury as to their duty with respect to the testimony of one who was awaiting sentence.

2. Burglary and Unlawful Breakings § 7—

If all the evidence tends to show the completed crime of breaking and entering with the intent to steal, and there is no conflicting evidence relating to the elements of the offense, the court is not required to submit the question of defendant's guilt of a nonfelonious breaking or entry.

APPEAL by defendant from *Bickett, J.*, Second January 1968 Regular Criminal Session of WAKE Superior Court.

Criminal prosecution upon a bill of indictment charging defendant Joe Lewis Shaw and co-defendants Leroy Latrochish Flowers, Albert Bo Crowder, and Arthur Smith, Jr., with the felonies of breaking and entering, larceny, and receiving on 11 November 1967. The defendants had not been arraigned prior to the call of the case for trial. Upon arraignment, all of the defendants entered pleas of not guilty except Arthur Smith, Jr., who pleaded guilty to the charge of larceny. After the jury was selected, but before it was empaneled, the solicitor stated to the Court that he did not elect to place Arthur Smith, Jr., on trial for breaking and entering. Arthur Smith, Jr., was not tried at that time but was used by the State as a witness.

Defendant waived, in writing, his right to counsel at the trial in Superior Court but retained counsel to prosecute his appeal to this Court.

Trial was by jury, after the plea of not guilty. The Court submitted the case to the jury on the charges of breaking and entering and larceny after telling the jury that there was no evidence in this case as to the charge of receiving stolen property. The verdict was guilty of breaking and entering and larceny as charged. Sentence was imposed, and defendant appealed to the Court of Appeals.

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

Nassif & Churchill by James R. Rogers, III, for defendant.

MALLARD, C.J. Defendant's first assignment of error is to a part of a sentence of the charge in which the Court refers to the witness Smith as "an admitted accomplice." The defendant contends that

this was prejudicial error because it amounted to an expression of opinion as to the weight and credibility of the witness Smith's testimony by the trial judge. The entire sentence in which these words appear reads as follows: "You may believe all that a witness testifies to, part of what he testified to, or nothing at all he testifies to, just as you find that particular witness worthy of belief; (remembering that the witness Smith is an admitted accomplice to the charge of larceny and his interest in the case as such accomplice should be scrutinized by you.)" The defendant excepted to only that portion of the charge in parentheses.

When the entire sentence is read, it is seen that this instruction is favorable to the defendant. The witness Smith had admitted upon arraignment that he was guilty of larceny and on the witness stand stated facts sufficient to show that he was an accomplice. When the charge is read as a whole, it is seen that the Court did not express an opinion but was cautioning the jury as to their duty with respect to the testimony of one who was awaiting sentence. *State v. Hale,* 231 N.C. 412, 57 S.E. 2d 322.

The defendant's second assignment of error is to the failure of the Court to submit to the jury the question of the defendant's guilt of the lesser included offense of nonfelonious breaking or entering. In *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545, the Supreme Court said:

> "The distinction is this: The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is *no conflicting evidence* relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice."

All the evidence in this case tends to show the completed crime of breaking and entering with the intent to steal, and there is no conflicting evidence relating to the elements of the crime charged. The evidence, which is uncontradicted, tends to show that there were two entries of the building described in the bill of indictment on the same night and that the crime of larceny was committed therein each time. There is no evidence of a nonfelonious breaking or entry, and it was not error to fail to charge as to this.

The defendant contends that the Court did not make it clear to the jury that the defendant Shaw could be acquitted on one or both

counts even though his co-defendants were convicted. This contention is without merit. The Court fully, completely, and accurately charged the jury as to the guilt or innocence of each defendant on each count.

The defendant makes other assignments of error which are without merit and require no discussion.

The defendant has had a fair trial, free from prejudicial error.

In the trial we find

No error.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. HENRY RUFFIN THARRINGTON.

(Filed 10 July 1968.)

1. Automobiles § 3—

The operation of a motor vehicle upon the highways of the State by a person whose driver's license has been suspended or revoked is unlawful, regardless of intent, since the specific performance of the act forbidden constitutes the offense itself. G.S. 20-28.

2. Automobiles § 3—

In a prosecution for the operation of a motor vehicle upon the public highway while license is in a state of suspension or revocation, an instruction to the jury that defendant contends he is not guilty and that "the automobile was just going up and down the road by itself and that he had nothing to do with it at all" *is held* erroneous as a fundamental misconstruction of defendant's contentions.

3. Criminal Law § 118—

A statement of a contention based on evidence which was not introduced, or a fundamental misconstruction of defendant's contentions, will be held for error notwithstanding the absence of objection at the time.

APPEAL by defendant from *Bickett, J.*, Second February 1968 Regular Criminal Session of WAKE Superior Court.

Defendant was tried under a warrant issued in the Wake Forest Recorder's Court charging that he did on or about 11 September 1967 unlawfully and willfully operate a motor vehicle on a public highway of North Carolina while his operator's license was revoked.

A witness for the State testified that he saw the defendant operate a motor vehicle on a public highway in Wake County on said date. The defendant stipulated that his operator's license was in a

state of suspension or revocation at the time. The defendant testified as a witness for himself and admitted operating the vehicle on the highway on said date but testified to circumstances which he contends justified his driving.

The jury found the defendant guilty as charged and from judgment pronounced upon the verdict, defendant appealed.

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

Sheldon L. Fogel, Attorney for defendant appellant.

BRITT, J. All of defendant's assignments of error relate to Judge Bickett's charge to the jury.

He first assigns as error an instruction to the effect that there are no exceptions to the statute under which the defendant was being tried. The pertinent part of G.S. 20-28 provides as follows:

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

The assignment of error is without merit and is overruled. In *State v. Correll,* 232 N.C. 696, 62 S.E. 2d 82, the trial court charged the jury that the defendant had no right to drive his car upon the highways of North Carolina after his license had been revoked and it made no difference what the defendant's intentions were in so doing. The court said:

> "The right to operate a motor vehicle upon the public highways of North Carolina is not an unrestricted right but a privilege which can be exercised only in accordance with the legislative restrictions fixed thereon. 5 Am. Jur., sec. 756.
>
> "The defendant did not deny that he had driven his car upon the highways after his license had been revoked but contended that he was attempting to get his car back home from a garage where it had been left. But the specific performance of an act which is expressly forbidden by statute constitutes the offense itself and we are of the opinion, and so hold, that the instruction of his Honor to the jury was proper."

The defendant also assigns as error the following portion of His Honor's charge to the jury:

"The defendant on the other hand says and contends that he is not guilty; says and contends *that the automobile was just going up and down the road by itself and that he had nothing to do with it at all.* He says and contends that you ought not to find him guilty." (Emphasis added.)

This assignment of error is sustained, entitling the defendant to a new trial. A statement of a contention based on evidence which was not introduced, or a fundamental misconstruction of defendant's contentions, will be held error notwithstanding the absence of objection at the time. 3 Strong, N. C. Index 2d, Criminal Law, § 118, p. 28. *State v. Dooley,* 232 N.C. 311, 59 S.E. 2d 808.

We will not discuss defendant's other assignments of error as the portions of the charge complained of in those assignments probably will not recur on a retrial of this case.

New trial.

CAMPBELL and MORRIS, JJ., concur.

JOSEPH F. McNULTY, ADMINISTRATOR OF THE ESTATE OF PHILIP WILLIAM McNULTY, v. BERT WAYNE CHANEY AND CLYDE R. CHANEY

AND

JOSEPH F. McNULTY v. BERT WAYNE CHANEY AND CLYDE R. CHANEY.

(Filed 10 July 1968.)

1. Automobiles § 13—

The violation of the statute, G.S. 20-129, prescribing lighting devices to be used at night on vehicles, is negligence *per se.*

2. Automobiles §§ 57, 79— Defendant's failure to drive with headlights on at nighttime presents issue of negligence for the jury.

Evidence tending to show that the defendant was operating an automobile on a dominant highway on a foggy, rainy night and at a time when there was insufficient light to render discernible a person on the highway at a distance of two hundred feet ahead, that the defendant had amber parking lights on but did not have lighted head lamps as required by G.S. 20-129, and that the automobile driven by plaintiff's decedent, who was approaching the dominant highway from a servient road, collided with defendant's car as the decedent entered the intersection of the two roads, *is held* sufficient to be submitted to the jury on the issues of (1) defendant's negligence in operating a vehicle without headlights burning and (2) plaintiff's decedent's contributory negligence in failing to keep a proper lookout.

APPEAL by plaintiff, in each case, from *Seay, J.*, 4 December 1967 Civil Session of Superior Court of RANDOLPH County.

These two cases were consolidated in the Superior Court for trial. Joseph F. McNulty, as Administrator of the Estate of Philip William McNulty, seeks to recover from the defendants, alleging negligence, resulting in the wrongful death of the deceased who was his son, and is also bringing this action to recover for the pain suffered by his deceased son, as well as medical expenses incurred by the deceased after he was injured in an automobile collision on 20 February 1967, until his death on 21 February 1967.

In the case of Joseph F. McNulty, in his individual capacity, he seeks to recover of the defendants damages to his automobile in which his son was riding at the time of his death.

Defendants deny any negligence on their part, and in the alternative allege that if they were guilty of negligence that the deceased, Philip William McNulty, was guilty of contributory negligence.

At the close of plaintiff's evidence upon motion, the Court granted the defendants' motion for nonsuit. The plaintiff, in each case, appealed to the Court of Appeals.

Ottway Burton for plaintiff appellant in each case.

Smith, Moore, Smith, Schell & Hunter by Stephen Millikin and Larry B. Sitton for defendant appellees in each case.

MALLARD, C.J. Plaintiff's decedent died on 21 February 1967 as a result of injuries he received when the 1957 MG A roadster owned by Joseph F. McNulty which plaintiff's decedent was operating northward on a servient road in Randolph County known as Arrowwood Road, collided with a 1963 Chevrolet automobile owned by Clyde R. Chaney and operated by Bert Wayne Chaney. The collision occurred as the MG automobile entered the intersection of Arrowwood Road with Highway #64 in Randolph County. The MG automobile was damaged.

The evidence offered by plaintiff was contradictory but when taken in the light most favorable to plaintiff, as we are required to do, tends to show that the defendant Bert Wayne Chaney was operating a dark blue 1963 model Chevrolet automobile owned by his father, Clyde R. Chaney, eastward on Highway #64 in Randolph County. It was a dark, rainy, foggy night and at a time when there was not sufficient light to render clearly discernible a person on the highway at a distance of two hundred feet ahead. The defendant had amber parking lights on but did not have lighted head lamps as required by G.S. 20-129. The violation of G.S. 20-129 constitutes

negligence *per se*. *Williamson v. Varner*, 252 N.C. 446, 114 S.E. 2d 92; *Scarborough v. Ingram*, 256 N.C. 87, 122 S.E. 2d 798. There is also evidence which, if believed, would constitute contributory negligence on the part of plaintiff's decedent, particularly as to whether he kept a proper lookout and saw what he should have seen. However, we are of the opinion that if the defendant's automobile did not have head lights burning, and if it was so dark that he should have, the question of contributory negligence is for the jury as to whether plaintiff's decedent was contributorily negligent in that he should have seen defendant's automobile approaching and before he entered Highway #64, after stopping for the stop sign. In *Raper v. Byrum*, 265 N.C. 269, 144 S.E. 2d 38, Justice Lake said:

> "Since the burden of proof on the issue of contributory negligence is upon the defendants, a motion for judgment of involuntary nonsuit upon that ground should be allowed only when the plaintiff's evidence, considered alone and taken in the light most favorable to him, together with all inferences favorable to him which may reasonably be drawn therefrom, so clearly establishes the defense that no other conclusion can reasonably be drawn."

We are of the opinion and so decide upon the conflicting evidence before us that jury questions were presented. Since each case will go back for a new trial, we refrain from a detailed discussion of the evidence. The trial court erred in granting the motion for judgment as of involuntary nonsuit.

New trial.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. LEROY LATROCHISH FLOWERS, JOE LEWIS SHAW, ALBERT BO CROWDER, ARTHUR SMITH, JR.

(Filed 10 July 1968.)

1. Criminal Law § 89—

There was no error in admitting the testimony of a police officer concerning extra-judicial statements made to him by an accomplice of defendants, the accomplice himself having testified extensively on direct and on cross-examination as to the matters covered in the officer's testimony, and the court having instructed the jury that the officer's testimony was offered for purposes of corroborating the accomplice's testimony only and was not to be considered as substantive evidence.

2. Constitutional Law § 31—

There was no denial of defendants' constitutional right to be confronted with the witnesses against them where counsel for the defense extensively cross-examined defendants' accomplice who had testified for the State.

APPEAL by defendants, Leroy Latrochish Flowers and Albert Bo Crowder, from *Bickett, J.*, 2 January 1968 Regular Criminal Session of WAKE Superior Court.

The appealing defendants, Leroy Latrochish Flowers and Albert Bo Crowder, and two other persons, Joe Lewis Shaw and Arthur Smith, Jr., were charged in a bill of indictment with the felonies of breaking and entering, larceny, and receiving on 11 November 1967. Upon arraignment, all defendants, except Arthur Smith, Jr., entered pleas of not guilty. Smith pleaded guilty to the charge of larceny, and the Solicitor elected not to place him on trial together with the other defendants. The three remaining defendants were tried together by jury upon their pleas of not guilty. At the conclusion of the evidence the court found there had been no evidence as to the charge of receiving stolen property, and submitted the case to the jury on the charges of breaking and entering and larceny. From verdicts of guilty of breaking and entering and larceny as charged in the bill of indictment, and sentences thereupon imposed, the defendants, Leroy Latrochish Flowers and Albert Bo Crowder, through their court-appointed attorney, appealed.

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

William T. McCuiston for defendant appellants.

PARKER, J. The principal witness for the State was Arthur Smith, Jr., who had been indicted together with the defendants in the same bill of indictment. Smith had entered a plea of guilty to the charge of larceny but was not being tried together with the defendants. He testified in detail, both on direct and cross-examination, to the part which he had played and which had been played by the defendants in connection with the crimes for which the defendants were being tried. Following his testimony, the Solicitor called as a witness a detective from the Raleigh Police Department who testified to statements which Smith had made to him at the time of his arrest. This testimony was offered solely to corroborate the witness Smith, and the court so instructed the jury at the time it was offered. No objection and no motion to strike was made by the defendants at the time the corroborating testimony of the police officer concerning the statements made to him by Smith was offered and

admitted in evidence. The appealing defendants now assign as error the admission of this testimony, contending that it was not competent as against them and that the failure of the court so to instruct the jury was prejudicial error. There is no merit in this contention.

Quite apart from defendants' failure to object or to except, there was no error in admitting the testimony of the police officer concerning the statements made to him by Smith. The court correctly instructed the jury that this testimony was being offered only for the purpose of corroborating the witness Smith and was not to be considered by them as substantive evidence. "If a statement is offered for any purpose other than that of proving the truth of the matter stated, it is not objectionable as hearsay." Stansbury, N. C. Evidence 2d, § 141. Further, the witness Smith had himself testified extensively from the witness stand concerning all of the matters which were covered in the extrajudicial statement which he had given to the police officer. He had been subjected to extensive cross-examination by the attorney for defendants. There was here no denial of the defendants' constitutional right to be confronted with the witnesses against them. See *Bruton v. United States,* 391 U.S. 123, 20 L. ed. 2d 476, 88 S. Ct. 20.

Appellants' remaining assignments of error relate to the charge of the court to the jury. We have carefully reviewed the entire charge, and find it to be without error. See opinion filed this date by Mallard, C.J., in *State v. Shaw,* 1 N.C.App. 606, 162 S.E. 2d 33, which relates to this same trial. The defendants have had a fair trial, free from prejudicial error.

In the entire trial, we find

No error.

MALLARD, C.J., and BROCK, J., concur.

STATE OF NORTH CAROLINA v. MACK FREDERICK BUMPUS.

(Filed 10 July 1968.)

Larceny § 7— Evidence held insufficient to show car driven by defendant was same car stolen from prosecuting witness.

Evidence tending to show that the defendant was apprehended while driving a sports car of the same make, color and year as the car stolen from the prosecuting witness, that the defendant, while being pursued, collided with a police roadblock and severed the right front wheel from the car, and that a vehicle subsequently identified by the prosecuting

witness as his own had a right front wheel missing, *is held* insufficient to be submitted to the jury on the question of defendant's guilt of larceny of an automobile, there being no evidence in the way of motor and serial numbers more particularly connecting the automobile driven by defendant as the automobile belonging to the prosecuting witness.

APPEAL by defendant from *Burgwyn, J.*, 23 October 1967 Session, WAKE Superior Court.

Defendant was tried upon a bill of indictment charging him with the larceny on 18 July 1967 of one 1966 Corvette automobile, serial number 1946765105151, 1967 North Carolina license number NF7163, the property of Joseph Nicholos.

The State's evidence tended to show that a gray colored 1966 Corvette automobile belonging to Joseph Nicholos was taken in Raleigh by someone on 18 July 1967 without the permission of the owner. The State's evidence further tended to show that the next time Mr. Nicholos saw his Corvette automobile was on 24 July 1967 "sitting in the Ford place off the beltline." The automobile had been damaged, and the right front tire and wheel were missing.

The State's evidence tended to show that on 24 July 1967 the defendant was driving a gray colored 1966 Corvette, and, although not looking for a stolen vehicle, two Durham city policemen became suspicious of defendant's conduct and undertook to follow him. The defendant fled from the police; they gave chase; defendant collided with a police roadblock in Durham, knocking the right front wheel off the Corvette; defendant continued driving on the remaining disc, and was finally stopped by the officers about three miles north of Apex. The officers placed defendant under arrest for failure to stop for a siren and blue light, and for hit and run. Defendant was taken back to Durham and turned over to the detective bureau of the Durham City Police Department.

The defendant had no identification on him, and he had no evidence of ownership of the 1966 Corvette. At the time of defendant's arrest the Corvette had on its rear a North Carolina license plate number EV9280 which was registered to a Mr. Parker of Durham, and on its front a Durham city license plate which was registered to a Mr. Mantle of Durham.

The defendant offered no evidence.

From a verdict of guilty, and judgment pronounced thereon, defendant appealed.

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

Potter and Fogel by Sheldon L. Fogel for defendant appellant.

BROCK, J. Defendant's first assignment of error is to the failure of the trial judge to sustain defendant's motion for judgment of nonsuit made at the close of the State's evidence, and renewed after defendant rested without offering evidence.

The State offered no evidence of the North Carolina license plate number which had been issued to Mr. Nicholos for his 1966 Corvette. Likewise it offered no evidence of the serial number or motor number of Mr. Nicholos' 1966 Corvette.

The State offered no evidence of the serial number or motor number of the 1966 Corvette driven by the defendant at the time of his arrest.

The State offered no evidence to connect the 1966 Corvette wrecked by the defendant and the 1966 Corvette which Mr. Nicholos saw "sitting in the Ford place off the beltline." There was no evidence from the State to explain why the car was "in the Ford place off the beltline," how it got there, or what Ford place and beltline Mr. Nicholos was talking about.

The only suggestion of connection between the vehicle driven by the defendant and the one taken from Mr. Nicholos was that both were gray in color, both were 1966 Corvettes, both were wrecked, and the right front wheel of both was missing. Obviously there may be more than one gray 1966 Corvette which has been wrecked in a similar fashion.

The defendant's conduct, and the similarity between the automobile driven by the defendant and the automobile stolen from Mr. Nicholos, casts a finger of suspicion in the defendant's direction. However, the State must do more than create suspicion. There must be competent evidence of each material element of the offense charged before the State is entitled to have a case submitted to the jury.

We hold that the defendant's motion for judgment of nonsuit should have been allowed and this case dismissed.

Reversed.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. KIRK FURR.

(Filed 10 July 1968.)

1. Searches and Seizures § 2—

In a prosecution for felonious breaking and entering and misdemeanor larceny, there was no error in admitting into evidence unexecuted copies

of the affidavit to a search warrant and the search warrant itself, where (1) the defendant did not object to the admission of the copies on this ground, (2) the original warrant and affidavit were in the court files of an accomplice of the defendant and were easily accessible, and (3) the officer who identified the copies at the trial was the one who executed the original affidavit and served the warrant.

2. Searches and Seizures § 3—

Evidence tending to show that a search warrant directed that the premises of a named person be searched, and that an officer served the warrant upon the named person at the address contained in the warrant and thereafter conducted the search of the premises which revealed a quantity of stolen items, *is held* not to disclose an illegal search.

APPEAL by defendant from *Martin, Harry C., J.*, 29 November 1967 Session BUNCOMBE Superior Court.

Defendant was charged in a bill of indictment with (1) felonious breaking and entering, (2) felonious larceny, and (3) felonious receiving of stolen property. Defendant entered pleas of not guilty to each of the three charges.

At the close of the State's evidence defendant's motion for judgment as of nonsuit was allowed as to the charge of receiving stolen property; and was also allowed as to the charge of felonious larceny. However, the motion was denied as to the charge of felonious breaking and entering, and the misdemeanor charge of larceny. Similar motions by the defendant made at the close of all the evidence were again denied.

The jury returned verdicts of guilty of felonious breaking and entering, and of guilty of the misdemeanor of larceny. From the verdicts and the judgments entered thereon, defendant appealed.

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

T. E. L. Lipsey, II, for defendant appellant.

BROCK, J. The defendant assigns as error that the trial judge found that the affidavit for the search warrant, and the search warrant were in conformity with the requirements of the law.

The affidavit for the search warrant and the search warrant appear to be complete and amply adequate to satisfy the requirements of the law, and the defendant makes no argument in his brief to the contrary. Defendant's only argument under this assignment of error is addressed to the fact that an unexecuted copy of the affidavit and warrant were admitted in evidence in place of the original.

At the trial defendant made no objection to the copy being used instead of the original; the defendant objected, but specified that his

objection was upon other grounds. It appears clearly from the officer's testimony that the original of the affidavit and the warrant were in the file of an accomplice who was separately tried. Also, the officer who identified the copies was the same officer who actually executed the original of the affidavit and served the warrant; and he was clearly in position to verify that the copies were true copies. Had the defendant objected to the copies being used, the originals could have easily been secured from the accomplice's file at that time. It would not be proper to allow the defendant to raise this objection for the first time in this Court. Defendant's first assignment of error is overruled.

The defendant assigns as error that the trial judge allowed the officer who executed the affidavit for the search warrant, and who served the search warrant, to testify as to the fruits of the search.

The defendant argues that the search warrant was served on some unidentified person and therefore the search is not a valid search. The search warrant directed that the premises of Lloyd Phillips be searched. The officer testified that he served the warrant on Mr. Lloyd Phillips at the address contained in the warrant, and that he thereafter conducted the search of Mr. Phillips' premises which revealed a quantity of items allegedly taken from the premises which had been broken into; some of the items were found in defendant's suitcase which was in Mr. Phillips' house.

Defendant's second assignment of error is without merit.

In the trial we find

No error.

MALLARD, C.J., and PARKER, J., concur.

EDWARD JOSEPH NOLAN, PETITIONER, v. STATE OF NORTH CAROLINA, RESPONDENT.

(Filed 10 July 1968.)

1. Criminal Law § 181—

No appeal lies from a final judgment entered upon a petition and proceeding for post-conviction review under the Post-Conviction Hearing Act, review being available only upon application by the petitioner or by the State for a writ of *certiorari*. G.S. 15-222.

2. Same—

An attempted appeal by petitioner from an adverse judgment entered in post-conviction review of the proceedings leading to his sentence of imprisonment is dismissed as improper by the Court of Appeals, G.S. 15-222, but the record docketed in the Court is considered as a petition for writ

of *certiorari*, and there being ample evidence to support the findings of fact which in turn support the conclusions of law of the trial judge, the petition is accordingly dismissed.

APPEAL by petitioner from *Falls, J.*, 29 January 1968 Session of CATAWBA Superior Court.

In July 1965 the petitioner, Edward Joseph Nolan, was charged in the Superior Court of Catawba County in five separate criminal cases with felonious breaking and entering and larceny and in one case with the crime of armed robbery. He was represented by court-appointed counsel and through his counsel in open court waived bills of indictment and entered pleas of guilty in all cases, and judgment of imprisonment was thereupon entered pursuant to which petitioner was committed to the State's Prison.

On 13 July 1967 petitioner, acting on his own behalf, initiated the present proceedings pursuant to G.S. 15-217 by filing in the Superior Court of Catawba County his petition for post-conviction review of the proceedings leading to his sentence of imprisonment. Petitioner asserts his constitutional rights were violated at the time of his arrest and in the proceedings resulting in the imposition of the sentence against him in that: (1) Immediately following his arrest he had been questioned for several hours by the police without the presence of legal counsel; (2) he was mentally deranged at the time of his arrest and at the time of his trial; and (3) his court-appointed attorney, now deceased, did not have adequate time to prepare for trial and did not adequately represent him. Following the filing of this petition, petitioner filed an affidavit of indigency and legal counsel was appointed to represent him at the post-conviction hearing. The matter was heard in the Superior Court of Catawba County in part on 11 August 1967 and was continued for the taking of additional testimony. Hearing was concluded on 9 February 1968, at which time petitioner appeared in person and through his court-appointed attorney. Upon the conclusion of the hearing the presiding judge entered an order making full findings of fact and conclusions of law and finding against the petitioner on all of his contentions. Based on these findings and conclusions judgment was entered determining the petition to be without merit, ordering it dismissed, and directing that the petitioner be remanded to the State Prison System for the service of the remainder of his sentence. From the entry of this judgment petitioner has attempted to appeal.

T. W. Bruton, Attorney General, by Dale Shepherd, Staff Attorney, for the State.

Lewis E. Waddell, Jr., for petitioner appellant.

PARKER, J. No appeal lies from a final judgment entered upon a petition and proceeding for post-conviction review under the North Carolina Post-Conviction Hearing Act, review being available only upon application by the petitioner or by the State for a Writ of *Certiorari*. G.S. 15-222. Accordingly, the appeal which petitioner has attempted to make in this case is dismissed. We have, however, considered the record presently before us as a petition for a Writ of *Certiorari* to review the judgment sought to be appealed from and, thus considered, have carefully reviewed the entire record and considered all questions raised in the briefs. The petitioner has had a full and fair hearing upon his petition for post-conviction relief, at which he was present in person and represented by his legal counsel. There was ample evidence to support the findings of fact of the trial judge, such findings fully support his conclusions of law, and these findings and conclusions fully support the judgment denying petitioner relief. Accordingly, the record docketed in this Court is dismissed as an appeal and, considered as a petition for Writ of *Certiorari*, is

Denied.

MALLARD, C.J., and BROCK, J., concur.

STATE OF NORTH CAROLINA v. STEVE LANCE.

(Filed 10 July 1968.)

1. Criminal Law § 17—

Defendant's contention that the State was thereafter barred from prosecuting him on three bills of indictment because the State authorities had voluntarily released him at one time to the custody of a United States Marshal in connection with a federal warrant charging violation of a federal offense, *is held* meritless.

2. Criminal Law § 148—

There is no appeal as a matter of right from interlocutory orders in criminal cases, G.S. 7A-27, and defendant's attempted appeal as a matter of right from an order denying his motion to quash will be dismissed as premature.

APPEAL by defendant from *Jackson, J.*, 11 March 1968 Session of HENDERSON County Superior Court.

At the October 1967 Session of Superior Court of Henderson County the Grand Jury returned true bills of indictment charging

defendant in one of the bills with the felony of assault with intent to commit rape, and in the other with the misdemeanor of assault on a female.

On 13 October 1967 defendant signed an affidavit of indigency, and the Court found that he was an indigent and appointed B. B. Massagee, Jr., to serve as counsel for him.

On 13 December 1967 a warrant was issued charging defendant with the crime of escape. Defendant was being held in jail in lieu of a $10,000 bond for his appearance on a felony charge prior to the escape.

On 9 January 1968 defendant filed a "Motion to Squash *(sic)* and Dismiss" all charges pending against him. In this motion defendant asserts in substance that the State did knowingly forfeit and surrender all rights and jurisdiction in all cases pending against him by releasing the petitioner to the custody of a United States Marshal.

At the February 1968 Session of Superior Court of Henderson County the Grand Jury returned a bill of indictment charging the defendant with the crime of escape from the Henderson County Jail on 13 December 1967.

On 11 March 1968 Judge Jackson, after a hearing at which the defendant was present and represented by court-appointed counsel, issued an order denying the motion, and the defendant appealed to the Court of Appeals.

Attorney General Thomas Wade Bruton and Staff Attorney Jacob L. Safron for the State.

Boyd B. Massagee, Jr., for the defendant.

MALLARD, C.J. The evidence taken at the hearing of defendant's motion to quash the bills of indictment and dismiss the charges against him tends to show that on 13 December 1967 the defendant escaped while he was in the Henderson County Jail awaiting trial on the felony and misdemeanor charge. On 14 December 1967 a Deputy United States Marshal took the defendant into custody from the Sheriff of Transylvania County, with the consent of a representative of the Sheriff of Henderson County, on a Federal warrant charging the defendant with a violation of the National Motor Vehicle Theft Act.

Defendant contends that under these circumstances the State was on the date of the hearing of his motion in March 1968 barred from prosecuting the defendant on three bills of indictment because the State authorities had voluntarily released him to the custody of the Federal authorities. The defendant cites no authority to sustain this contention, and we have found none.

The defendant in this case attempts to appeal as a matter of right from the order denying his motion to quash and dismiss. In G.S. 7A-27 there is no provision for an appeal as a matter of right from interlocutory orders in criminal cases. *State v. Henry*, 1 N.C.-App. 409. In fairness to his court-appointed lawyer, it should be noted that the defendant prepared his own "Notice of Appeal."

The appeal in this case was premature and should be, and it is Dismissed.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. ROGER DALE CHAPMAN.

(Filed 10 July 1968.)

1. Constitutional Law § 36—

A sentence within the statutory limits is not excessive, nor is it cruel and unusual punishment in the constitutional sense.

2. Criminal Law § 146; Constitutional Law § 4—

Before the Court of Appeals passes upon constitutional questions, they should first be raised and passed upon by the trial court.

APPEAL by defendant from *Snepp, J.*, 25 March 1968 Session of GASTON Superior Court.

By a bill of indictment, proper in form, defendant was charged with feloniously breaking and entering the Carr Elementary School Building in the town of Dallas, N. C., on 6 December 1967, with the intent to commit the felony of larceny therein. By warrant issued from the Municipal Court of the city of Gastonia, he was charged with escape from the custody of a police officer on 12 December 1967.

Defendant, with his attorney, appeared before Judge Snepp and, with the consent of the solicitor, pled guilty to non-felonious breaking and entering and escape. On the breaking and entering charge, defendant was given an active prison sentence of two years; on the escape charge, he was given an active prison sentence of two years, this sentence to commence at the expiration of the sentence imposed in the breaking and entering charge.

From the judgments imposing said sentences, defendant appealed.

T. Wade Bruton, Attorney General, by Ralph Moody, Deputy Attorney General, for the State.

Robert H. Forbes, Attorney for defendant appellant.

BRITT, J. Defendant's sole assignment of error is that the court erred in imposing an active sentence of two years in the breaking and entering case and an additional two years active sentence in the escape case. He contends that said sentences amount to cruel, unusual, and excessive punishment.

The assignment of error is without merit and is overruled. For many years, it has been held in this jurisdiction that a sentence within the statutory limits is not excessive nor is it cruel and unusual punishment. *State v. Parrish,* 273 N.C. 477, 160 S.E. 2d 153; *State v. Bethea,* 272 N.C. 521, 158 S.E. 2d 591; *State v. Faison,* 272 N.C. 146, 157 S.E. 2d 664. See also *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216.

The record fails to show that defendant at any time in the trial court raised any constitutional question, either state or federal, relative to the sentences imposed. Before this Court passes on constitutional questions, they should be raised and passed upon first by the trial court. *State v. Jelly, et al.,* 251 N.C. 177, 111 S.E. 2d 1.

The sentences imposed by Judge Snepp were within the statutory limits and did not violate any provision of the Federal or State Constitutions.

The judgments of the Superior Court are
Affirmed.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES ALLISON.

(Filed 10 July 1968.)

1. Criminal Law § 134—

Upon trial court's request for argument from counsel for defense and from the solicitor prior to the sentencing of defendant upon his plea of guilty to the charge of felonious escape, defendant was not prejudiced by the solicitor's argument that defendant had cases pending against him that had been nol prossed with leave or that defendant should be incarcerated for a considerable length of time for the protection of society, the defendant neither contending that the statements were inaccurate or that he was denied the right to introduce evidence in mitigation before judgment.

2. Same—

A judgment will not be disturbed because of sentencing procedures unless there is a showing of an abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.

3. Escape § 1—

Sentence of imprisonment of one year imposed upon defendant's plea of guilty to the charge of felonious escape is within the statutory maximum, G.S. 148-45, and is not excessive.

APPEAL by defendant from *McKinnon, J.*, February 1968 Criminal Session of Superior Court of PERSON County.

Defendant was charged in a valid bill of indictment with the felony of escape, it being a second offense. Upon a plea of guilty, the Court pronounced judgment of imprisonment "for a term of one year to begin at the expiration of all sentences he was serving or had to serve on the date of the escape on July 5, 1967, the last such sentence being one imposed in the Superior Court of Lincoln County on May 14, 1965 of not less than four nor more than nine years for breaking and entering and larceny." From the judgment imposed, the defendant appeals to the Court of Appeals.

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

Ramsey, Long & Jackson by George W. Jackson for the defendant.

MALLARD, C.J. Defendant's only assignment of error is to certain remarks made by the solicitor to the trial judge after the defendant had entered a plea of guilty to the charge in the bill of indictment and before the imposition of judgment.

The record on appeal reveals that after the plea of guilty and after hearing the evidence presented, the Court *requested argument* from counsel for defendant and from the solicitor. The solicitor told the Court "that the defendant had cases pending against him in Alamance County that were nol prossed with leave at a prior time" and that "defendant's counsel had approached him (Solicitor) in an effort to work a deal with him (Solicitor)" . . . "that the defendant should be incarcerated for a considerable length of time to keep people like the defendant from preying on society."

The defendant does not contend that these statements made by the solicitor are inaccurate. The defendant does not contend that he was denied the right to introduce evidence in mitigation before judgment. The defendant's contention that these statements by the solicitor were not a proper subject of argument, under the circumstances revealed by this record, is without merit. In *State v. Pope*, 257 N.C. 326, 126 S.E. 2d 126, the Supreme Court said, "A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defend-

ant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play."

The sentence imposed by Judge McKinnon was not excessive. Under the provisions of the applicable statute, G.S. 148-45, the judge could have sentenced the defendant to imprisonment for a minimum of six months or a maximum of three years. None of defendant's fundamental rights were violated; he has had a fair trial.

The judgment of the Court is

Affirmed.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. CHARLES FRANKLIN ABERNATHY.

(Filed 10 July 1968.)

1. **Criminal Law § 23—**

Although it is a good practice and would be considered proper in all respects, it is not a prerequisite to the sustaining of a conviction based upon a guilty plea that the trial judge examine defendant for the purpose of ascertaining if the plea was voluntarily made, and it will be presumed, nothing else appearing, that an attorney in entering a plea of guilty was duly authorized to do so by his client.

2. **Constitutional Law § 36—**

Sentences of imprisonment within the statutory limits are constitutional.

APPEAL by defendant from *Snepp, J.*, 25 March 1968 Session of GASTON Superior Court.

By a bill of indictment, proper in form, defendant was charged with feloniously breaking and entering the Carr Elementary School Building in the Town of Dallas, North Carolina, on 6 December 1967, with the intent to commit the felony of larceny therein. This was in Case No. 67-909. In another indictment in Case No. 67-321, the defendant was charged with wilfully, maliciously and unlawfully committing the offense of an escape from the custody of city police officers, C. L. Heffner and F. B. Childers while being transferred from the Gastonia Municipal Court in Gastonia to the Gaston County Jail on 23 March 1967, in violation of G.S. 14-256.

Defendant with his attorney appeared before Judge Snepp and with the consent of the solicitor pleaded guilty to non-felonious breaking and entering and, likewise, pleaded guilty to an escape in violation of G.S. 14-256.

On the breaking and entering charge, defendant was given an active prison sentence of two years; on the escape charge he was

given an active prison sentence of two years, this sentence to commence at the expiration of the sentence imposed in the breaking and entering charge.

From the judgments imposing said sentences, defendant appealed.

Thomas Wade Bruton, Attorney General, Andrew McDaniel, Assistant Attorney General, and Charles W. Wilkinson, Jr., Staff Attorney, for the State.

J. Ralph Phillips, Attorney for defendant appellant.

CAMPBELL, J. The defendant assigns as error the fact that the trial judge accepted pleas of guilty through the defendant's privately employed counsel and did not inquire of the defendant personally if his pleas were voluntarily made, if he understood what he was doing, and if he authorized his counsel to enter the pleas in his behalf.

Chief Justice Parker in *State v. Woody,* 271 N.C. 544, 548, 157 S.E. 2d 108, stated:

> "This Court would find itself under an avalanche of frivolous appeals from criminal convictions if it were to allow a defendant to attack for the first time in an appellate court his own plea of guilty entered by and through the advice and assistance of competent counsel, when this attack is made simply because the trial court saw no need to examine him for the purpose of ascertaining whether he actually intended to plead guilty originally and whether he still freely assents thereto. Though it is a good practice and it would be considered proper in all respects, it is not a prerequisite to the sustaining of a conviction based upon a guilty plea that the trial judge so examine the defendant because it is to be presumed that no honorable lawyer would enter such a plea in behalf of his client unless the client authorized him to do so. Generally speaking, the legal profession is composed of honorable men who are fair and candid in their dealings with the court."

The sentences imposed by Judge Snepp were within the statutory limits and did not violate any provision of the Federal or State Constitutions.

The judgments of the Superior Court are

Affirmed.

BRITT and MORRIS, JJ., concur.

THE GELTMAN CORPORATION v. NEISLER MILLS, INC.

(Filed 10 July 1968.)

Trial § 21—

On motion to nonsuit, all of the evidence must be considered in the light most favorable to the plaintiff, and this is so because the jury may give more weight to the plaintiff's evidence and may find according to the plaintiff's evidence.

APPEAL by plaintiff from *Falls, J.*, 1 January 1968 Session CATAWBA Superior Court.

Plaintiff instituted this action to recover the balance alleged to be due on an account for treating fabrics with stain repellent for the defendant. By answer defendant denied that plaintiff had performed any services for it.

Plaintiff's evidence tended to show that plaintiff began to treat fabrics with stain repellent for the defendant in December 1965, and continued until July 1966, at which time defendant began doing its own treating of its fabrics. That periodically invoices were sent to defendant and paid by defendant. That in July 1966 defendant owed plaintiff a balance of $5,052.28. That after this action was instituted defendant made seven separate payments on the account, leaving a balance of $1,500.00 at the time of trial.

Defendant's evidence tended to show that defendant was merely a real estate holding company for Massachusetts Mohair Plush Company, Inc., and that plaintiff had never done any work for the defendant.

At the close of all the evidence the trial judge entered judgment of nonsuit. Plaintiff appealed.

Williams, Pannell and Matthews by Phillip R. Matthews for plaintiff appellant.

H. Haywood Robbins and Lefler and Gordon for defendant appellee.

BROCK, J. The plaintiff assigns as error the action of Judge Falls in allowing defendant's motion for judgment of nonsuit.

The evidence was in direct conflict, and the question of whether defendant owed the plaintiff a sum of money was a question for the jury. In determining this question it was for the jury to find whether plaintiff had in fact performed services for the defendant.

In considering whether plaintiff's evidence is sufficient to withstand defendant's motion for nonsuit at the close of all the evidence, all of the evidence must be considered in the light most favorable to the plaintiff. This is so because the jury may give more weight to

the plaintiff's evidence and may find according to the plaintiff's evidence. *Sneed v. Lions Club,* 273 N.C. 98, 159 S.E. 2d 770.

We hold that plaintiff's evidence as disclosed by the record on appeal is sufficient to require submission of the case to the jury.

Reversed.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. LEWIS DONALD STANLEY.

(Filed 10 July 1968.)

APPEAL by defendant from *Hall, J.,* 13 February 1968 Regular Criminal Session of DURHAM Superior Court.

Defendant was indicted under a bill of indictment, proper in form, charging him with felonious assault on one Lee Pollock.

Briefly summarized, the evidence tends to show the following: Defendant and his sister resided in the same house in Durham, and Lee Pollock entered the home at about 8:15 p.m. as a guest of defendant's sister. Some time later, defendant and his sister were in the kitchen and began arguing about defendant's girl friend. There were some six or eight people in the small house at the time. Defendant had a pistol in his possession, threatened to kill someone, and looked at Pollock. Pollock pushed or grabbed defendant and pinned him against a cabinet. Pollock either released the defendant or was pulled from him, after which defendant took his 38-caliber pistol from his pocket and said to Pollock: "Lee, you get out of my house." Pollock, with no weapon, started toward defendant and defendant shot Pollock from a distance of eight feet. The bullet entered Pollock's left side, and defendant ran out of the back door of the house. Pollock was taken to the hospital where he received treatment for eighty-eight days, undergoing six operations involving the removal of his gall bladder and two ribs and repair of his liver and intestine.

The jury found the defendant guilty of assault with a deadly weapon, and the judgment of the court was that the defendant be imprisoned for two years, assigned to work under the supervision of the Department of Corrections, but with recommendation that he be granted the privilege of working under the work release program. Defendant appealed.

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

M. Hugh Thompson, Attorney for defendant appellant.

BRITT, J. Defendant's two assignments of error relate to Judge Hall's charge to the jury. He contends that His Honor failed to charge the jury "upon all the law as raised by the evidence, under G.S. 1-180"; also, that His Honor failed to charge the jury properly regarding the right of the defendant to defend his home.

We have carefully reviewed the charge and find that the learned trial judge properly charged the jury on all questions. He correctly instructed the jury regarding self-defense and other contentions of the defendant. Defendant's assignments of error are overruled.

Although defendant's counsel did not comply with our Rule 19 (d) (2), we have carefully reviewed the entire record. Defendant had a fair trial, free from prejudicial error, and the sentence imposed was within the limits prescribed by statute. The judgment of the Superior Court is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

STATE v. ARTHUR PRICE.

(Filed 10 July 1968.)

APPEAL from *Froneberger, J.*, 26 February 1968, Criminal Session of Superior Court, GASTON County.

The defendant was tried under two bills of indictment, each being in proper form. The one in No. 67-929 charged the defendant with the crime of larceny of meat from Winn-Dixie Store, a corporation, on 13 December 1967. The other, in No. 67-930, charged the defendant with the offense of larceny of two knives and blades and a paint brush from S. H. Kress and Company, Inc. on 13 December 1967. In each case the value of the property was less than $200 and, thus, a misdemeanor charge.

In case No. 67-929 the defendant entered a plea of not guilty and the jury returned a verdict of guilty as charged.

In case No. 67-930 the defendant entered a plea of guilty and the court found that this plea was freely, understandingly and voluntarily made without promise of leniency.

The two cases were consolidated for the purposes of judgment and the defendant was ordered confined in the common jail of Gaston County to be assigned to work under the supervision of the State Department of Corrections for a period of six months.

From this judgment, the defendant appealed.

T. W. Bruton, Attorney General, and James F. Bullock, Deputy Attorney General, for the State.

Robert H. Forbes, Attorney for defendant.

CAMPBELL, J. This case represents another instance where those charged with crime take advantage of society. Without cost or expense to themselves, they enjoy the services of an attorney appointed by the court and compensated by the State out of taxpayers' money. After a fair and impartial trial in the one case, and after a plea of guilty freely and voluntarily entered in the other, a lenient sentence of six months for both crimes was entered. Under the statute the sentence could have been two years for each offense or a total of four years. Then at further expense to the taxpayers, the law breaker insists upon the case being brought to this Court for review.

After a review of the record in this case, we compliment the attorney for the defendant who frankly stated that he had "carefully scrutinized the record on appeal to determine whether or not any other assignments of error should be made. However, attorney can find no legitimate assignment of error or valid contention whereby defendant would be entitled to a new trial." We commend this attorney for his frankness and candor and, after a review of the record, we agree with his conclusion.

No error.

BRITT and MORRIS, JJ., concur.

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15. Appeals from Industrial Commission and Utilities Commission Pending in Superior Court — How Disposed of
16. Rules of Practice and Procedure in Superior Court Applicable to District Court
17. Opinions by Emergency Justices and Judges — How Filed When Period of Service Has Expired
18. Appeal Bond

RULES OF PRACTICE IN THE COURT OF APPEALS OF NORTH CAROLINA

1. Sessions.

It has been determined by the Chief Judge that, until due notice is given otherwise, there will be two sessions of the Court each year: a Spring Session beginning on the Fourth Monday in January, which shall have two calls of the districts; and a Fall Session beginning on the Third Monday in August, which shall have one call of the districts.

2. Definitions.

(a) When the words "trial tribunal" are used in these rules, they include any judge, court, administrative agency, commission, or other body from which an appeal may be taken to this Court pursuant to law.

3. Appeals — How Docketed.

Each appeal shall be docketed from the judicial district to which it properly belongs, and appeals in criminal cases from each district shall be placed at the head of the docket for the district. Appeals in both civil and criminal cases shall be docketed each in its own class, in the order in which they are filed with the clerk.

4. The Court of Appeals Will Not Entertain an Appeal:

(a) From an order overruling a demurrer except when the demurrer is interposed as a matter of right for misjoinder of parties and causes of action. The movant may enter an exception to the order overruling the demurrer and present the question thus raised to this Court on the final appeal; provided that when the demurrant conceives that the order overruling his demurrer will prejudicially affect a substantial right to which he is entitled unless the ruling of the court is reviewed on appeal prior to the trial of the cause on its merits, he may petition this Court for a writ of *certiorari* within thirty days from the date of the entry of the order overruling the demurrer.

(b) From an order striking or denying a motion to strike allegations contained in pleadings. When a party conceives that such order will be prejudicial to him on the final hearing of said cause, he may petition this Court for a writ of *certiorari* within thirty days from the date of the entry of the order.

RULES OF PRACTICE IN THE COURT OF APPEALS.

5. Appeals — When Heard.

In order for an appeal to stand for hearing at any call of any session of this Court, the record on appeal must be docketed at least twenty-eight days before the call of the district to which the case belongs, and if so docketed, shall be heard at the next ensuing call of the district, unless for cause it is continued. With respect to appeals from the Industrial Commission, "the district to which the case belongs" shall mean the county in which the alleged accident happened, or in which the employer resides, or in which the employer has his principal office.

If the record on appeal is not docketed within ninety days after the date of the judgment, order, decree, or determination appealed from, the case may be dismissed under Rule 17, if the appellee shall file a proper certificate prior to the docketing of such record on appeal; provided, the trial tribunal may, for good cause, extend the time not exceeding sixty days, for docketing the record on appeal.

6. Appeals — Criminal Actions.

Appeals in criminal cases, docketed twenty-eight days before the call of the docket for their districts, shall be heard before the appeals in civil cases from said districts. Criminal appeals docketed after the time above stated and docketed for at least twenty-eight days shall be called immediately at the close of argument of appeals from the Eighth District in the order of filing, unless for cause otherwise ordered, and shall have priority over civil cases placed at the end of the docket.

(a) *Appeal Bond.* If a justified appeal bond (except in pauper appeals) is not filed with the record on appeal, as required by G.S. § 1-286, the appeal will be dismissed.

(b) *Pauper Appeals.* See Rule 22.

(c) *When Appeal Abates.* See Rule 37.

(d) *Appeal Dismissed if Record on Appeal Not Printed or Mimeographed or Otherwise Reproduced as Provided by Rule. See Rule 24.*

7. Call of Judicial Districts.

Appeals to the Court of Appeals from the judicial districts of the State will be called for hearing in the following order, unless otherwise ordered under G.S. 7A-19(c).

Third Division (1st through 3rd weeks of Session)

From the Seventeenth and Twenty-first Districts, the first week of the Session

From the Eighteenth and Nineteenth Districts, the second week of the Session

From the Twentieth, Twenty-second and Twenty-third Districts, the third week of the Session

Second Division (5th through 7th weeks of Session)

From the Ninth, Twelfth and Thirteenth Districts, the fifth week of the Session

From the Tenth and Eleventh Districts, the sixth week of the Session

From the Fourteenth, Fifteenth and Sixteenth Districts, the seventh week of the Session

Fourth Division (10th and 11th weeks of Session)

From the Twenty-sixth, Twenty-ninth and Thirtieth Districts, the tenth week of the Session

From the Twenty-fourth, Twenty-fifth, Twenty-seventh and Twenty-eighth Districts, the eleventh week of the Session

First Division (14th and 15th weeks of Session)

From the First, Second, Third and Seventh Districts, the fourteenth week of the Session

From the Fourth, Fifth, Sixth and Eighth Districts, the fifteenth week of the Session.

A second call of the districts in the Spring Session will be held as follows:

During the Eighteenth through the Twenty-second weeks of the Spring Session, this Court will set for hearing those appeals which have been docketed too late for the first call of the districts but at least twenty-eight days before the second call, and they will be called for hearing in the following order, unless otherwise ordered by the Court:

Third Division (18th and 19th weeks of Session)

From the Seventeenth, Eighteenth, and Twenty-first Districts, the eighteenth week of the Session

From the Nineteenth, Twentieth, Twenty-second and Twenty-third Districts, the nineteenth week of the Session

Second Division (21st week of Session)

From the Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth and Sixteenth Districts, the twenty-first week of the Session

Fourth and First Divisions (22nd week of Session)

From the Twenty-fourth, Twenty-fifth, Twenty-sixth, Twenty-seventh, Twenty-eighth, Twenty-ninth, Thirtieth, the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Districts, the twenty-second week of the Session.

8. End of Docket.

At the Spring Session, causes not reached and disposed of during the period allotted to each district, and those for any other cause put to the foot of the docket, shall be called at the close of argument of appeals from the Eighth District, and each cause, in its order tried or continued, subject to Rule 6.

At the Fall Session, appeals in criminal cases only will be heard at the end of the docket, unless the Court for special reason shall set a civil appeal to be heard at the end of the docket at that Session.

At either session the Court in its discretion may place cases not reached on the call of a district at the end of the call of some other district.

9. Call of Docket.

Each appeal shall be called in its proper order. If any party shall not be ready, the appeal, if in a civil action, may be put to the foot of the district by consent of counsel or for cause, and be again called when reached, if the docket shall be called a second time; otherwise, the first call shall be peremptory. At the first week of each session of the Court in the year a cause may, by consent of the Court, be put to the foot of the docket; if no counsel appear for either party at the first call, it will be put at the end of the district, unless a printed brief is filed by one of the parties; and if none appear at the second call, it will be continued, unless the Court shall otherwise direct. Appeals in criminal actions will be called peremptorily for argument on the first call of the docket, unless for good cause assigned.

10. Submission on Briefs.

By consent of counsel, any case may be submitted without oral argument, upon briefs by both sides, without regard to the number of the case on the docket, or date of docketing the appeal. Such consent must be signed by counsel of both parties and filed, and the clerk shall make a note thereof on the docket; but the Court, notwithstanding, may direct an oral argument to be made, if it shall deem best.

An appeal submitted under this rule must be docketed before the twenty-first week of the Spring Session, or the fourteenth week of the Fall Session has been entered upon, unless it appears to the court from the record that there has been no delay in docketing the appeal, and that it has been docketed as soon as practicable, and that public interest requires a speedy hearing of the case.

11. Briefs Not Received After Argument.

When the case is argued orally on the regular call of the docket, in behalf of only one of the parties, no written argument for the other party will be received, unless it is filed before the oral argument begins. No brief or written argument will be received after a case has been argued or submitted, except upon leave granted in open court, after notice to opposing counsel.

12. Briefs Regarded as Personal Appearance.

When a case has been scheduled for oral argument and is reached on the regular call of the docket, in the event of the absence of counsel for either or both sides, the briefs shall be considered as personal appearance.

13. When Case May Be Heard Out of Order.

In cases where the State is concerned, involving or affecting some matter of general public interest, the Court may, upon motion of the Attorney General, assign an earlier place on the calendar, or fix a day for the argument thereof, which shall take precedence of other business. Similarly the Court in its judgment may make a like assignment at the instance of a party to a cause which directly involves the right to a public office, or at the instance of a party arrested in a civil action who is in jail by reason of inability to give bond or from the refusal of the Court to discharge him, or in other cases of sufficient importance.

14. When Cases May Be Heard Together.

Two or more cases involving the same question may, by order of the Court, be heard together and argued as one case.

15. Appeal Dismissed if Not Prosecuted.

Cases not prosecuted within twelve months after docketing shall, when reached in order thereafter, be dismissed at the cost of the appellant, unless the same, for sufficient cause, shall be continued. When so dismissed, the appellant may, not later than the corresponding week of the next succeeding session, move for cause to have the same reinstated, on notice to the appellee.

16. Motion To Dismiss Appeal — When Made.

A motion to dismiss an appeal for noncompliance with the requirements of the statutes or rules of court in perfecting an appeal must be made in writing and filed with the clerk of this Court,

together with a copy for opposing counsel, at or before entering upon the argument of the appeal upon its merits and such motion must set out the grounds of noncompliance. Such motion will be allowed unless such compliance be shown in the record or a waiver thereof appear therein, or such compliance is dispensed with by a writing signed by the appellee or his counsel, or unless this Court shall allow appropriate amendments.

17. Appeal Dismissed for Failure to Docket in Time.

If the appellant shall fail to bring up and file the record on appeal before the call of cases from the district to which the case belongs, by failure to comply with Rule 5, the appellee may file with the clerk of this Court a motion to docket and dismiss at appellant's cost. The appellee must file a certificate of the clerk or comparable officer of the trial tribunal from which the appeal comes, showing the names of the parties thereto, the time when the judgment, order, decree, or determination was entered, and appeal therefrom taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been settled. The motion may be allowed within ten days or at the first session of the Court thereafter, with leave to the appellant within thirty days and after five days notice to the appellee to apply for the redocketing of the cause; provided, that such motion of appellee to docket and dismiss the appeal will not be considered unless the appellee, before making such motion to dismiss, has paid the clerk of this Court the fee charged by the statute or rule of Court for docketing an appeal, the fee for preparing and entering judgment, and the determination fee; execution for such amount to issue in favor of appellee against appellant.

(1) *Appeal Docketed by Appellee When Frivolous and Taken for Purposes of Delay.*

A record on appeal which is obviously frivolous and appears to have been taken only for purposes of delay, may be docketed in this Court by appellee before the time required by Rule 5, and if it appears to the Court that the appellee's contention is correct, the appeal will be dismissed at cost of appellant.

18. Appeal Docketed and Dismissed Not to be Reinstated Until Appellant Has Paid Costs.

When an appeal is dismissed by reason of the failure of the appellant to bring up a record on appeal as provided in Rule 5 and Rule 17, no order shall be made setting aside the dismissal or al-

lowing the appeal to be reinstated, even though the appellant may be otherwise entitled to such order, until the appellant has paid to the clerk of this Court for the use and benefit of the appellee the costs of the appellee in procuring the certificate and in causing the same to be docketed and the appeal dismissed.

19. Record on Appeal.

(a) *What to Contain and How Arranged.* In every record on appeal brought to this Court the trial tribunal and the presiding Judge shall be identified, the appealing party shall be identified, and proceedings shall be set forth in the order of the time in which they occurred, and the processes, orders, and documents included in the record on appeal shall be identified by its title or heading, and shall be arranged to follow each other in the order that they were filed. Every pleading, motion, affidavit, or other document included in the record on appeal shall plainly show the date on which it was filed and, if verified, the date of the verification and the name of the person who verified it. Every order, judgment, decree, and determination shall show the date on which it was signed and the date on which it was filed.

The pleadings on which the case was tried, the issues, and the order, judgment, decree, or determination appealed from shall be included in the record on appeal in all cases, and the charge of the Court where there is exception thereto. It shall not be necessary to include any affidavits, orders, processes, or documents not required for an understanding of the exceptions relied on, provided counsel so agree in writing, and such agreement is included; but, in the event of disagreement of counsel, the trial tribunal shall designate by written order what shall be included in the record on appeal.

This rule is subject to the power of this Court, in its discretion, to order additional parts of the record or proceedings to be sent up, and added to the record on appeal.

The pages of the record on appeal shall be numbered, and on the front thereof there shall be an index.

(b) *Two Appeals.* When there are two or more appeals in one action, only one copy of the record and the proceedings of the trial in the trial tribunal shall be necessary. In the event counsel cannot agree, the trial tribunal shall determine which of the methods described in Rule 19 (d) shall be followed, who is to prepare it, and the part of the costs to be advanced by each appealing party.

(c) *Exceptions Grouped.* All exceptions relied on shall be grouped and separately numbered immediately before the signature

to the record on appeal. Exceptions not thus set out will be deemed to be abandoned.

(d) *Evidence — How Stated.* The evidence in record on appeal shall be in one of the two following methods:

(1) The evidence in record on appeal shall be in narrative form, and not by question and answer, except that a question and answer, or a series of them, may be set out when the subject of a particular exception. When this rule is not complied with, and the record on appeal is settled by the trial tribunal, this Court will in its discretion hear the appeal, or remand for a settlement of the record to conform to this rule. If the record is settled by agreement of counsel, or the statement of the appellant becomes the record on appeal, and the rule is not complied with, or the appeal is from a judgment of nonsuit, the appeal will be dismissed. In other cases, the Court will in its discretion dismiss the appeal, or remand for a settlement of the record on appeal.

(2) As an alternative to the above method (as a part of the record on appeal but not to be reproduced), the appellant shall cause the complete stenographic transcript of the evidence in the trial tribunal, as agreed to by the opposite party or as settled by the trial tribunal as the case may be, to be filed with the clerk of this Court and then the appellant in an appendix to his brief shall set forth in succinct language with respect to those witnesses whose testimony is deemed to be pertinent to the questions raised on appeal, what he says the testimony of such witness tends to establish with citation to the page of the stenographic transcript in support thereof. The opposite party in case of disagreement as to any portion of the appendix in appellant's brief may set forth in an appendix to his brief in succinct language what he says the testimony of a witness establishes with citation to the page of the stenographic transcript in support thereof.

(e) *Agreed Statement in Lieu of Record.* When the questions presented by an appeal can be determined without an examination of all of the pleadings, evidence, and proceedings in the trial tribunal, the parties may prepare and sign a statement of the case showing how the questions arose and were decided in the trial tribunal and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the questions by the appellate court. The statement may include or have annexed thereto such portions of the stenographic transcript of the testimony as the parties may desire. The statement may also include a designation by each of the parties of such portions of the

original record below as they may desire to have presented to this Court. The statement shall include a copy of the judgment appealed from, and a concise statement of the points to be relied on by the appellant, and within twenty days of the filing of the notice of appeal, shall be presented to the trial tribunal for approval. The trial tribunal shall approve or disapprove the statement within ten days after its submission. If the statement conforms to the truth, it, together with such additions as the trial tribunal may consider necessary fully to present the questions raised by the appeal, shall be approved by the trial tribunal and shall then, together with such portions of the original record as may have been designated by the parties, be certified to this Court as the record on appeal.

(f) *Statement When No Stenographic Record Was Made.* In the event no stenographic record of the evidence or proceedings at a hearing or trial was made, the appellant shall, within ten days of the filing of the notice of appeal, prepare and serve on the respondent a statement of the evidence and proceedings from the best available sources, including his recollection, for use instead of a stenographic transcript. The respondent may serve objections or propose amendments thereto within ten days after service upon him. Thereupon the statement with the objections or proposed amendments, shall be submitted within ten days by the appellant to the trial tribunal for settlement and as settled and approved shall be included in the record on appeal. The trial tribunal shall settle the statement within ten days after its submission.

(NOTE: This rule does not apply to the cases referred to in G.S. § 7A-195. See Rule 19 (g).)

(g) *Appeals Involving Juvenile Cases.* In all appeals from the District Courts in cases involving juveniles pursuant to G.S. § 7A-195 these rules shall apply with the exception that when notice of an appeal is given in such cases the District Court Judge shall, within ten days thereafter, summarize the evidence and make findings of fact as required by the Statute.

(h) *Unnecessary Portions of Record on Appeal — How Taxed.* The cost of copying and printing unnecessary and irrelevant matter not needed to explain the exceptions or errors assigned shall in all cases be charged to the appellant, unless it appears that they were sent up at the instance of the appellee, in which case the cost shall be taxed against him.

(i) *Records in Pauper Appeals.* See Rule 22.

(j) *Maps.* Three copies of every map, photograph, diagram, or other exhibit, which is a part of the record on appeal, and which is applicable to the merits of the appeal, shall be filed with the clerk

of this Court before such appeal is called for argument: Provided, however, the Court of Appeals may authorize a lesser number to be filed.

(k) *Appeal Bond.* See Rule 6 (a).

(1) The prosecution bond given in every case shall be sent up with the record on appeal. Such bond shall be justified and the justification shall name the county wherein the surety resides.

20. Pleadings.

(a) *When Deemed Frivolous.* Memoranda of pleadings will not be received or recognized in the Court of Appeals as pleadings, even by consent of counsel, but the same will be treated as frivolous and impertinent.

(b) *When Scandalous.* Pleadings containing scandalous or impertinent matter will, in a plain case, be ordered by the Court to be stricken from the record, or reformed; and for this purpose the Court may refer it to the clerk, or some member of the bar, to examine and report the character of the same.

(c) *Amendment.* This Court may amend any process, pleading, or proceedings, either in form or substance, for the purpose of furthering justice, on such terms as shall be deemed just, at any time before final determination by this Court, or may make proper parties to any case, where the Court may deem it necessary and proper for the purpose of justice, and on such terms as the Court may prescribe, at any time before final determination by this Court.

21. Exceptions (See also Rule 19 [c])

When appellant is required to serve a record on appeal, he shall set out in his statement of record on appeal his exceptions to the proceedings, ruling, or judgment of the court, briefly and clearly stated and numbered. When record on appeal is not required to be served, appellant shall file said exceptions in the office of the clerk or comparable officer of the trial tribunal, within ten days next after the entry of the judgment, order, decree, or determination, on or after the end of the session at which judgment is rendered, from which the appeal is taken, or in case of a ruling of the court in chambers and not during a session, within ten days after notice thereof. No exceptions not thus set out, or filed and made a part of the record on appeal, shall be considered by this Court, other than exceptions to the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment.

22. Printing (Record on Appeal) (But see Rule 25).

Twenty-five copies of the record on appeal in every case docketed, except in pauper appeals, shall be printed and filed immediately after the case has been docketed, unless printed before the case has been docketed, in which event the printed copies shall be filed when the case is docketed. It shall not be necessary to print the summons and other papers showing service of process, if a statement signed by counsel is printed giving the names of all the parties and stating that summons has been duly served. Nor shall it be necessary to print formal parts of the record showing the organization of the court, the constitution of the jury, etc.

In pauper appeals the counsel for appellant may file nine legible typewritten copies of his brief, in lieu of printed copies, if he so elects, and such briefs must give a succinct statement of the facts applicable to the exceptions and the authorities relied on, and in pauper appeals the appellant may also file, in lieu of printed copies, if he so elects, nine legible typewritten copies of the record on appeal, in addition to the original record on appeal. Should the appellant prevail, the cost of preparing the typewritten briefs and record on appeal shall be taxed against the appellee, provided receipted statement of such cost is given the clerk of this Court before the case is decided.

When any party to an action tried and determined in any trial tribunal desires to appeal as a pauper from the judgment rendered therein to the Appellate Division of the General Court of Justice, the provisions of G.S. 1-288 shall be followed, where applicable; and the terms 'judge' or 'clerk' used therein, referring to the superior courts, shall be deemed to mean the presiding official of the trial tribunal. The preceding sentence shall not apply to appeals in forma pauperis in criminal actions.

The arrangement of the matter in the printed record on appeal shall follow the order prescribed by Rule 19.

23. How Printed.

The record on appeal, except the stenographic transcript referred to in Rule 19 (d)(2), shall be printed under the direction of the clerk of this Court, and in the same type and style, and pages of same size as the reports of this Court, unless it is printed before the appeal is docketed in the required style and manner. If it is to be printed here, the appellant or the party sending up the appeal shall send therewith to the clerk of this Court a cash deposit, sufficient to cover the cost of printing, which shall include ten cents per page for preparing the record on appeal in proper shape for the printer.

When it appears that the clerk has waived the requirement of a cash deposit by appellant to cover estimated cost of printing, and the cost of printing has not been paid when the case is called for argument, the Court will in its discretion, on motion of counsel for appellee or a statement made by the clerk, dismiss the appeal.

24. Appeal Dismissed If Record on Appeal Not Properly Reproduced.

If the record on appeal (except in pauper appeals and except the stenographic transcript referred to in Rule 19 (d)(2) shall not be properly reproduced as required by the rules, by reason of the failure of the appellant to send up the record on appeal, or deposit the cost therefor, in time for it to be properly reproduced when called in its regular order (as set out in Rule 5), the appeal shall, on motion of appellee, be dismissed; but the Court may, on motion of appellant, after five days notice, at the same session for good cause shown, reinstate the appeal, to be heard at the next session. When a case is called and the record on appeal is not fully and properly reproduced, if the appellee does not move to dismiss, the case will be continued.

25. Mimeographed Records and Briefs.

Counsel may file with the clerk of this Court in lieu of printed records on appeal and briefs twenty-five mimeographed copies thereof, to be prepared as provided in Rule 25 of the Rules of Practice in the Supreme Court.

25½. Alternate Method of Reproducing Records and Briefs.

Subject to the approval of the Chief Justice of the Supreme Court, the Administrative Officer of the Courts may provide for an alternate method of reproducing records on appeal and briefs, utilizing current equipment and techniques.

26. Cost of Reproducing Records on Appeal and Briefs to Be Recovered.

The actual cost of reproducing the record on appeal and of the brief shall be allowed the successful litigant, not to exceed $1.50 per page, and not exceeding sixty pages for a record on appeal and twenty pages for a brief, unless otherwise specially ordered by the Court, and he shall be allowed ten cents additional for each such page paid to the clerk of this Court for making copy for the printer, unless the record on appeal was printed before the case was docketed; provided, receipted statement of such cost is given the clerk before the case is decided. In pauper appeals the actual cost of pre-

paring typewritten copies of the record on appeal and of the brief shall be allowed the appellant, not to exceed twenty-five cents per page, and not to exceed sixty pages for record on appeal and twenty pages for brief.

Judge and counsel should not encumber the record on appeal with evidence or with matters not pertinent to the exceptions taken. When the record on appeal is settled, either by the judge or the parties, if either party deems that unnecessary matter is incorporated, he shall have his exception noted, designating the parts deemed unnecessary, and if upon hearing the appeal, the Court finds that such parts were in fact unnecessary, the cost of reproducing such unnecessary matter shall be taxed against the party at whose instance it was done, no matter in whose favor the judgment is given here, except when such party has already paid the expense of such unnecessary matter, and in that event he shall not recover it back, though successful on his appeal. Motions for taxation of costs for reproducing unnecessary parts sent up in the record on appeal shall be decided without argument.

27. Briefs.

Twenty-five copies of briefs of both parties shall be filed in all cases (except in pauper appeals, as provided in Rule 22). Such briefs may be sent up by counsel ready printed, or they may be printed or reproduced as provided by these rules if a proper deposit for cost is made, as specified in Rule 23. They must be of the size and style prescribed by such rule. The briefs are expected to cover all the points presented in the oral argument, though additional authorities may be cited, if discovered after brief is filed, by furnishing list to opposing counsel and handing memorandum of same to the clerk to be placed by him with the papers in the case, but counsel will not be permitted to consume time on the argument in the citation of additional authorities.

27½. Statement of the Questions Involved.

The first page of appellant's brief, other than formal matters appearing thereon, shall be used exclusively for a succinct statement of the question or questions involved on the appeal. Such statement should not ordinarily exceed fifteen lines, and should never exceed one page. This will then be followed on the next page by a recital of the facts and the argument as required by the other rules. In case of disagreement as to the exact question or questions presented for determination, the appellee may submit a counter-statement, using the first page of appellee's brief for this purpose. But no counter-statement need be made unless appellee thinks appellant's

statement is inaccurate, or that it does not present the points for decision in a proper light.

The statement of the questions involved or presented by the appeal, is designed to enable the Court, as well as counsel, to obtain an immediate view and grasp of the nature of the controversy; and a failure to comply with this rule may result in a dismissal of the appeal.

28. Appellant's Brief.

The brief of appellant shall set forth a succinct statement of the facts necessary for understanding the exceptions. As to an exception that there was no evidence, it shall be sufficient to refer to pages of the record containing the evidence. Such brief shall contain, properly numbered, the several grounds of exception and assignment of error with reference to the pages of the record, and the authorities relied on classified under each assignment; and if statutes are material, the same shall be cited by the book, chapter, and section. 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. Such briefs when filed shall be noted by the clerk on the docket, and when reproduced a copy thereof furnished by him to appellee's counsel.

Appellant shall, upon filing a copy of his brief to be reproduced, on the same date mail or deliver to appellee's counsel a copy thereof. If the appellant's brief has not been filed with the clerk of this Court, and no copy has been mailed or delivered to appellee's counsel by 12:00 o'clock noon on the third Tuesday preceding the call of the district to which the case belongs, the appeal will be dismissed on motion of appellee, when the call of that district is begun, unless for good cause shown the Court shall give further time to file the brief.

29. Appellee's Brief.

The appellee shall file a copy of his brief to be reproduced, or twenty-five printed copies thereof, with the clerk of this Court by noon of the second Tuesday preceding the call of the district to which the case belongs and on the same date mail or deliver to appellant's counsel a copy, and the filing thereof shall be noted by the clerk on his docket and when reproduced, a copy furnished by the clerk to counsel for appellant. It is not required that the appellee's brief shall contain a statement of the case. On failure of the appellee to file his brief by the time required, the cause will be heard and determined without argument from the appellee unless

for good cause shown the Court shall give appellee further time to file his brief.

30. Arguments.

(a) Counsel for the appellant shall be entitled to open and conclude the argument.

(b) Counsel for appellant may be heard ten minutes for statement of case and twenty-five minutes in argument.

(c) Counsel for appellee may be heard for twenty-five minutes.

(d) The time allowed for argument may be extended by the Court in a case requiring such extension, but application for extension must be made before the argument begins. The Court, however, may direct the argument of such points as it may see fit outside of the time limited.

(e) Any number of counsel may be heard on either side within the time limitations herein specified, but if more than one counsel is to be heard, each must confine himself to a part or parts of the subject matter involved in the exceptions not discussed by his associate counsel, unless otherwise directed by the Court, in order to avoid tedious and useless repetition.

31. Reargruments.

The Court will, of its own motion, direct a reargument before deciding any case, if in its judgment it is desirable.

32. Agreement of Counsel.

The Court will not recognize any agreement of counsel in any case unless the same shall appear in the record, or in writing filed in the cause in this Court.

33. Appearances.

An attorney shall not be recognized as appearing in any case unless he be entered as counsel of record in the case. Upon his request, the clerk shall enter the name of such attorney, or he may enter it himself, thereby making him counsel of record for the party he may designate therein. Such appearance of counsel shall be deemed to be general in the case, unless a different appearance be indicated. Counsel of record are not permitted to withdraw from a case, except by leave of the Court.

34. Certiorari and Supersedeas.

(a) *When Applied For.* Generally, the writ of *certiorari*, as a substitute for an appeal, must be applied for at the session of this

Court to which the appeal ought to have been taken, or, if no appeal lay, then before or to the session of this Court next after the judgment complained of was entered in the trial tribunal. If the writ shall be applied for after that session, sufficient cause for the delay must be shown.

(b) *How Applied For.* The writs of *certiorari* and *supersedeas* shall be granted only upon petition, specifying the grounds of application therefor, except when a diminution of the record shall be suggested and it appears upon the face of the record that it is manifestly defective, in which case the writ of *certiorari* may be allowed, upon motion in writing. In all other cases the adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit, and such other evidence as may be pertinent.

(c) *Notice of.* No such petition or motion in the application shall be heard unless the petitioner shall have given the adverse party ten days notice, in writing, of the same; but the Court may, for just cause shown, shorten the time for such notice and the manner of giving such notice.

(d) When a petition for *certiorari* is filed under the provisions of G.S. 15-222, two (2) copies of the complete transcript of the post-conviction proceedings, including the transcript of the questions and answers, or if there was no reporter present, a summary of the evidence from the presiding judge's notes, shall be filed with the petition.

35. Additional Issues.

If, pending the consideration of an appeal, the Court of Appeals shall consider the trial or finding of one or more issues of fact necessary to a proper decision of the case upon its merits, such issue shall be made up under the direction of the Court and certified to the trial tribunal for trial or finding and the case will be retained for that purpose.

36. Motions.

All motions made to the Court must be reduced to writing, and shall contain a brief statement of the facts on which they are founded, and the purpose of the same.

No personal appearance of counsel in open Court shall be necessary for the purpose of filing a motion, and the motion will be considered filed when received by the clerk.

Motions filed in open Court shall be tendered to the Court upon

the opening of Court on any day the Court is sitting to hear arguments.

Motions filed in this Court, whether in open Court, with an individual judge, or by delivery to the clerk, shall show thereon the date and manner of notice to opposing parties or counsel.

Motions which in the opinion of this Court require argument will be calendared for argument by order of this Court; otherwise, motions will be determined by this Court in conference.

37. Abatement and Revivor.

Whenever, pending an appeal to this Court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in, and, on motion, be admitted to become parties to the action, and thereupon the appeal shall be heard and determined as in other causes; and if such representatives shall not so voluntarily become parties, then the opposing party may suggest the death upon the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within the first five days of the ensuing session, the party moving for such order shall be entitled to have the appeal dismissed; or, if the party moving shall be the appellant, he shall be entitled to have the appeal heard and determined according to the course of the Court; *provided,* such order shall be served upon the opposing party.

When the death of a party is suggested, and the proper representatives of the deceased fail to appear by the fifth day of the session next succeeding such suggestion, and no action shall be taken by the opposing party within the time to compel their appearance, the appeal shall abate, unless otherwise ordered.

38. Certification of Decisions.

The clerk of this Court shall transmit to the clerk, or comparable officer, of the trial tribunal from which the appeal originated, certificates of the decisions of this Court on the second Monday after the written opinions of the Court are filed in his office, unless otherwise directed. The Court in its discretion may order an opinion certified at an earlier day. Upon final adjournment of a session of the Court, the clerk of this Court shall at once certify to the clerk, or comparable officer, of the trial tribunal, all of the decisions not theretofore certified. The clerk of this Court shall issue execution for all costs incurred in this Court, or by order of this Court.

39. Judgment and Minute Dockets.

The judgment docket of this Court shall contain an alphabetical index of the names of the parties in favor of whom and against whom any judgment for costs or judgment interlocutory or upon the merits is entered. On this docket the clerk of the Court will enter a brief memorandum of every final judgment affecting the right to real property, and of every judgment requiring, in whole or in part, the payment of money, stating the names of the parties, the session at which such judgment was entered, and its number on the docket of the Court. When it shall appear from the return on the execution, or from an order for entry of satisfaction by this Court, that the judgment has been satisfied, in whole or in part, the clerk at the request of any one interested in such entry, and on the payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

The clerk shall keep a permanent minute book, containing a brief summary of the proceedings of this Court in each appeal disposed of. The clerk shall keep a permanent card index file pertaining to all motions and petitions disposed of.

40. Clerk and Commissioners.

The clerk and every commissioner of this Court, who, by virtue or under color of any order, judgment, or decree of the Court of Appeals in any action or matter pending therein, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action or matter, or of any other person, shall, at the session of said Court held next after the first day of January in each year, report to the Court a statement of said fund, setting forth the title and number of the action or matter, the session of the Court at which the order or orders under which the clerk or such commissioner professes to act was made, the amount and character of the investment, and the security for same, and his opinion as to the sufficiency of such security. In every subsequent report he shall state the condition of the fund and any change made in the amount or character of the investment, and every payment made to any person entitled thereto.

The reports required by the preceding paragraph shall be examined by the Court or some member thereof designated by the Chief Judge, and their or his approval endorsed shall be recorded in a well-bound book, kept for the purpose, in the office of the clerk of the Court of Appeals, entitled "Record of Funds," and the cost of

recording the same shall be allowed by the Court and paid out of the fund. The report shall be filed among the papers of the action or matter to which the fund belongs.

41. Court of Appeals Library.

Books Taken Out. No book belonging to the Court of Appeals Library shall be taken therefrom, except in the Court of Appeals chamber, unless by a Judge of the Court of Appeals, without the special permission of the Chief Judge of the Court, and then only upon an application in writing, and in such cases the Chief Judge shall require his secretary to enter in a book kept for the purpose the name of the person requiring the same, the name and number of the volume taken, when taken, and when returned. A copy of this rule shall be posted in the Library of the Court of Appeals.

42. Court's Opinions.

After a panel of the Court has decided a cause, the judge assigned to write the decision shall cause three typewritten copies thereof to be made and a copy sent to each member of the hearing panel, to the end that the same may be carefully examined, and the bearing of the authority cited may be considered prior to the day when the opinion shall be finally adopted by the hearing panel as the decision of the Court and ordered to be filed by the Clerk.

43. Executions.

(a) *Teste of Executions.* When an appeal shall be taken after the commencement of a session of this Court, the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

(b) *Issuing and Return of.* Executions issuing from this Court may be directed to the proper officers of any county in the State. At the request of a party in whose favor execution is to be issued, it may be made returnable on any specified day after the commencement of the session of this Court next ensuing its teste. In the absence of such request, the clerk shall, within thirty days after the certificate of decision is sent down, issue such execution to the county from which the cause came, making it returnable on the first day of the next ensuing session. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the session of the appropriate trial tribunal held next after the date of its issue, and thereafter successive executions will only be issued from said trial tribunal, and when satisfied, the fact

shall be certified to this Court, to the end that an entry to this effect be made here.

Executions for the cost of this Court, adjudged against the losing party to appeals, may be issued after the determination of the appeal, returnable to a subsequent day of the session; or they may be issued after the end of the session, returnable on a day named, at the next succeeding session of this Court.

The officer to whom said executions are directed shall be amenable to the penalties prescribed by law for failure to make due and proper return thereof.

44. Petition to Rehear.

(a) *When Filed.* Petitions to rehear must be filed within forty days after the filing of the decision in the case. No communication with the Court, or any Judge thereof, in regard to any such petition, will be permitted under any circumstances. No oral argument or other presentation of the cause to the Court, or any Judge thereof, by either party, will be allowed, unless on special request the Court shall so order.

(b) *What to Contain.* The petition must assign the alleged error of law complained of, or the matter overlooked, or the newly discovered evidence; and allege that the judgment complained of has been performed or secured. Such petition shall be accompanied with the certificate of at least two members of the bar of this Court, who have no interest in the subject matter and have not been of counsel for either party to the suit, and each of whom shall have been at least five years a member of the bar of this Court, that they have carefully examined the case and the law bearing thereon and the authorities cited in the decision, and they shall summarize succinctly in such certificate the points in which they deem the decision erroneous.

(c) *One Copy to be Filed, How Endorsed.* The petitioner shall endorse upon the petition, of which he shall file one copy, the name of the Judge to whom the petition shall be referred by the clerk, and in cases where there has been a dissent the name of the Judge so endorsed shall be the name of a Judge who did not dissent, and the case shall not be docketed for rehearing unless the Judge endorses thereon that it is a proper case to be reheard.

The clerk shall, upon the receipt of a petition to rehear, immediately deliver the copy to the Judge to whom it is to be referred, unless the petition is received during a vacation of the Court, in which event it shall be delivered to the Judge designated by the petitioner on the first day of the next succeeding session of Court.

(d) *Judge to Act in Thirty Days.* The clerk shall enter upon the rehearing docket and upon the petition the date when the petition is filed in the clerk's office, the name of the Judge to whom the petitioner has requested that the petition be referred, and also the date when the petition is delivered to the Judge. The Judge will act upon the petition within thirty days after it is delivered to him, and the clerk is directed to report in writing to the Chief Judge a list of all petitions to rehear not acted on within the time required.

(e) *New Briefs to be Filed.* There shall be no oral argument before the Judge thus designated, before it is acted on by him, and if he orders the petition docketed, there shall be no oral argument thereon before the hearing panel of the Court (unless the hearing panel of its own motion shall direct an oral argument), but it shall be submitted on the record at the former hearing, the petition to rehear, and a brief to be filed by the petitioner within ten days after the petition is ordered to be docketed, and a brief to be filed by the respondent within twenty days after such order to docket. Such briefs shall not be the briefs on the first hearing, but shall be new briefs, directed to the errors assigned in the petition, and shall be reproduced as provided by the rules. If the brief is not filed within the prescribed time by the petitioner, the petition will be dismissed, and for similar default by the respondent, the cause will be disposed of without his brief.

(f) *When Petition Docketed for Rehearing.* The petition may be ordered docketed for a rehearing as to all points recited by the two certifying counsel (who cannot certify to errors not alleged in the petition), or it may be restricted to one or more of the points thus certified, as may be directed by the Judge who grants the application. When a petition to rehear is ordered to be docketed, notice shall at once be given by the clerk to counsel on both sides.

(g) *Stay of Execution.* When a petition to rehear is filed with the clerk of this Court, the Judge designated by the petitioner to pass upon it may, upon application and in his discretion, stay or restrain execution of the judgment or order until the certificate for a rehearing is either refused, or, if allowed, until this Court has finally disposed of the case on the rehearing. Unless the party applying for the rehearing has already stayed execution in the trial tribunal by giving the required security, he shall, at the time of applying to the Judge for a stay, tender sufficient security for that purpose, which shall be approved by the Judge. Notice of the application for a stay must be given to the other party, if deemed

proper by the Judge, for such time before the hearing of the application and in such manner as may be ordered. If a petition for a rehearing is denied, or if granted, and the petition is afterwards dismissed, the stay shall no longer continue in force, and execution may issue at once, or the judgment or order be otherwise enforced, unless, in case the petition is dismissed, the Court shall otherwise direct. When a stay is granted, the order shall run in the name of this Court and be signed and issued by the clerk, under its seal, with proper recitals to show the authority under which it was issued.

45. Sittings of the Court.

One panel of the Court will sit daily, during the session as scheduled under Rule 7 (Sundays and Mondays excepted), from 9:30 a.m. to 12:30 p.m., and another panel from 1:00 p.m. to 4:00 p.m., for the hearing of causes, except when the docket of a district is exhausted before the close of the time allotted to it.

46. Citation of Reports.

Supreme Court Rule No. 46 applies.

47. The Chief Judge shall schedule additional sessions of the Court as required to discharge expeditiously the Court's business.

The Court may be reconvened at any time after final adjournment of any session by order of the Chief Judge, or, in the event of his inability to act, by one of the Associate Judges in order of seniority.

48. If these rules are not complied with, the appeal may be dismissed.

49. Remedial Writs.

The prerogative writs including mandamus, prohibition, certiorari, and supersedeas shall be issued and heard by a panel of not less than three Judges of the Court of Appeals.

This rule does not apply to the writ of habeas corpus.
(NOTE: See G.S. § 7A-32).

This is to certify that the foregoing rules were submitted to the Supreme Court of North Carolina by the Court of Appeals of North Carolina and the same were approved and adopted in conference by the Supreme Court of North Carolina on September 25, 1967. (See G.S. § 7A-16 and G.S. § 7A-33.)

JOSEPH BRANCH,
For the Supreme Court.

FEE BILL — CLERK OF THE COURT OF APPEALS.

Approved October 10, 1967

Pursuant to G.S. 7A-20(b), the Court of Appeals of North Carolina hereby adopts the following schedule of fees for services rendered by the Clerk of the Court of Appeals:

Docketed on appeal	$10.00
Docketing petition for certiorari or other petition for extraordinary writ	10.00
Docketing a pauper appeal	2.00
A continuance	.50
A scire facias	1.00
A determination	2.00
A certificate	2.00
A fieri facias or other execution	1.00
A subpœna, writ or other process	1.00
A seal	.50
An acknowledgment, oath or affidavit	.50
Preparing judgment	2.00
Certifying case to Supreme Court of North Carolina	10.00
Furnishing copies of decisions to publishing houses, per page	.55
Furnishing copies of decisions to counsel for litigants, per page	.40
Docketing and recording disbarment proceedings	1.00
Issuance of execution	2.00
In lieu of fee allowed Attorney General by G.S. 114-8	10.00

SUPPLEMENTARY RULES OF THE SUPREME COURT OF NORTH CAROLINA

Governing the Hearing of Causes in the Supreme Court Which Were Originally Docketed in the Court of Appeals and Other Rules Required by the Act Establishing the Court of Appeals

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Rule 1. Discretionary Review by the Supreme Court Before Determination by the Court of Appeals.

(a) Causes docketed in the Court of Appeals for appellate review may be certified for appellate review by the Supreme Court, before determination by the Court of Appeals, upon petition for writ of certiorari filed in the Supreme Court by any of the parties when:

(1) the subject matter of the appeal has significant public interest, or

(2) the cause involves legal principles of major significance to the jurisprudence of the State, or

(3) delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm.

A petition for writ of certiorari filed under subsection (a) of this rule shall be filed within fifteen days after the cause is docketed in the Court of Appeals; in all other respects Rule 34 of the Rules of Practice in the Supreme Court shall apply.

(b) The Supreme Court, upon its own motion and in accordance with a memorandum of procedure issued from time to time by the Supreme Court, may certify for appellate review by the Supreme Court, before determination by the Court of Appeals, causes docketed in the Court of Appeals for appellate review when in the opinion of the Supreme Court:

(1) the subject matter of the appeal has significant public interest, or

(2) the cause involves legal principles of major significance to the jurisprudence of the State, or

(3) delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm, or

(4) the work load of the Courts of the Appellate Division is such that the expeditious administration of justice requires certification.

NOTE: Neither subsection (a) nor (b) of this rule is applicable to appeals docketed in the Court of Appeals from the North Carolina Utilities Commission or the North Carolina Industrial Commission; or to post-conviction proceedings under Article 22, Chapter 15, of the General Statutes of North Carolina.

Rule 2. Discretionary Review by the Supreme Court After Determination by the Court of Appeals.

(a) Causes determined by the Court of Appeals may be certified for further appellate review by the Supreme Court upon petition for writ of certiorari filed in the Supreme Court by any of the parties when:

(1) the subject matter of the appeal has significant public interest, or

(2) the cause involves legal principles of major significance to the jurisprudence of the State, or

(3) the decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

Interlocutory determinations by the Court of Appeals, including orders remanding the cause for a new trial or for other proceedings, shall be certified for review by the Supreme Court only upon a determination by the Supreme Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm.

A petition for writ of certiorari filed under subsection (a) of this rule shall be filed within fifteen days after the date of the certification to the trial tribunal of the determination of the Court of Appeals; in all other respects Rule 34 of the Rules of Practice in the Supreme Court shall apply.

(b) The Supreme Court, upon its own motion and in accordance with a memorandum of procedure issued from time to time by the Supreme Court, may certify causes determined by the Court of Appeals for further appellate review by the Supreme Court when in the opinion of the Supreme Court:

(1) the subject matter of the appeal has significant public interest, or

(2) the cause involves legal principles of major significance to the jurisprudence of the State, or

(3) the decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

Interlocutory determinations by the Court of Appeals, including orders remanding the cause for a new trial or for other proceedings, shall be certified for review by the Supreme Court only upon a determination by the Supreme Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm.

In causes certified under subsection (a) or (b) of this rule the Supreme Court will review the decision of the Court of Appeals.

NOTE: Neither subsection (a) nor (b) of this rule applies to post-conviction proceedings under Article 22, Chapter 15, of the General Statutes of North Carolina.

Rule 3. Appeals as of Right From the Court of Appeals to the Supreme Court.

When an appeal as a matter of right is taken to the Supreme Court from a decision of the Court of Appeals 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.

Rule 4. "Appellant" Defined.

The word "appellant" as used in these Supplementary Rules means: (1) With respect to appeals as of right, the party who appeals from the decision of the Court of Appeals to the Supreme Court; (2) With respect to discretionary review by the Supreme Court after determination by the Court of Appeals, the party who petitioned for certiorari or other writ.

Rule 5. Record on Appeal in the Supreme Court — What Constitutes.

(a) When a cause is docketed in the Supreme Court pursuant to the provisions of Rule 1 or Rule 2 of these Supplementary Rules, or pursuant to G.S. § 7A-30 or G.S. § 7A-31, the record and exhibits, if any, docketed in the Court of Appeals shall constitute the record on

appeal in the Supreme Court; provided such record complies with the Rules of the Court of Appeals.

(b) When a cause is docketed in the Supreme Court pursuant to the provisions of Rule 2 of these Supplementary Rules, the petitioner shall attach to his petition a copy of the opinion of the Court of Appeals. Likewise, the petitioner in any cause docketed in the Supreme Court under G.S. § 7A-31, after it has been determined by the Court of Appeals, shall attach to his petition a copy of the opinion of the Court of Appeals. Unless a narration of the evidence is contained in the record initially docketed in the Court of Appeals, the transcript of the evidence shall, if pertinent to questions raised by the petitioner, be filed with the Clerk of the Supreme Court by the Clerk of the Court of Appeals.

Rule 6. Records and Briefs.

When a cause is removed to the Supreme Court pursuant to Rule 1 of these Supplementary Rules, twelve copies of the record and twelve copies of the brief of the respective parties, if filed, shall be filed in the office of the clerk of the Supreme Court; provided, however, if the briefs have not been filed at the time of the removal of the cause, twelve copies of the respective briefs must be filed with the clerk of the Supreme Court and the remaining number of said briefs required by Rule 27 of the Rules of the Court of Appeals shall be filed with the clerk of the Court of Appeals.

Rule 7. Records and Briefs — Review of a Determination of the Court of Appeals by Supreme Court.

When a cause is allowed to be docketed in the Supreme Court for review of the determination made by the Court of appeals, as provided by Rule 2 of these Supplementary Rules, or pursuant to G.S. § 7A-30, twelve copies of the record and twelve copies of the brief of the respective parties shall be filed with the clerk of the Supreme Court, subject to the provisions contained in Rule 5 of these Supplementary Rules. Provided, however, in all causes for review of a determination made by the Court of Appeals, the respective parties shall file a new or supplemental brief dealing with the question or questions sought to be reviewed by the Supreme Court.

Rule 8. Briefs in Causes for Review.

When a cause is docketed in the Supreme Court for review of a determination made by the Court of Appeals, the cause shall not be calendared for hearing until after the expiration of twenty-eight days from the date the cause was docketed in the Supreme Court. And the appellant shall have fourteen days after the cause is docketed in the

Supreme Court to file twenty-five copies of a new or supplemental brief. The appellee shall file twenty-five copies of a new or supplemental brief within twenty-one days after the cause is docketed in the Supreme Court. (In pauper appeals, briefs may be filed as provided by Rule 22 of the Rules of Practice in the Supreme Court.)

Rule 9. Time of Hearing a Cause for Review.

When a cause has been determined in the Court of Appeals and a petition for certiorari or other writ is allowed and the cause ordered docketed in the Supreme Court for review, the Supreme Court may calendar the cause for hearing at any time it may deem appropriate after the expiration of twenty-eight days from the date on which the cause was docketed in the Supreme Court.

Rule 10. Hearing of Causes Not Determined by the Court of Appeals.

When a cause has been docketed in the Supreme Court before a determination thereof has been made by the Court of Appeals, the Supreme Court may calendar the cause for hearing at such time as it may deem appropriate; provided the time has expired in which the cause might have been calendared for hearing in the Court of Appeals.

Rule 11. Removal of Cause Not Determined by the Court of Appeals Does Not Extend Time for Filing Briefs.

The removal of a cause to the Supreme Court from the Court of Appeals before the Court of Appeals has determined the cause shall not extend the time for filing briefs by the respective parties unless otherwise ordered by the Supreme Court.

Rule 12. Notice to Counsel of Record With Respect to Time of Hearing.

The clerk of the Supreme Court shall give twenty days' notice to counsel of record in a cause prior to the time set for hearing the cause in the Supreme Court. Such notice shall apply to all hearings in the Supreme Court in which the cause was originally docketed in the Court of Appeals.

Rule 13. Causes Transferred by Written Order.

Whenever a cause which has been filed with the Court of Appeals is to be heard by the Supreme Court under provisions of G.S. § 7A-31, either before or after hearing by the Court of Appeals, the Supreme Court will in writing order the transfer of said cause to the Supreme Court.

Rule 14. Appeals from District Court Pending in Superior Court — How Disposed of.

Civil cases tried in the District Court in which notice of appeal to the Superior Court has been given on or before September 30, 1967, and which have not been finally determined in the Superior Court on that date, shall be disposed of in the Superior Court in accordance with the laws and rules governing such appeals which were applicable immediately prior to the first day of October, 1967. This rule is made pursuant to the provisions of G.S. § 7A-35(a).

Rule 15. Appeals from Industrial Commission and Utilities Commission Pending in Superior Court — How Disposed of.

All causes heard by the Industrial Commission, and all causes heard by the Utilities Commission, in which notice of appeal to the Superior Court has been given on or before September 30, 1967, and which have not been finally determined in the Superior Court on that date, shall be disposed of in the Superior Court in accordance with the laws and rules governing such appeals which were applicable immediately prior to the first day of October, 1967. This rule is made pursuant to the provisions of G.S. § 7A-35(d).

Rule 16. Rules of Practice and Procedure in Superior Court Applicable to District Court.

The rules of practice and procedure now in effect in the Superior Courts shall, where applicable, be the rules of practice and procedure in the District Courts. This rule is made pursuant to G.S. § 7A-34. This rule shall become effective October 1, 1967.

Rule 17. Opinions by Emergency Justices and Judges — How Filed When Period of Service Has Expired.

When an emergency Justice or Judge has been recalled to active service under the provisions of G.S. § 7A-39.7, any opinion prepared by him but not filed until after his period of temporary service has expired shall be filed in the same manner and have the same effect as though he were still on active service.

This rule is made pursuant to G.S. § 7A-39.8.

Rule 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.

Abatement and Revival—Wife's action for alimony without divorce does not abate husband's action for absolute divorce, *McLeod v. McLeod*, 396.

Abuse of Discretion—By local administrative agency, *Jones v. Hospital*, 33.

Accomplice — Instruction that jury should scrutinize testimony of accomplice with care and caution held without error, *S. v. Mitchell*, 528; *S. v. Fowler*, 549; *S. v. Shaw*, 606; testimony of police officer as to an accomplice's extra-judicial statement is held corroborative evidence, *S. v. Flowers*, 612.

Accounts Receivable—Held not to be protected by implied warranty, *Varnish Co. v. Klein Corp.*, 431.

Accrual of Action—Upon injury caused by explosion of tobacco curer, *Lewis v. Oil Co.*, 570.

Action in Trespass — Introduction of maps or parol evidence of monuments or natural boundaries in, *Smith v. Starnes*, 192.

Administrative Law—Exclusiveness of statutory remedies, *Stocks v. Thompson*, 201; duties and authority of administrative boards in general, *Lanier v. Vines*, 208; review of administrative orders, *Jones v. Hospital*, 33.

Ad Valorem Taxes—Mandamus will lie to compel county commissioners to include tobacco allotments for taxation, *Stocks v. Thompson*, 201; income producing property of urban redevelopment commission is subject to ad valorem taxes, *Redevelopment Comm. v. Guilford County*, 512.

Adverse Examination—See Bill of Discovery.

Aider and Abettor—Evidence of defendant's guilt in robbery prosecution, *S. v. McCabe*, 461.

Alamance County — General county court of has jurisdiction to try divorce actions, *In re Holt*, 108.

Alcoholic Beverages — Operating automobile containing nontaxpaid liquor is prima facie evidence of guilt of illegal possession and transportation, *S. v. Jiles*, 138; evidence of defendant's intoxication some 50 minutes after automobile accident, *S. v. Spear*, 255; examination of defendant as to his consumption of beer and of defense witness as to whether defendant was "stoned", *S. v. Brooks*, 590; employer has duty to prove that employee's injuries were occasioned by employee's intoxication, *Yates v. Hajoca Corp*, 553; failure by officer to advise defendant of his right to refuse breathlyzer test does not render test results inadmissible, *S. v. McCabe*, 237.

Alibi—Defense of alibi in illegal possession of liquor prosecution, *S. v. Jiles*, 137.

Alimony—See Divorce and Alimony.

Alleyway — Obstruction of plaintiff's alleyway by dirt dumped thereon warrants nominal and punitive damages in trespass action, *Academy of Dance Arts*, 333.

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AUTOMOBILES.

§ 2. Grounds and Procedures for Suspension or Revocation of Drivers' Licenses.

Allegations of the complaint were sufficient to establish that revocation of plaintiff's driver's license under G.S. 20-28.1 was not mandatory and that plaintiff was entitled to a review of the Commissioner's order in the Superior Court. *Underwood v. Howland*, 560.

§ 3. Driving Without License or After Revocation or Suspension of License.

Operation of a motor vehicle on the public highways by a person whose drivers license has been suspended is unlawful regardless of intent. *S. v. Tharrington*, 608.

§ 8. Attention to Road, Lookout and Due Care in General.

It is the duty of a motorist to exercise that degree of care an ordinarily prudent person would exercise under similar circumstances, which requires him to keep his vehicle under control and to keep a reasonable careful lookout. *R. R. Co. v. Dockery*, 195.

§ 9. Turning and Turning Signals.

G.S. 20-154(a) requires a motorist to give a signal before stopping or turning from a direct line of travel only when the operation of another vehicle will be affected thereby. *Clarke v. Holman*, 176.

§ 10. Stopping and Parking; Signals and Flares.

A mere temporary or momentary stoppage on the highway without intent to break the continuity of travel is not parking or standing within the purview of G.S. 20-161. *Wilson v. Lee*, 119.

§ 13. Lights.

Violation of the headlights statute is negligence *per se*. *McNulty v. Chaney*, 610.

§ 19. Right of Way at Intersections.

The driver along a dominant highway may assume that motorist on a servient highway will yield to him. *Taylor v. Combs*, 188.

The driver along a servient highway is not required to anticipate that a driver along a dominant highway will travel at an excessive speed or fail to observe the rules of the road applicable to him. *Taylor v. Combs*, 188.

When two vehicles arrive at the same time at an intersection, the vehicle to the left shall yield the right of way. *White v. Hester*, 410.

The duties of a motorist faced with a green light or an amber light at an intersection are defined. *Sayre v. Thompson*, 517.

§ 46. Opinion Testimony as to Speed.

Testimony of a witness that he "guessed" the speed of an automobile is a colloquial way to express an opinion and is not incompetent. *Boyd v. Blake*, 20.

AUTOMOBILES—*Continued.*

§ 55. Sufficiency of Evidence of Stopping Without Signal or Parking Without Lights.

Evidence held insufficient to show defendant's negligence in stopping or parking on highway. *Wilson v. Lee*, 119.

Evidence held insufficient to show negligence by defendant's failure to give turn signal and to show insulating negligence by codefendant. *Clarke v. Holman*, 176.

§ 57. Sufficiency of Evidence of Exceeding Reasonable Speed at Intersection and Failing to Yield Right of Way.

Evidence is held sufficient to be submitted to the jury on the issue of driver's negligence in operating his automobile along a dominant highway at an unlawful speed and without keeping a proper lookout. *Taylor v. Combs*, 188.

Evidence held sufficient to go to the jury on defendant's negligence in entering dominant highway from servient street controlled by a stop sign. *Taylor v. Combs*, 188.

Evidence of defendant's negligence held sufficient to be submitted to jury in these intersection accidents. *McNulty v. Chaney*, 610; *Sayre v. Thompson*, 517.

§ 69. Sufficiency of Evidence of Striking Bicyclist.

A motorist who sees a young child riding a bicycle on a highway is put on notice to exercise due care, and evidence that defendant had sufficient opportunity to see the child is sufficient to carry the case of defendant's negligence to the jury. *Boyd v. Blake*, 20.

§ 71. Sufficiency of Evidence in Towing.

Evidence held sufficient to support a finding of defendant's negligence in attempting to hoist a truck out of sand. *Pollock v. Chevrolet Co.*, 377.

Evidence of defendant's negligence in towing a disabled automobile is a jury question. *Buffkin v. Gaskin*, 563.

§ 76. Sufficiency of Evidence in Following too Closely or Hitting Stopped or Parked Vehicle.

Evidence held insufficient to disclose contributory negligence as a matter of law in decedent's collision with an unlighted trailer at night. *Williams v. Hall*, 508.

§ 79. Sufficiency of Evidence in Intersection Accident.

Evidence in this case held insufficient to show contributory negligence as a matter of law in an intersection accident. *Wilson v. Dunn Co.*, 65.

§ 90. Instructions in Automobile Accident Cases.

Where the evidence shows plaintiff's contributory negligence in suddenly pulling onto a dominant highway, the court must apply the law of contributory negligence to the evidence, and a mere statement of the contentions is insufficient. *Tate v. Golding*, 38.

Failure to apply the reckless driving statute to the evidence in the case fails to meet the requirements of G.S. 1-180. *Tolar v. Brink's*, 315.

§ 126. Competency and Relevancy of Evidence in Prosecutions Under G.S. 20-138.

Failure by officers to advise defendant of his right to refuse to take a breathalyzer test does not render the result of the test inadmissible in evi-

AUTOMOBILES—*Continued.*

dence, defendant having impliedly consented to the test by virtue of driving an automobile on the public highways of the State. *S. v. McCabe*, 237.

Evidence of defendant's guilt of driving upon the highway under the influence of intoxicating liquor is sufficient to go to the jury. *S. v. Spear*, 255.

§ 127. Sufficiency of Evidence and Nonsuit in Prosecutions Under G.S. 20-138.

Evidence that defendant driver was intoxicated at the scene of the accident 50 minutes after the accident occurred is held sufficient to be submitted to the jury on the question of defendant's guilt of driving upon a public highway under the influence of intoxicating liquor. *S. v. Spear*, 255.

BILL OF DISCOVERY.

§ 2. Examination of Adverse Party to Obtain Information Necessary to Draft Pleadings.

Plaintiff's application to adversely examine individual stockholders does not authorize an order allowing a general examination of a corporation's records. *Brown v. Alexander*, 160.

Wrongfully discharged plaintiff fails to show the necessity for the adverse examination of his former employer in order to draft his complaint. *Hendrix v. Alsop*, 422.

The statute allowing compulsory examination of an adversary prior to the filing of the complaint does not contemplate that plaintiff is to be given a general permit to embark upon an unrestricted "fishing expedition" through the records and recollections of his adversary. *Hendrix v. Alsop*, 422.

§ 3. Examination of Adverse Party to Procure Evidence to be Used at the Trial.

A subpœna *duces tecum* cannot be substituted for a bill of discovery in order to adversely examine a witness. *Overall Corp. v. Linen Supply*, 318.

BOUNDARIES.

§ 10. Sufficiency of Description and Admissibility of Evidence Aliunde.

Parol evidence of monuments or natural boundaries, to be competent, must be shown to relate to the courses and distances set out in the instrument under which title is claimed, and a mere understanding of the parties, or their predecessors in title, as to the location of boundaries, without more, will not control its location. *Smith v. Starnes*, 192.

§ 13. Maps and Ancient Documents.

Introduction of a map in a trespass case is erroneous where plaintiff offers no evidence establishing source of map. *Smith v. Starnes*, 192.

BURGLARY AND UNLAWFUL BREAKINGS.

§ 2. Breaking and Entering Otherwise Than Burglariously.

Nonfelonious breaking and entering is a lesser included offense of the felony of breaking and entering with intent to commit a felony. G.S. 14-54. *S. v. Johnson*, 15.

The breaking of a store window with the intent to commit a felony completes the offense defined in G.S. 14-54, even though the building is not actually entered. *S. v. Burgess*, 104.

BURGLARY AND UNLAWFUL BREAKINGS—*Continued*

Defendant's breaking of a store window with the intent to commit a felony completes the offense even though defendant abandons his purpose, and the evidence is sufficient to be submitted to the jury on defendant's guilt of breaking and entering. *S. v. Wooten*, 240.

The misdemeanor of nonfelonious breaking or entering is a lesser included offense of the felony of breaking or entering with intent to commit a felony as described in G.S. 14-54. *S. v. Fowler*, 546.

§ 3. Indictment.

Indictment charging a felonious breaking and entering in language of the statute is not fatally defective in failing to identify the premises with particularity. *S. v. Burgess*, 142.

An indictment charging the burglarious breaking and entry of the dwelling house of a named person situated in a specified county sufficiently describes the subject premises to withstand a motion to quash. *S. v. Branch* 279.

In bills of indictment charging a violation of G.S. 14-54, the use by the solicitor of an identifying address for the premises broken into or entered is noted with approval. *S. v. McDowell*, 361.

There is a fatal variance when the indictment alleges the breaking or entering of a storehouse, etc., and the proof shows a breaking of a dwelling house. *S. v. McDowell*, 361.

§ 5. Sufficiency of Evidence and Nonsuit.

Evidence held sufficient to go to jury on issue of defendant's guilt of felonious breaking and entering. *S. v. Johnson*, 15.

Evidence held sufficient to go to jury on defendant's guilt of breaking and entering with intent to commit felonious larceny. *S. v. Burgess*, 104.

Evidence that store window was broken, that defendant, together with co-defendants, was discovered nearby, is held sufficient to be submitted to the jury as to defendants' guilt of breaking and entering with intent to commit the felony of larceny. *S. v. Burgess*, 104.

Evidence that defendant ran when discovered near broken store glass held insufficient to go to jury on defendant's guilt of attempted breaking and entering. *S. v. Swain*, 112.

Failure to identify the items traced to defendant's possession as the identical items stolen from the prosecuting witness warrants dismissal of the prosecution. *S. v. Evans*, 603.

§ 6. Instructions.

In a prosecution for felonious breaking and entering and for larceny, an instruction that the jury "might note that this offense is linked with the crime of burglary in which the technical break in may be effected by the lifting of a latch or the turning of a knob, the building being otherwise closed," *is held* not erroneous. *S. v. Fowler*, 546.

§ 7. Verdict and Instructions as to Possible Verdicts.

In these prosecutions for felonious breaking and entering, the evidence did not require the lesser offense of nonfelonious breaking to be submitted to the jury. *S. v. Fowler*, 546; *S. v. Shaw*, 606.

§ 8. Sentence and Punishment.

Sentence of 10 years imprisonment for felonious breaking and entering is not cruel and unusual. *S. v. Burgess*, 142.

COMPROMISE AND SETTLEMENT.

§ 1. Nature, Elements, Validity, and Effect.

The law favors the settlement of controversies out of court. *Ins. Co. v. Surety Co.*, 9.

CONSTITUTIONAL LAW.

§ 4. Persons Entitled to Raise Constitutional Questions; Waiver and Estoppel.

In a wrongful death action based on the negligence of a county jailer, a demurrer grounded upon the alleged unconstitutionality of a local act which authorizes the commissioners of defendant county to operate the county jail and to appoint the jailer is a speaking demurrer and will be overruled. *Wilkie v. Henderson County*, 155.

§ 7. Delegation of Powers by the General Assembly in General.

The judicial power granted to the Commissioner of Insurance to impose a civil penalty is a constitutional delegation of power. *Lanier v. Vines*, 208.

The General Assembly may not delegate its supreme legislative power to any other branch of the State government or to any agency, but as to a specific subject matter it may delegate a limited portion of its legislative power to an administrative agency, if it prescribes the standards under which the agency is to exercise the delegated power. *Ibid.*

Article IV, § 3, Constitution of North Carolina authorizes the General Assembly to vest administrative agencies with such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purpose for which they were created. *Ibid.*

The judicial power to impose a civil penalty granted to the Commissioner of Insurance by G.S. 58-44.6 is reasonably necessary as an incident to the accomplishment of the purposes for which the North Carolina Insurance Department was created, and is authorized by Article IV, § 3, Constitution of North Carolina. *Ibid.*

§ 10. Judicial Powers.

A statute is presumed to be constitutional. *S. v. Vines*, 208.

§ 21. Right to Security in Person and Property.

The constitutional guaranty against unreasonable searches and seizures does not apply where incriminating articles are revealed by the voluntary act of defendant or are in plain view of the officers. *S. v. Colson*, 339.

§ 24. Requisites of Due Process.

The object of service of process is to give notice to the person sued and to allow him to prepare a defense. *Coble v. Brown*, 1.

§ 30. Due Process in Trial in General.

Where the State was granted a continuance due to the illness of a witness and the trial was held at the next criminal session of court, the delay did not violate defendant's right to a speedy trial. *S. v. Cavallaro*, 412.

§ 31. Right of Confrontation, Time to Prepare Defense, and Access to Evidence.

The denial of a motion for continuance made by defendant's attorney ten minutes after his appointment to represent defendant is prejudicial error. *S. v. Braxton*, 407.

Where defendant is allowed to extensively cross-examine a witness of the State, there is no denial of the right of confrontation. *S. v. Flowers*, 612.

CONSTITUTIONAL LAW—*Continued.*

§ 32. Right to Counsel.

Evidence held sufficient to show defendant freely and voluntarily waived his right to counsel at police identification line-up. *S. v. Williams*, 127.

Defendant is not entitled to counsel at his preliminary hearing. *S. v. Bentley*, 365.

§ 33. Self-incrimination.

Failure by officers to advise defendant of his right to refuse to take a breathalyzer test does not render the result of the test inadmissible in evidence, defendant having impliedly consented to the test by virtue of driving an automobile on the public highways of the State. *S. v. McCabe*, 237.

In a prosecution for felonious breaking and entering and larceny, it was not error for the court to permit a defense witness to refuse to answer questions asked by defendant's counsel on the ground of his privilege against self-incrimination, notwithstanding the witness had previously plead guilty to breaking and entering as a result of the same occurrence for which defendant was being tried, since his testimony might disclose facts leading to proof of other crimes in connection with this occurrence which would not have been known without his admission. *S. v. Huffstetler*, 405.

Cross-examination of defendant about his consumption of beer did not violate his privilege against self-incrimination when he had testified on direct examination as to evidence of the same import. *S. v. Brooks*, 590.

§ 36. Cruel and Unusual Punishment.

Sentence within statutory maximum cannot be cruel and unusual. *S. v. Burgess*, 142.

Sentences of imprisonment within statutory limits are constitutional. *S. v. Abernathy*, 625; *S. v. Chapman*, 622.

CONTRACTS.

§ 1. Nature and Essentials of Contracts in General.

Persons *sui juris* have a right to make any contract not contrary to law or public policy. *Construction Co. v. Contracting Co.*, 535.

§ 2. Offer and Acceptance and Mutuality.

Parties to a contract must mutually agree as to all of the terms therein, and unless an agreement to make a future contract is definite and certain as to the terms to be embraced therein it is void. *Construction Co. v. Housing Authority*, 181.

§ 3. Definiteness and Certainty of Agreement.

Where the language of the contract is clear and unambiguous, a party thereto may not complain that a different meaning was intended. *Construction Co. v. Contracting Co.*, 535.

§ 12. Construction and Operation of Contracts Generally.

Ambiguity in a written contract is to be inclined against the party who prepares the written instrument. *Construction Co. v. Housing Authority*, 181.

The court can only interpret a contract and cannot make a new one for the parties. *Construction Co. v. Contracting Co.*, 512.

CORONERS.

Court's refusal in homicide prosecution to instruct the jury on statutory duties of coroners is proper. *S. v. Colson*, 339.

COUNTIES.

§ 9. Liability for Torts.

A complaint may properly allege that defendant county has waived its governmental immunity by purchasing liability insurance, but this allegation may not be read to the jury. *Wilkie v. Henderson County*, 155.

Damage to plaintiff's crops by county's mosquito spray machine did not constitute a taking entitling plaintiff to compensation. *Bynum v. Onslow County*, 351.

COURTS.

§ 14. Jurisdiction of Inferior Courts.

An appeal in a small claims action is properly perfected from the magistrate who tried it pursuant to G.S. 7A-211 when notice of appeal is given in open court and the magistrate notes the appeal on the judgment. *Porter v. Cahill*, 579.

CRIME AGAINST NATURE.

§ 1. Elements of the Offense.

In this jurisdiction crime against nature embraces sodomy, buggery and bestiality as those offenses were known and defined at common law. *S. v. Stokes*, 245.

§ 2. Prosecutions.

Indictment charging defendant with commiting a crime against nature is sufficient even though it failed to allege the name of the other person. *S. v. Stocks*, 245.

CRIMINAL LAW.

§ 2. Intent.

Where specific intent is not an element of the crime, proof of commission of the unlawful act is sufficient to support verdict. *S. v. Jiles*, 137.

§ 5. Mental Capacity in General.

Defendant is not entitled to additional psychiatric examination to determine his mental competency at time of the alleged offense. *S. v. Cavallaro*, 412.

§ 9. Principals in the First or Second Degree; Aiders and Abettors.

The mere presence of a person at the scene of a crime does not make him a principal. *S. v. McCabe*, 461.

A person aids or abets in the commission of a crime when he shares the criminal intent and by word or deed gives encouragement to the actual perpetrator or by his conduct makes it known to such perpetrator that he is standing by to render assistance if necessary. *Ibid.*

§ 17. Jurisdiction of Federal and State Courts.

Defendant's contention that the State was thereafter barred from prosecuting him on three bills of indictment because the State authorities had voluntarily released him at one time to the custody of a Federal Marshal in connection with a federal warrant charging violation of a federal offense, *is held* meritless. *S. v. Lance*, 620.

§ 23. Plea of Guilty.

A plea of guilty may be set aside when defendant shows that an involun-

CRIMINAL LAW—*Continued.*

tary confession was a substantial factor in his decision to plead guilty. *S. v. White*, 219.

Upon defendant's plea of guilty to the offense charged, it is not a prerequisite to the sustaining of the conviction that the trial judge examine defendant as to the voluntariness of the plea. *S. v. Abernathy*, 625.

§ 24. Plea of Not Guilty.

A plea of not guilty puts in issue every essential element of the crime charged. *S. v. Frye*, 542.

§ 29. Suggestion of Mental Incapacity to Plead.

Defendant is not entitled to additional psychiatric examination to determine his mental competency at time of the alleged offense. *S. v. Cavallaro*, 412.

§ 34. Evidence of Defendant's Guilt of Other Offenses.

Evidence of other offenses held inadmissible since it was not related to the prosecution at hand. *S. v. Branch*, 279.

§ 35. Evidence that Offense was Committed by Another.

Habeas Corpus judgment is *res judicata* as to the identity of defendant. *S. v. Lewis*, 296.

§ 38. Evidence of Like Facts and Transactions.

Officer's testimony that defendant was intoxicated within 50 minutes after the accident occurred is competent. *S. v. Spear*, 255.

§ 42. Articles and Clothing Connected With the Crime.

Defendant's motion to suppress the admission of clothing identified as that worn by defendant at the time of the crime is held properly denied without a preliminary investigation in the absence of the jury. *S. v. McCabe*, 461.

§ 46. Flight as Implied Admission.

Flight of an accused is insufficient to submit issue of guilt to jury. *S. v. Swain*, 112.

§ 75. Voluntariness and Admissibility of Confession in General.

The requirements of *Miranda v. Arizona* do not apply to retrials of cases originally heard before the effective date of that decision. *S. v. Lewis*, 296; *S. v. Branch*, 279.

§ 76. Determination and Effect of Admissibility of Confession.

Trial court's findings upon the *voir dire* to determine voluntariness of confession are conclusive on appeal when supported by competent evidence. *S. v. Bentley*, 365.

§ 82. Privileged Communications.

The confidential relationship between attorney and his client is terminated when defendant testifies as to communications between him and the attorney. *S. v. White*, 219.

The trial judge in his discretion may allow leading questions. *S. v. Fowler*, 438.

§ 84. Evidence Obtained by Unlawful Means.

Defendant's bloody underclothing is lawfully seized and admitted into

CRIMINAL LAW—*Continued.*

evidence even though defendant may have been intoxicated, where the clothing was in plain view of the officer who seized it. *S. v. Colson*, 339.

§ 85. Character Evidence Relating to Defendant.

Where defendant takes the stand in his own behalf, he is not prejudiced by cross-examination as to his juvenile record where he admits numerous convictions after he reached the age of sixteen. *S. v. Brown*, 145.

§ 88. Cross-examination.

Objection to a question by defense counsel on cross-examination seeking to elicit testimony which had previously been given by the witness is properly sustained. *S. v. Jetton*, 567.

§ 89. Credibility of Witness; Corroboration and Impeachment.

Evidence for impeachment purposes that the State's main witness would lose her welfare payments is held properly excluded. *S. v. Fowler*, 438.

Solicitor's question as to whether the witness was "stoned" at the time of the offense is not improper. *S. v. Brooks*, 590.

Testimony by a police officer as to extrajudicial statements made to him by another witness is properly admitted for purposes of corroboration. *S. v. Flowers*, 612; *S. v. Jetton*, 567.

§ 90. Rule That Party Bound by and May Not Discredit Own Witness.

Defendant's exculpatory statement does not warrant nonsuit when such evidence is contradicted by other evidence. *S. v. Cavallaro*, 412.

§ 91. Time of Trial and Continuance.

The granting of a continuance because of the illness of a witness for the State is not an abuse of the court's discretion. *S. v. Cavallaro*, 412.

No abuse of discretion is shown in the denial of a continuance where defendant's cases were calendared for trial and where defendant has not shown that his counsel did not have time to prepare and present his defense in the time after his appointment. *S. v. Fowler*, 546.

Motion for continuance is addressed to discretion of the trial court. *Ibid; S. v. Fowler*, 549; *S. v. Fowler*, 552. The inclusion of a case on the trial calendar constitutes notice to defendant that his case is set for trial. *S. v. Fowler*, 546.

§ 92. Consolidation and Severance of Counts.

Motion for separate trials is addressed to the court's discretion. *S. v. McCabe*, 461.

§ 97. Introduction of Additional Evidence.

The trial court has discretionary power to permit the State to introduce additional evidence after both sides have argued to the jury. *S. v. Brown*, 145.

Trial court did not abuse its discretion in allowing State to recall a witness. *S. v. Bentley*, 365.

§ 99. Conduct of Court and its Expression of Opinion on Evidence During Trial.

It is not an expression of opinion for the trial court to direct the defendant to reply to the solicitor's question. *S. v. LeGrande*, 25.

A remark of the court during trial will not entitle defendant to a new trial unless it tends to prejudice defendant. *Ibid.*

The question asked witnesses by the court in this case *are held* to be solely

CRIMINAL LAW—*Continued.*

for the purpose of clarification of the witness' testimony and do not constitute an expression of opinion by the court on the evidence. *S. v. Colson*, 339.

§ 102. Argument and Conduct of Counsel or Solicitor.

Control of arguments of solicitor and defendant's attorney rests largely in trial court's discretion. *S. v. Burgess*, 104.

In a prosecution for uttering a forged check, solicitor's remark in his argument to the jury that the "defendant was out there robbing" the prosecuting witness is held a mere lapus linguæ and is not prejudicial. *S. v. Bentley*, 365.

§ 104. Consideration of Evidence on Motion to Nonsuit and Renewal Thereof.

On motion to nonsuit, the evidence must be considered in the light most favorable to the State. *S. v. Johnson*, 15; *S. v. Williams*, 127; *S. v. Wooten*, 240.

Rules on motion of nonsuit. *S. v. Jiles*, 137; *S. v. Williams*, 127; *S. v. Swain*, 112.

On motion to nonsuit, the evidence must be considered in the light most favorable to the State and defendant's evidence relating to matters of defense will be disregarded. *S. v. Jiles*, 137.

§ 105. Necessity for and Functions of Motion to Nonsuit and Renewal Thereof.

Where defendant introduces evidence, only the correctness of the denial of the motion to nonsuit made at the close of all the evidence is presented on appeal. *S. v. Brown*, 145.

§ 106. Sufficiency of Evidence to Overrule Nonsuit.

Extra-judicial confession is insufficient to support a criminal conviction without independent proof of the *corpus delicti*, but evidence of the *corpus delicti* need not be sufficient, standing alone, to establish commission of the crime. *S. v. Burgess*, 104; *S. v. Hamilton*, 99.

If there is evidence, circumstantial, direct, or a combination of both, amounting to substantial evidence of each element of the offense charged, motion to nonsuit should be denied, it being in the province of the jury. *S. v. Swain*, 112.

If there is more than a scintilla of competent evidence to support the allegations in the warrant or bill of indictment, nonsuit is properly denied. *S. v. Brown*, 145.

Where the State's evidence tends both to incriminate and exculpate the defendant, it is sufficient to repel motion for nonsuit. *S. v. Jenkins*, 223.

§ 107. Nonsuit for Variance.

Fatal variance between indictment and proof is raised by motion for nonsuit. *S. v. McDowell*, 361.

§ 114. Expression of Opinion by Court on Evidence in Charge.

A remark of the court to the jury, "You may retire now, that was just a legal technicality I forgot to tell you about," while not approved, is deemed not to constitute an expression of opinion by the trial court. *S. v. Williams*, 127.

In stating the defendant's contentions in a prosecution for manslaughter, the defendant not having testified, a statement by the trial judge that defendant says he could not control the car for some unknown reason, followed by

CRIMINAL LAW—*Continued.*

the judge's comment that "it is not in evidence so maybe it could even be explained that this car went out of control" *is held* an expression of opinion. *S. v. Watson*, 250.

§ 115. Instructions on Lesser Degrees of Crime and Possible Verdicts.

The trial court is not required to charge the jury upon the question of defendant's guilt of lesser degrees of the crime charged in the indictment when there is no evidence to sustain a verdict of defendant's guilt of such lesser degree. *S. v. LeGrande*, 25.

In prosecution for robbery, the court must of its own motion submit the issue of defendant's guilt of assault when there is evidence to support such a finding. *S. v. Hamm*, 444.

§ 117. Charge of Character Evidence and Credibility of Witness.

An instruction to the jury as to how they should consider the testimony of an accomplice who testifies for the State is without error *S. v. Mitchell*, 528; *S. v. Shaw*, 606.

§ 118. Charge on Contentions of the Parties.

A mere disparity in the length of time devoted by the trial court in stating the contentions of the parties is not prejudicial error where the charge as a whole fairly presents the contentions of the defendant. *S. v. Evers*, 81.

A charge which fundamentally misconstrues the contentions of the defendant will be held for error. *S. v. Tharrington*, 608.

§ 130. New Trial for Misconduct of or Affecting Jury.

Trial court did not abuse its discretion in denying motion for mistrial on the ground that a juror had been an officer of a domestic relations court. *S. v. Brooks*, 590.

§ 134. Form and Requisites of Judgment or Sentence in General.

Remarks of the solicitor during presentencing investigation held not prejudicial in demanding that defendant be incarcerated for the protection of society. *S. v. Allison*, 623.

§ 146. Nature and Grounds of Appellate Jurisdiction in General.

Constitutional questions should first be raised and passed upon by the trial court. *S. v. Chapman*, 622.

§ 147. Motions.

Motions made in Court of Appeals must be made in writing. *S. v. Lynch*, 248.

§ 148. Judgments Appealable.

There is no appeal as a matter of right from interlocutory order in a criminal action. *S. v. Henry*, 409; *S. v. Lance*, 620.

§ 155. Docketing of Transcript of Record.

The Court of Appeals considered indigent defendants' assignments of error although their record on appeal was not docketed within 90 days from date of sentence. *S. v. Squires*, 199.

§ 159. Form and Requisites of Transcript.

Where defendant submits evidence in the form of a stenographic transcript, he must also set forth in an appendix to the brief the testimony to which he excepts. *S. v. Evans*, 603; *S. v. Mitchell*, 525.

CRIMINAL LAW—*Continued.*

§ 162. Objections, Exceptions, and Assignments of Error and Motions to Strike.

Exceptions to the admission of evidence are deemed waived if not taken in apt time during trial. *S. v. Williams*, 127.

Exception to the admission of evidence is waived by permitting evidence of like import to be introduced thereafter without objection. *S. v. Brown*, 145.

An exception to the evidence must be supported by an objection. *S. v. McCabe*, 461.

§ 163. Exceptions and Assignments of Error to Charge.

An exception to the charge in its entirety is a broadside exception and cannot be sustained. *S. v. Evers*, 81.

Rules of practice require that charge be included in the record on appeal. *S. v. Jiles*, 137.

An exception to the charge not set out in the record on appeal will not be considered. *S. v. Lane*, 539.

§ 166. The Brief.

Assignments and exceptions not brought forward and argued in the brief are deemed abandoned. *S. v. Jetton*, 567; *S. v. Lane*, 539; *S. v. McCabe*, 461.

§ 167. Harmless and Prejudicial Error in General.

A new trial will not be granted for mere technical error which could not have affected the result, but only for prejudicial error amounting to the denial of a substantial right. *S. v. Williams*, 127.

§ 168. Harmless and Prejudicial Error in Instructions.

The charge of the court will be construed contextually. *S. v. Heffner*, 597.

§ 169 Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The admission of testimony over objection is rendered harmless when testimony of the same import is thereafter introduced without objection. *S. v. LeGrande*, 25.

§ 170. Harmless and Prejudicial Error in Argument of Solicitor.

Impropriety of solicitor's remark held cured by court's instruction. *S. v. Burgess*, 104.

§ 171. Error Relating to One Count.

Where concurrent sentences of equal length are imposed upon conviction on two counts, error in the charge relating to one count only is harmless. *S. v. Huffstetler*, 405.

§ 172. Whether Error is Cured by Verdict.

An erroneous instruction upon the intensity of proof required to satisfy the jury of matters in mitigation or justification of homicide is not cured by defendant's conviction of manslaughter, since defendant's defense of self-defense, if established to the jury's satisfaction, would entitle him to an acquittal. *S. v. Calloway*, 150.

§ 181. Post-Conviction Hearing.

No appeal lies from a post-conviction hearing, review being available only by petition for writ of *certiorari*. *Nolan v. State*, 618.

DEATH.

§ 3. Nature and Grounds for Action for Wrongful Death.

A complaint by a father in his individual capacity seeking to recover for the wrongful death of his minor son states a defective cause of action. *Kendrick v. Cain*, 557.

A father may not maintain an action in his individual capacity for the wrongful death of his minor son. *Kendrick v. Cain*, 557.

DECLARATORY JUDGMENT ACT.

§ 1. Nature and Grounds of Remedy.

The liability of an insurance company under its policy of insurance is a proper subject for a declaratory judgment when a genuine controversy exists. *Ins. Co. v. Surety Co.*, 9.

DEDICATION.

§ 1. Nature, Methods and Elements of Dedication.

Dedication of an easement may be made by express language, reservation, or by conduct showing an intention to dedicate. *Woody v. Clayton*, 520.

Evidence held insufficient to support an express or implied dedication of an easement. *Ibid.*

DEEDS.

§ 19. Restrictive Covenants Generally.

Restrictive covenants are to be strictly construed against limitation on use.

§ 20. Restrictive Covenants as Applied to Subdivision Developments.

Nonsuit is proper in action to restrain violation of restrictive covenants where instrument is ambiguous as to whether defendant's property is included within area restricted. *Worrell v. Royal*, 489.

DISORDERLY CONDUCT AND PUBLIC DRUNKENNESS.

§ 2. Prosecutions.

The offense of public drunkenness, G.S. 14-335, is within the jurisdiction of a Justice of the Peace. *S. v. Williams*, 312.

Failure of warrant to allege that defendant was intoxicated in a public place is fatal. *Ibid.*

DIVORCE AND ALIMONY.

§ 1. Jurisdiction.

The general county court of Alamance County has jurisdiction to try and determine divorce actions, G.S. 7-279, and such jurisdiction continues until the establishment of a district court pursuant to G.S. 7A-131(2). G.S. 50-13.5(h). *In re Holt*, 108.

The District Court has authority to hear an uncontested divorce action at a criminal session of court notwithstanding the case was not calendared for trial and defendant was not given actual notice of the time of trial. *Laws v. Laws*, 243.

§ 13. Separation for Statutory Period.

In an action for divorce on the ground of a one-year separation, a defend-

DIVORCE AND ALIMONY—*Continued.*

ant waives his right to trial by jury by failing to file a request therefor prior to the call of the action for trial. G.S. 50-10. *Laws v. Laws*, 243.

§ 16. Alimony Without Divorce.

Wife's action for alimony without divorce does not abate husband's action for absolute divorce on ground of one year's separation. *McLeod v. McLeod*, 396. Evidence held sufficient for jury in wife's action for alimony without divorce based upon indignities to the person. *Butler v. Butler*, 357.

An action for alimony without divorce under former G.S. 50-16 based upon indignities to the person of the plaintiff may be instituted as soon as the grounds have occurred. *Ibid.*

G.S. 50-16.9(b) held not to apply retroactively to relieve the husband from making support payments upon the wife's remarriage. *Dunn v. Dunn*, 532.

§ 21. Enforcing Alimony Payment.

Husband's wilful failure to comply with a judgment of the court ordering him to make support payments to his wife subjects husband to contempt proceedings. *Dunn v. Dunn*, 532. Uncontradicted evidence that defendant is gainfully employed and earning a good income is sufficient to support a contempt order for failure to support his wife. *Ring v. Ring*, 592.

§ 22. Jurisdiction and Procedure in Custody and Support Actions Generally.

Where final judgment for absolute divorce has been rendered in one court without a determination of custody or support of the children, the issue of custody and support may be determined in an independent action in another court. *In re Holt*, 108.

When parents are divorced, children of the marriage become wards of the court and their welfare is the determining factor in custody proceedings. *In re Custody of Ross*, 393.

§ 24. Custody.

Award of custody of the children to the father held to be in the interest of the children's welfare. *In re Custody of Ross*, 393.

§ 26. Validity of and Attack on Domestic Decree.

To set aside a judgment of absolute divorce for irregularity or excusable neglect, the movant must show that he has a meritorious defense. *Laws v. Laws*, 243.

EASEMENTS.

§ 1. Nature and Creation in General.

A negative easement is required by the statute of frauds to be in writing. *Simmons v. Morton*, 308.

An agreement to use property solely for residential purposes is a negative easement. *Ibid.*

EJECTMENT.

§ 8. Defendant's Bonds in Ejectment to Try Title.

The statutory requirement of bond in actions for the recovery or possession of real property may be waived unless seasonably insisted upon by plaintiff. *Gates v. McDonald*, 587.

In an action for the possession of real property, plaintiff's motion at the

trial that defendant's answer be stricken for failure to file the defense bond required by G.S. 1-111 is properly overruled. *Ibid.*

Where answer has been filed in ejectment proceedings without the statutory bond and has remained on file for some time without objection, it is improper for the trial court to strike the answer without giving defendant opportunity to file a bond. *Ibid.*

EMINENT DOMAIN.

§ 1. Nature and Extent of Power.

The exercise of the power of eminent domain is in derogation of common right, and all laws conferring such power must be strictly construed. *Redevelopment Comm. v. Abeyounis*, 270.

§ 2. Acts Constituting a Taking.

Damage to plaintiff's crops by county's mosquito spray machine did not constitute a taking entitling plaintiff to compensation. *Bynum v. Onslow County*, 351.

Denial of direct access to a highway held to constitute a taking and to justify compensation. *Realty Co. v. Highway Comm.*, 82.

§ 4. Delegation of Power.

The right to authorize the power of eminent domain and the mode of the exercise thereof are wholly legislative, subject to the constitutional limitations that private property may not be taken for public use without just compensation and reasonable notice and opportunity to be heard. *State Ports Authority v. Felt Corp.*, 231.

§ 7. Proceedings to Take Land and Assess Compensation, Generally.

The State Ports Authority must obtain the approval of the Governor and Council of State before instituting proceedings to condemn land for its authorized purposes, and must affirmatively plead such prior approval in any condemnation action instituted by it. *State Ports Authority v. Felt Corp.*, 231.

§ 9. Proceedings to Take in Condemnation by Housing Authority.

Failure of a housing authority to comply strictly with the statutes of eminent domain renders void the acquisition of land. *Redevelopment Comm. v. Abeyounis*, 270.

ESCAPE.

§ 1. Elements of, and Prosecutions for, Escape.

Sentence of imprisonment of one year upon plea of guilty to the charge of escape is not excessive. *S. v. Allison*, 623.

EVIDENCE.

§ 14. Communications Between Physician and Patient.

The patient does not waive the physician-patient privilege by introducing into evidence at a hearing upon an application for a temporary restraining order pursuant to G.S. 55-81 an affidavit of his physician as to his mental capacity, and the physician may not be compelled by the opposing party to disclose privileged information at a deposition hearing held thereafter. *Neese v. Neese*, 426.

In action to rescind sale of stock on ground of mental incapacity to make sale, plaintiff does not waive the physician-patient privilege by alleging his mental condition. *Ibid.*

EVIDENCE—*Continued.*

§ 25. Relevancy and Competency of Maps in Evidence.

Introduction of a map in a trespass case is erroneous where plaintiff offers no evidence establishing source of map. *Smith v. Starnes*, 192.

A map is ordinarily inadmissible as substantive evidence unless made pursuant to a court order. *Pruden v. Keemer*, 417.

A private map not made pursuant to official authority is properly excluded as incompetent. *Vail v. Smith*, 498.

§ 46. Nonexpert Opinion Evidence as to Handwriting.

A nonexpert witness who is familiar with the handwriting of the testator may testify as to its genuineness or falsity. *In re Will of Head*, 575.

§ 50. Expert Medical Testimony.

Where a medical expert has testified without objection that plaintiff "will suffer" from an injury, it is not prejudicial error for him to be asked and to give as his opinion that he did not know how long this condition would continue. *Murrell v. Poole*, 584.

FRAUD.

§ 9. Pleadings.

A complaint setting forth six causes of action alleging various fraudulent practices is held demurrable for misjoinder of parties and causes of action. *Gilliam v. Ruffin*, 503.

FRAUDS, STATUTE OF

§ 9. Easements.

A negative easement is required by the statute of frauds to be in writing. *Simmons v. Morton*, 308.

FRAUDULENT CONVEYANCES.

§ 3. Actions to Set Aside Conveyances and Transfers as Fraudulent.

A complaint setting forth six causes of action alleging various fraudulent practices is held demurrable for misjoinder of parties and causes of action. *Gilliam v. Ruffin*, 503.

GRAND JURY.

§ 3. Challenge to Composition of.

A showing by a Negro defendant that over a substantial period a small portion of Negroes had served on the grand jury or a showing that the jury scrolls had a symbol designating race is a prima facie case of discrimination. *S. v. Wright*, 479.

Where defendant's own evidence is sufficient to rebut a prima facie showing of unlawful discrimination in the composition of the grand jury which indicted him, the State is not required to go forward and produce independent evidence to the same effect. *Ibid.*

Findings of fact made by the trial court on the question of grand jury discrimination are conclusive on appeal when supported by competent evidence produced either by defendant or the State. *Ibid.*

Defendant's prima facie showing of systematic exclusion of grand jury members by race is held rebutted by defendant's further evidence. *Ibid.*

A motion for permission to examine the names in the jury box is addressed to the discretion of the trial judge. *Ibid.*

GUARDIAN AND WARD.

§ 2. Appointment, Qualification and Tenure.

Motion for appointment of a guardian *ad litem* for defendant will be denied in the absence of evidence to rebut presumption defendant is *sui juris*. *Tew v. Ins. Co.*, 94.

HABEAS CORPUS.

§ 1. Nature of Writ; Issuance and Return.

An order or judgment in a *habeas corpus* proceeding discharging a petitioner is conclusive in his favor that he is illegally held in custody, and is *res judicata* of all issues of law and fact necessarily involved in that restraint. *S. v. Lewis*, 296.

§ 3. Determination of Right of Custody of Children.

Where final judgment for absolute divorce has been rendered in one court and there has been no determination of custody or support of the children of the marriage, the issue of custody and support may be determined in an independent action, instituted after October 1, 1967, in another court. *In re Holt*, 108.

HIGHWAYS.

§ 5. Rights of Way.

Denial of direct access to a highway held to constitute a taking and compensation therefor. *Realty Co. v. Highway Comm.*, 82.

HOMICIDE.

§ 1. Definitions in General.

The *corpus delicti* in a criminal homicide consists of the fact of death and the existence of a criminal agency as its cause. *S. v. Hamilton*, 99.

§ 6. Definitions and Distinctions of Manslaughter.

Involuntary manslaughter is the unintentional killing of a human being resulting from the performance of an unlawful act not amounting to a felony or not naturally dangerous to human life, or from the performance of a lawful act in a culpably negligent way, or from the culpably negligent omission to perform a legal duty. *S. v. Hamilton*, 99.

§ 14. Presumptions and Burden of Proof.

When the intentional killing of a human being with a deadly weapon is admitted or is established by the evidence, the burden is on the defendant to prove to the satisfaction of the jury the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or the legal justification that will excuse it altogether upon the ground of self-defense, and this burden may be carried by evidence offered by the defendant, or by the State, or both. *S. v. Calloway*, 150.

Where intentional killing with a deadly weapon is established, defendant has the burden to mitigate malice or to establish self-defense. *S. v. Fowler*, 438.

§ 16. Dying Declarations.

A dying declaration which tends to exonerate defendant may be impeached by the State with evidence contradicting the declaration. *S. v. Stalnaker*, 524.

§ 21. Sufficiency of Evidence and Nonsuit.

To make a *prima facie* showing of a homicide *corpus delicti*, the State need

HOMICIDE—*Continued.*

not eliminate all inferences tending to show a noncriminal cause of death, but must introduce evidence sufficient to create a reasonable inference that the death could have been caused by a criminal agency. *S. v. Hamilton*, 99.

Evidence held sufficient to show a homicide *corpus delicti* and, together with defendant's confession, to submit issue of defendant's guilt of homicide to jury. *Ibid.*

Circumstantial evidence of defendant's guilt of homicide held sufficient for the jury although some evidence tended to exculpate defendant. *S. v. Jenkins*, 223.

Evidence of defendant's guilt of second degree murder held sufficient to be submitted to the jury. *S. v. Colson*, 339; *S. v. Cavallaro*, 412.

Evidence held sufficient to be submitted to the jury on voluntary or involuntary manslaughter. *S. v. Frye*, 542.

§ 23. Instructions in General.

Failure of the court to instruct the jury on proximate cause is prejudicial error. *S. v. Frye*, 542.

§ 24. Instructions or Presumptions and Burden of Proof.

An instruction that defendant has the burden to prove self-defense to the satisfaction of the jury and that such degree of proof exceeds proof by the greater weight of the evidence is prejudicial. *S. v. Calloway*, 150.

§ 26. Instructions on Manslaughter.

Failure of the trial court to instruct the jury as to difference between voluntary and involuntary manslaughter is prejudicial. *S. v. Frye*, 542. Failure of the court to instruct the jury as to the issue of proximate cause is prejudicial. *S. v. Frye*, 542.

§ 30. Submission of Guilt of Lesser Degrees of the Crime.

Uncontradicted evidence that defendant set the deceased on fire does not support an inference that the deceased was burned accidentally, and therefore there was no need to submit the issue of involuntary manslaughter to the jury. *S. v. Stalnaker*, 524.

HOSPITALS.

§ 2. Support and Control.

County commissioners and boards of trustees of the county hospitals authorized by Chapter 131 of the General Statutes are vested with the authority to select suitable hospital sites. G.S. 153-9, G.S. 131-126.18 *et seq. Jones v. Hospital*, 33.

Suit by taxpayers to restrain construction of a county hospital fails to allegs sufficient facts to show a manifest abuse of discretion on the part of county officials. *Jones v. Hospital*, 33.

INDICTMENT AND WARRANT.

§ 9. Charge of Crime.

An indictment charging a statutory offense in the language of the statute meets the requirement of law. *S. v. Lane*, 539.

An indictment charging the burglarious breaking and entry of the dwelling house of a named person situated in a specified county sufficiently describes the subject premises to withstand a motion to quash. *S. v. Branch*, 279.

§ 12. Amendment.

The court has authority to amend warrant defective in form provided the nature of the offense is not changed. *S. v. Williams*, 312.

INDICTMENT AND WARRANT—*Continued.*

§ 13. Bill of Particulars.

A motion for a bill of particulars is addressed to the trial court's discretion. *S. v. McCabe*, 461.

§ 17. Variance Between Averment and Proof.

Evidence in a criminal case must correspond with the material allegations of the indictment. *S. v. McDowell*, 361.

INFANTS.

§ 5. Appointment, Duties and Authority of Next Friend.

The next friend appointed for the adult plaintiff in this case *is held* to have the authority of a next friend of an infant, G.S. 1-64, and consequently his consent to a judgment involving the interests of the plaintiff without the investigation and approval by the court is invalid. *Hagins v. Phipps*, 63.

The next friend is an officer of the court and may negotiate and settle the rights of his ward subject to approval by the court. *Hagins v. Redevelopment Comm.*, 40; *Hagins v. Transit Co.*, 51; *Hagins v. Warehouse Corp.*, 56; *Hagins v. Phipps*, 63.

INSURANCE.

§ 1. Control and Regulation in General.

The Commissioner of Insurance is a real party in interest and is entitled to bring an action in Superior Court to enforce the collection of a civil penalty imposed pursuant to G.S. 58-44.6. *Lanier v. Vines*, 208.

§ 35. Right to Proceeds Where Beneficiary Causes Death of Insured.

Court's conclusion that beneficiary of a policy was not his wife's slayer is held not supported by the court's finding that defendant had been found not guilty of the wife's death by reason of insanity. *Tew v. Ins. Co.*, 94.

§ 81. Assigned Risk Insurance.

The provisions of the Motor Vehicle Financial Responsibility Act of 1957 must be read into a policy issued pursuant to the Assigned Risk Plan. *Grant v. Ins. Co.*, 76.

§ 94. Cancellation of Liability Insurance.

Cancellation of automobile insurance upon request by premium finance company acting under power of attorney is ineffectual to prevent recovery upon the policy in absence of a showing by the insurer that the finance company had given the insured the statutory ten days notice of request of cancellation. *Grant v. Ins. Co.*, 76.

§ 99. Settlement by Insurer.

The settlement of certain claims by a liability insurer is not a waiver of insurer's defenses of noncoverage as to other claims when the settlement is not detrimental to the insured. *Ins. Co. v. Surety Co.*, 9.

§ 108. Defenses Available to Insurer.

To avoid liability under an assigned risk policy the insurer has the burden to prove cancellation of the policy in accordance with applicable statutes. *Grant v. Ins. Co.*, 76.

INTOXICATING LIQUOR.

§ 15. Sufficiency of Evidence and Nonsuit on Charge of Illegal Possession.

Evidence that officers observed defendant operating an automobile in which were found eleven one-half gallon plastic jugs containing nontaxpaid intoxicating liquor makes out a *prima facie* case of defendant's guilt of illegal possession and illegal transportation of intoxicating liquor, and the case is properly submitted to the jury. *S. v. Jiles*, 137.

§ 19. Instructions.

Where, in a prosecution for unlawful possession and transportation of intoxicating liquor, the State's evidence makes out a *prima facie* case of the defendant's guilt, the intent of defendant is presumed from the unlawful acts, and where defendant's evidence relates solely to his defense of alibi, the trial court is not required to instruct the jury that defendant would not be guilty in the absence of knowledge that the liquor was in his automobile. *S. v. Jiles*, 137.

JAILS AND JAILERS.

The duties of a jailer and a deputy sheriff are separate and distinct, and a person acts either as deputy sheriff or jailer but not in both capacities. *Wilkie v. Henderson County*, 155.

JUDGMENTS.

§ 6. Modification and Correction in Trial Court.

The trial court may, prior to the expiration of the session, vacate on its own motion a judgment rendered during the session. *Huggins v. Dedevelopment Comm.*, 40.

§ 19. Irregular Judgments.

Clerk has authority to vacate judgment by default final where plaintiff fails to allege a fixed sum of money owing him. *Booker v. Porth*, 434.

§ 20. Judgment by Default.

Defendant need not show mistake or excusable neglect where plaintiff has not taken default judgment prior to defendant's motion for extension of time to file answer. *Mills v. McCuen*, 403.

§ 24. For Mistake, Surprise, or Excusable Neglect.

To set aside a default judgment under G.S. 1-220 defendant must show excusable neglect and a meritorious defense. *Sawyer v. Sawyer*, 400.

§ 25. What Conduct Justifies Relief.

Findings held sufficient to support an order setting aside judgment by default and inquiry. *Zum v. Ford*, 494.

§ 34. Trial, Determination and Judgment.

The trial court's findings on a motion to set aside a judgment by default and inquiry are conclusive on appeal if supported by competent evidence. *Zum v. Ford*, 494.

§ 35. Conclusiveness of Judgment and Bar in General.

Habeas Corpus judgment is held *res judicata* as to issue of defendant's identity in a subsequent trial. *S. v. Lewis*, 296.

LARCENY.

§ 7. Sufficiency of Evidence and Nonsuit.

Evidence of defendant's guilt of felonious larceny held for jury. *S. v. Brown*, 145.

Evidence held to establish defendant's guilt of larceny of an automobile under the theory of recent possession of stolen property. *S. v. Jetton*, 567.

Failure to identify the items traced to defendant's possession as the identical items stolen from the prosecuting witness warrants dismissal of the prosecution. *S. v. Evans*, 603.

Evidence held insufficient to show that a car driven by defendant was the same car stolen from prosecuting witness, and nonsuit was proper. *S. v. Bumpus*, 614.

§ 10. Judgment and Sentence.

Sentences of five to ten years for conviction of felonious larceny held within statutory maximum. *S. v. Burgess*, 142.

LIMITATION OF ACTIONS.

§ 4. Accrual of Right of Action and Time Statute Begins to Run in General.

A cause of action accrues and the statute of limitations begins to run, in the absence of disability or fraud or mistake, whenever a party becomes liable to an action. *Lewis v. Oil Co.*, 570.

An action for breach of warranty of fitness of a tobacco curer accrues either at time of installation or upon first sign of damage and not at subsequent explosion. *Lewis v. Oil Co.*, 570.

§ 17. Burden of Proof.

Upon the plea of the applicable statute of limitations, the burden is on plaintiff to show that the action was instituted within the prescribed period. *Lewis v. Oil Co.*, 570.

§ 18. Sufficiency of Evidence, Nonsuit and Directed Verdict.

An action upon breach of warranty of fitness of a tobacco curer accrues either at its installation or upon first sign of damage and not at subsequent explosion. *Lewis v. Oil Co.*, 570.

LIS PENDENS.

Where plaintiff seeks to secure a personal judgment for the payment of money, he is not entitled to file notice of *lis pendens*. *Booker v. Porth*, 434.

MANDAMUS.

§ 1. Nature and Grounds of Writ in General.

Mandamus will not lie where other adequate remedies are available. *Stocks v. Thompson*, 201.

§ 2. Ministerial or Descretionary Duty.

Mandamus will lie to compel the performance of a ministerial act required by law. *Stocks v. Thompson*, 201.

MARRIAGE.

§ 2. Validity and Attack.

Evidence that a man and woman lived together as husband and wife and were reputed to be married is admissible to prove the marriage. *Green v. Construction Co.*, 300.

MASTER AND SERVANT.

§ 33. Liability of Employer for Injuries to Third Persons, Generally.

When an employee, in undertaking to do that which he was employed to do, adopts a method which constitutes a tort and inflicts injury on another, it is the fact that he is about his employer's business which imposes liability upon the employer, and the employer is not excused from liability in that the employee adopted a wrongful or unauthorized method, or even a method expressly prohibited. *Clemmons v. Ins. Co.*, 215.

The complaint held to state a cause of action of assault by defendant's agent in the course of employment. *Clemmons v. Ins. Co.*, 215.

§ 35. Construction and Operation of Federal Employers' Liability Act in General.

An employer's duty under the Federal Employers' Liability Act is the same as at common law — to use reasonable care in furnishing employees with a safe place to work and safe tools and appliances. *Battley v. Railway Co.*, 384.

§ 36. Application of Federal Employers' Liability Act.

In an action for damages against a railroad company under the Federal Employers' Liability Act, allegations of the plaintiff, an engineer, that he was injured while attempting to enter the cab of his train are held insufficient to state a cause of action. *Battley v. Railway Co.*, 384.

§ 51. Dual Employments.

In this action by the injured employee against a university and a municipality for injuries arising out of and in the course of his employment as an administrative assistant to the town under a program whereby prospective college students in need of financial assistance undertake summertime work, the evidence is held insufficient to support Commission's findings of dual employment. *Forgay v. State University*, 320.

§ 53. Injuries Compensable in General.

In order to be compensable under the Workmen's Compensation Act, an injury must arise out of and in the course of employment. *Harless v. Flynn*, 448.

§ 54. Causal Relation Between Employment and Injury in General.

Where any reasonable relationship to employment exists or employment is a contributing cause, the court is justified in upholding an award under the Compensation Act as arising out of the employment. *Williams v. Board of Education*, 90.

§ 55. Intoxication of Employee.

Where a claim for compensation is resisted on the ground that the injuries were occasioned by claimant's intoxication, defendant has the burden of proving such defense. G.S. 97-12. *Yates v. Hajoca Corp.*, 553.

§ 57. Negligence of Fellow Employee.

Employee's injury caused by negligence of fellow employee on the parking

lot of employer during lunch hour is compensable under the Workmen's Compensation Act. *Harless v. Flynn*, 448.

§ 58. Unauthorized Acts of Employee and Personal Missions.

In tending to his personal physical needs, an employee is indirectly benefiting his employer. *Harless v. Flynn*, 448.

§ 60. Injuries While on Way to or From Work.

Injury suffered by school superintendent while coming from work late at night arises out of and in course of employment when he is paid allowance to cover cost of transportation to work. *Williams v. Board of Education*, 89.

Evidence held sufficient to support finding that accident between employer's office and claimant's home occurred in the course of employment. *Yates v. Hajoca Corp.*, 553.

§ 69. Compulation of Average Weekly Wage in Exceptional Cases.

Industrial Commission properly computed defendant's average weekly wage in accordance with the average amount earned by a person of the same grade in the same class of employment. *Cobb v. Clearing and Grading*, 327.

§ 74. Review of Award by Commission for Change of Condition.

Approval by the Chief Claims Examiner of the Industrial Commission of agreement to pay compensation is binding upon the claimant, and claimant is barred from pursuing claim for change of condition more than 12 months after the last claim of compensation. *Hedgecock v. Frye*, 369.

§ 76. Persons Entitled to Payment.

Under the provisions of the Workmen's Compensation Act a surviving child is conclusively presumed to be wholly dependent for support upon the deceased employee, and it is error for the Industrial Commission to require that there be evidence and findings of fact that the deceased employee, at the time of his death, was in fact engaged in furnishing support to his acknowledged illegitimate child before the claim of such child could be recognized. *Hewett v. Garrett*, 234.

Findings that deceased employee and the *femme* claimant lived together as husband and wife entitles claimant to award of compensation. *Green v. Construction Co.*, 300.

§ 82. Nature and Extent of Jurisdiction of Industrial Commission in General.

The Industrial Commission has jurisdiction to hear and determine tort claims against any county board of education arising as a result of any alleged negligent act or omission of the driver of a public school bus in the course of his employment when the salary of such driver is paid from the State Nine Months School Fund. *Mitchell v. Board of Education*, 373.

The Industrial Commission is a creature of the General Assembly and its jurisdiction is limited to that prescribed by statute. *Ashley v. Rent-A-Car, Inc.*, 171.

The Industrial Commission has the inherent authority to appoint deputies with the same power to enter awards as is possessed by members of the Commission. *Hedgecock v. Frye*, 369.

§ 86. Common Law Right of Action Against Third Person Tort-Feasor.

In employees' action against third party tort-feasor, the defendant may

MASTER AND SERVANT—*Continued.*

properly allege the concurring negligence of the employer and compensation awards received by plaintiff. *Jackson v. Jones*, 71.

An employee who sustains an injury arising out of and in the course of employment, caused by the negligence of a fellow employee who was acting within the course of employment, G.S. 97-2(6), may not maintain an action at common law against the negligent employee. *Harless v. Flynn*, 448.

§ 88. Filing of Claim in General.

A claim for compensation for a dependent under 18 years of age must be prosecuted in the dependent's name by a general guardian or other legal representative. *Coble v. Clearing & Grading, Inc.*, 327.

Hearing Commissioner erred in appointing widow as next friend of her minor child since the interests of both are opposed. *Cobb v. Clearing and Grading*, 327.

§ 90. Prosecution of Claim and Proceedings Before Commission.

Motion to offer additional evidence on appeal before the Full Commission is addressed to the discretion of the Commission, whose ruling thereon is not reviewable in the absence of an abuse of discretion. *Green v. Construction Co.*, 300.

§ 91. Findings and Award of Commission.

An agreement for the payment of compensation, when approved by the Industrial Commission, is as binding on the parties as an order, decision or award of the Commission. G.S. 97-87. *Hedgecock v. Frye*, 369.

The Industrial Commission has the authority to appoint deputies with the same power to enter awards as is possessed by members of the Commission. *Ibid.*

§ 93. Review in the Superior Court.

Findings of Industrial Commission are conclusive on appeal when supported by competent evidence. *Dunn v. Highway Comm.*, 116; *Green v. Construction Co.*, 300; *Etheridge v. Butler*, 582.

Order remanding cause to Industrial Commission for rehearing on ground of newly discovered evidence held proper. *Hall v. Milling Co.*, 380.

§ 94. Review in Appellate Courts.

When supported by competent evidence, findings of fact by the Industrial Commission on a claim properly constituted under the Workmen's Compensation Act are conclusive on appeal. *Williams v. Board of Education*, 89.

On appeal from the Industrial Commission review is limited to questions of law, which include whether the record contains any competent evidence to support the findings of fact by the Commission and whether the facts found are sufficient to support the conclusions of law. *Forgay v. State University*, 320.

Findings of fact by the Industrial Commission are conclusive on appeal if there is any competent evidence to support them. *Mitchell v. Board of Education*, 373.

§ 96. Costs and Attorneys Fees.

Where attorney has an agreement as to the payment of his fees, the Commission must pass upon the reasonableness of the agreement. *Salmons v. Lumber Co.*, 390.

G.S. 97-88 authorizes the Industrial Commission to award a fee to claimant's attorney as a part of the costs of an appeal by the insurer only when its

MASTER AND SERVANT—*Continued.*

decision orders the insurer to make or to continue payments of compensation to the claimant. *Ashley v. Rent-A-Car, Inc.*, 171.

The Industrial Commission has no authority to award fees to a claimant's attorney as part of the costs where its decision relates only to an award of medical and hospital expenses. *Ashley v. Rent-A-Car, Inc.*, 171.

MORTGAGES AND DEEDS OF TRUST.

§ 13. Estates, Rights and Duties of Parties to the Instrument.

The execution of a deed of trust on property held by a life tenant who has a power of disposition does not divest the remainder interest of another person where the deed of trust has not been foreclosed. *Simms v. Hawkins*, 168.

A mortgagee or trustee in a deed of trust takes the legal title to the property merely as security for payment of the debt. *Ibid.*

The estate of a mortgagee or a trustee in a deed of trust is a determinable fee terminating the instant the debt is paid or other condition of the moragage or deed of trust is performed. *Ibid.*

MUNICIPAL CORPORATIONS.

§ 4. Legislative Control; Supervision and Powers of Municipalities in General.

The purpose of the Urban Redevelopment Act is to promote the health and welfare of the people. *Redevelopment Comm. v. Guilford County*, 512.

NEGLIGENCE.

§ 1. Actions and Omissions Constituting Negligence in General.

Negligence defined. *Forrest v. Kress & Co.*, 305; *R. R. Co. v. Dockery*, 195.

§ 7. Proximate Cause and Foreseeability of Injury.

Only negligence which proximately causes or contributes to the accident is of legal import, and foreseeability is an essential element of proximate cause. *Kinley v. Honeycutt*, 441.

§ 16. Contributory Negligence of Minors.

Eleven year old child is presumed to be incapable of contributory negligence. *Mitchell v. Board of Education*, 373.

§ 20. Pleadings in Negligence Actions.

An allegation that defendant "negligently operated" a fog machine so that the wind carried DDT into plaintiff's fields and damaged his crops fails to state a cause of action based upon negligence. *Bynum v. Onslow County*, 351.

Plaintiff's injury by hot asphalt could not have been foreseen by defendant and therefore plaintiff has no cause of action for negligence. *Kinley v. Honeycutt*, 441.

§ 21. Presumptions and Burden of Proof.

Plaintiff must show the failure to exercise due care and that such failure was the proximate cause of injury. *Battley v. Railway Co.*, 384.

§ 24. Sufficiency of Evidence and Nonsuit.

Negligence is not presumed from mere fact of injury. *Wilson v. Lee*, 119.

NEGLIGENCE—*Continued.*

§ 26. Nonsuit for Contributory Negligence.

Nonsuit for contributory negligence is proper only when plaintiff's own evidence discloses contributory negligence so clearly that no other reasonable conclusion may be drawn therefrom. *Wilson v. Dunn Co.*, 65.

Nonsuit on issue of contributory negligence should be denied when plaintiff's proof permits diverse inferences. *Pollock v. Chevrolet Co.*, 377.

Rules governing motion for nonsuit on the ground of contributory negligence. *Buffkin v. Gaskin*, 563; *Williams v. Hall*, 508.

§ 36. Attractive Nuisances and Injury to Children.

It is not negligence for a person to maintain an unenclosed pond or pool on his premises. *McLean v. Ward*, 572.

Owner of an unenclosed irrigation pond is held not liable for the drowning of a small child in the pond. *McLean v. Ward*, 572.

§ 37b. Duties and Liabilities to Invitees in General.

The owner of a store is not an insurer of the safety of his patrons, and a customer, in order to recover for injury sustained on the premises, must introduce evidence tending to establish actionable negligence on the part of the proprietor, the doctrine of *res ipsa loquitur* not being applicable. *Connor v. Thalhimers Greensboro, Inc.*, 29.

The proprietor of a business establishment has the duty to keep his premises in a safe condition for the foreseeable use by his invitee and to warn him of any hidden dangers or unsafe conditions of which the proprietor knew or in the exercise of reasonable supervision and inspection should have known and which were unknown to the invitee. *Britt v. Mallard-Griffin, Inc.*, 252; *Forrest v. Kress & Co.*, 305.

§ 37f. Sufficiency of Evidence and Nonsuit in Actions by Invitees.

Invitee's loss of hand held not due to defendant's negligence in maintaining power saw. *Britt v. Mallard-Griffin, Inc.*, 252. Evidence that invitee slipped on oily surface in defendant's store held sufficient to go to jury on proprietor's negligence. *Forrest v. Kress & Co.*, 305.

Evidence in this case held insufficient to show negligence of a store in maintaining a door which suddenly closed upon plaintiff. *Connor v. Thalhimers Greensboro, Inc.*, 29.

NOTICE.

§ 1. Necessity for Notice.

Parties to an action are fixed with notice of all motions or orders made during the session of court. *Hagins v. Redevelopment Comm.*, 40.

Parties are fixed with notice of all motions or orders made in pending causes during term, and the statutory provisions for notice of motions are not applicable in such instances. *Angle v. Black*, 36.

Plaintiff is charged with notice of a judgment rendered in a pending cause during session. *Dunn v. Highway Comm.*, 116.

The District Court has authority to hear an uncontested divorce action at a criminal session of court notwithstanding the case was not calendared for trial and defendant was not given actual notice of the time of trial. *Laws v. Laws*, 243.

PARENT AND CHILD.

§ 4. Right of Parent to Recover for Injuries to Child.

If the death of a minor child injured by the wrongful act of another is instantaneous, the father may not recover damages for loss of services of the child. *Kendrick v. Cain*, 557.

PARTIES.

§ 2. Parties Plaintiff.

Findings in this case held to authorize the appointment of a next friend for an adult plaintiff. *Hagins v. Redevelopment Comm.*, 40.

The Commissioner of Insurance is a real party in interest to enforce the collection of a civil penalty. *S. v. Vines*, 208.

PAYMENT.

§ 1. Transactions Constituting Payment.

The term "to pay" means to satisfy someone for services rendered. *Forgay v. State University*, 320.

PENALTIES.

A civil penalty imposed under the insurance laws is payable to the State Treasurer. *S. v. Vines*, 208.

PLEADINGS.

§ 2. Statement of Cause of Action in General.

Pleadings must plainly state the grounds of action or defense so as to properly inform the other side and the court. *Jackson v. Jones*, 71.

§ 6. Filing of Answer, Time for Filing and Extension of Time.

The judge may extend the time to file answer. *Mills v. McCuen*, 403.

§ 8. Counterclaims and Cross-Actions.

Where the contract between a general contractor and the owner of property includes the contractor's agreement to take all necessary precautions to protect the owner's property during the course of construction, the agreement becomes a necessary and integral part of the contract, and allegations of the owner in a counterclaim that it was damaged by the contractor's failure to protect its property from the elements state a cause of action *ex contractu* and not in tort. *Thompson & Sons v. Hosiery Mills*, 347.

§ 9. Verification of Answer.

The Superior Court may allow verification of the answer *nunc pro tunc*. *Booker v. Porth*, 434.

§ 12. Office and Effect of Demurrer.

Upon 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. *Wilkie v. Henderson County*, 155.

A demurrer admits the truth of the facts in the pleadings and should be liberally construed. *Clemmons v. Ins. Co.*, 215; *Underwood v. Howland*, 560.

In ruling upon demurrer, the court may not consider matters outside the pleadings. *Bynum v. Onslow County*, 351.

§ 15. "Speaking" Demurrers.

A demurrer based upon matters *dehors* the pleadings is a "speaking" demurrer and will not be sustained. *Wilkie v. Henderson County*, 155.

PLEADINGS—*Continued.*

In a wrongful death action based on the negligence of a county jailer, a demurrer grounded upon the alleged unconstitutionality of a local act which authorizes the commissioners of defendant county to operate the county jail and to appoint the jailer is a speaking demurrer and will be overruled. *Ibid.*

§ 18. Demurrer for Misjoinder of Parties and Causes of Action.

Complaint against two tortfeasors held demurrable for misjoinder of parties and causes. *Robertson v. Ins. Co.*, 122.

Plaintiff's cross-action in tort is held a misjoinder of parties and causes. *Thompson & Sons v. Hosiery Mills*, 347.

Where the causes of action set forth in the complaint do not affect all parties there is a misjoinder of parties and causes of action. *Gilliam v. Ruffin*, 503.

§ 30. Motions for Judgment on the Pleadings.

Judgment on the pleadings is improper where the pleadings raise an issue of fact on any single material proposition. *Searcy v. Walker*, 124.

Plaintiff's motion for judgment on the pleadings is in effect a demurrer to the answer and admits for the purpose of the motion the truth of all facts well pleaded in the answer and the untruth of plaintiff's allegations which are controverted in the answer. *Ibid.*

On plaintiff's motion for judgment on the pleadings, defendant's answer will be liberally construed and the motion denied if the facts alleged in the answer constitute a defense or if the answer is good in any respect or to any extent. *Ibid.*

§ 25. Scope of Amendment to Pleadings.

A statement of a defective cause of action may not be cured by amendment. *Kendrick v. Cain*, 557.

A complaint by a father in his individual capacity seeking to recover for the wrongful death of his minor son states a defective cause of action which may not be cured by amendment. *Kendrick v. Cain*, 557.

§ 34. Right to Have Allegations Stricken on Motion.

Allegations in the answer setting up matter ineffectual as a defense are properly stricken. *Ins. Co. v. Surety Co.*, 9.

PRINCIPAL AND AGENT.

§ 4. Proof of Agency—

In an action against an alleged principal upon an agreement made by an alleged agent, nonsuit is proper where there is no proof of agency. *Simmons v. Morton*, 308.

PRINCIPAL AND SURETY.

§ 8. Bonds for Public Construction.

Evidence held sufficient to support plaintiff's action to cancel a bid bond posted for a general construction contract of public housing apartments. *Construction Co. v. Housing Authority*, 181.

PROCESS.

§ 15. Service on Nonresidents in Actions to Recover for Negligent Operation of Automobile in This State.

Evidence in this case held insufficient to support a finding that defendant had departed the State and remained absent for 60 days continuously, and thus plaintiff's purported service of process under G.S. 1-105.1 was properly quashed. *Coble v. Brown*, 1.

A mere averment that after due diligence personal service on the defendant could not be had in the State *is held* not sufficient to support service of process under G.S. 1-105.1. *Ibid.*

Court order which extends nonresident motorist's time to file answer is not an abuse of discretion. *Mills v. McCuen*, 403.

PUBLIC OFFICERS.

§ 8. Performance of Official Duties and Disqualification.

The presumption is that public officials will discharge their duties in good faith and in accordance with the law. *Jones v. Hospital*, 33.

RAILROADS.

§ 5. Crossing Accidents — Injuries to Drivers.

Evidence of railroad company held sufficient to show motorist is negligent in allowing automobile to leave paved crossing by not keeping his automobile under proper control or by not keeping a proper lookout. *R. R. Co. v. Dockery*, 195.

REFERENCE.

§ 11. Trial by Jury Upon Exceptions.

Failure of a party to a compulsory reference to object to the introduction of incompetent evidence at the hearing before the referee does not preclude the court from excluding such evidence upon objection at the trial. *Vail v. Smith*, 498.

RELIGIOUS SOCIETIES AND CORPORATIONS.

§ 2. Government, Management and Property.

The true congregation of a church consists of those members who adhere to the characteristic doctrines, usages, customs and practices of that particular church, recognized and accepted by both factions before the dissension between them arose. *Lawrence v. Stephenson*, 600.

§ 3. Actions.

Action to determine true congregation of a church is not subject to judgment on the pleadings when the pleadings raise an issue of fact requiring consideration of evidence. *Sercy v. Walker*, 124.

Instruction to the jury in church controversy case which weighed too heavily against one faction warrants new trial. *Lawrence v. Stephenson*, 600.

ROBBERY.

§ 4. Sufficiency of Evidence and Nonsuit.

Evidence in this case held for jury on defendant's guilt of armed robbery. *S. v. Williams*, 127; *S. v. McCabe*, 461.

ROBBERY—*Continued.*

§ 5. Instructions and Submission of Question of Less Degrees of the Crime.

Where all the evidence shows a completed robbery with firearms and there is no conflicting evidence the court is not required to submit to the jury defendant's guilt of assault. *S. v. LeGrande*, 25.

In prosecution for robbery the court must of its own motion submit the issue of defendant's guilt of assault when there is evidence to support such a finding. *S. v. Hamm*, 444.

In a trial of four defendants for armed robbery, a statement by the court in its instructions that one defendant contends that "all he could be, if he is anything, would be an aider and abettor," will not be held prejudicial error when considered with other portions of the charge. *S. v. McCabe*, 461.

SALES.

§ 5. Express Warranties.

Evidence that accounts receivable were uncollectible is held insufficient to be submitted to the jury on the issue of the assignor's breach of warranty that such assets were free from liens and encumbrances. *Varnish Co. v. Klein Corp.*, 431.

§ 6. Implied Warranties.

The statute of limitations applicable to an action based upon breach of warranty of fitness and safety is three years. *Lewis v. Oil Co.*, 570.

§ 10. Action by Seller to Recover Purchase Price.

In seller's action to recover purchase price for goods sold, the allegations and the evidence of one defendant are held sufficient to support its claim that the other defendant had agreed to assume the indebtedness. *Paper Co. v. Multi-Ply Corp.*, 164.

§ 14. Actions or Counterclaims for Breach of Warranty.

Express warranties in the assignment of accounts receivable control over warranties implied by law. *Varnish Co. v. Klein Corp.*, 431.

SCHOOLS.

§ 7. Taxation, Bonds and Allocation of Proceeds.

County commissioners may levy tax without a vote of the people for the purpose of supplementing teachers' salaries. *Harris v. Board of Commissioners*, 258.

§ 11. Liability for Torts.

Evidence held sufficient to support a finding that school bus driver was negligent in striking child. *Mitchell v. Board of Education*, 373.

SEARCHES AND SEIZURES.

§ 1. Necessity for Search Warrant and Waiver.

The constitutional guaranty against unreasonable searches and seizures does not apply where incriminating articles are revealed by the voluntary act of defendant or are in plain view of the officers. *S. v. Colson*, 339.

§ 2. Requisites and Validity of Search Warrant.

There was no error in admitting into evidence unexecuted copies of a search warrant and affidavit thereto. *S. v. Furr*, 616.

SHERIFFS.

§ 2. Deputies Sheriff.

The duties of a jailer and a deputy sheriff are separate and distinct, and a person acts either as deputy sheriff or jailer but not in both capacities. *Wilkie v. Henderson County*, 155.

STATUTES.

§ 4. Construction in Regard to Constitutionality.

A statute will not be declared unconstitutional unless it is clearly so. *S. v. Vines*, 208.

§ 5. General Rules of Construction.

Where the language of a statute is clear and unambiguous, there is no room for judicial construction. *Underwood v. Howland*, 560.

TAXATION.

§ 6. Necessary Expense and Necessity for Vote.

County commissioners may levy tax without a vote of the people for the purpose of supplementing teachers' salaries. *Harris v. Board of Commissioners*, 258.

§ 19. Exemption of Property and Transactions from Taxation in General.

Non-income producing property held by a municipal redevelopment commission is exempt from county or municipal ad valorem taxation. *Redevelopment Comm. v. Guilford County*, 512.

Exemptions from taxation are to be strictly construed. *Ibid.*

§ 21. Property of State and Political Subdivisions.

Non-income producing property held by a municipal redevelopment commission is exempt from county or municipal ad valorem taxation. *Redevelopment Comm. v. Guilford County*, 512.

§ 23. Construction of Tax Statutes in General.

Tax statutes are to be strictly construed against the State and in favor of the taxpayer. *In re Assessment of Franchise Taxes*, 133.

§ 25. Listing, Levy and Assessment of Property for Ad Valorem Taxes.

Mandamus will lie to compel county commissioners to include tobacco allotments as an element of value in the appraisal of real property for *ad valorem* taxes. *Stocks v. Thompson*, 201.

§ 26. Assessment of and Liabilities for Franchise and License Taxes.

Compensation received by telephone company for use of facilities to provide a private line service for transmitting communications outside the State held revenue for transmission of communications in interstate commerce and not rental revenue, and franchise tax is inapplicable. *In re Assessment of Franchise Taxes*, 133.

§ 34. Suit by Taxpayer to Restrain the Issuance of Bonds or Levy of Tax.

A taxpayer may maintain an action to restrain the levy of a tax on the

TAXATION—*Continued.*

ground that the tax itself is illegal or invalid or that the tax is for an illegal or unauthorized purpose. *Redevelopment Comm. v. Guilford County*, 512.

TELEPHONE AND TELEGRAPH COMPANIES.

§ 1. Control and Regulation.

A telephone or telegraph company is an instrument of commerce, and its business constitutes commerce. *In re Assessment of Franchise Taxes*, 133.

TRESPASS.

§ 6. Competency and Relevancy of Evidence.

In an action in trespass, testimony to the effect that plaintiff's plans for the construction of a building on its land were delayed as a result of defendant's acts in placing obstructions on the land, and that the delay resulting therefrom increased the cost of the building by $10,000, *is held* properly admitted in the absence of objection to the testimony relating to the increase in the cost of construction. *Academy of Dance Arts v. Bates*, 334.

§ 8. Damages in General.

In trespass action, evidence that a contractor obstructed plaintiff's use of his alleyway by dumping dirt and broken material thereon at the direction of defendant is sufficient to support allegations relating to punitive damages. *Academy of Dance Arts v. Bates*, 333.

TRESPASS TO TRY TITLE.

§ 1. Nature and Essentials of Right of Action.

In an action in trespass to try title plaintiff must allege and prove both title in himself and trespass by defendant. *Pruden v. Keemer*, 417.

§ 2. Presumptions, Pleadings and Burden of Proof.

Plaintiff must rely on the strength of his own title which he must prove by some method recognized by law. *Pruden v. Keemer*, 417.

§ 4. Sufficiency of Evidence and Nonsuit.

Plaintiff's evidence held insufficient to establish its title under the common source doctrine. *Pruden v. Keemer*, 417.

TRIAL.

§ 1. Notice and Calendars.

Whether a calendar of cases will be prepared rests in the discretion of the trial court. *Laws v. Laws*, 243.

Appellant's attorney failed to support his contentions that case was never properly calendared for trial. *Bost v. Bank*, 470.

§ 2. Call of Cases and Time of Trial.

There is no requirement that a defendant in an uncontested divorce action be given actual notice of the time of trial of the action at a criminal session of court. *Laws v. Laws*, 243.

§ 3. Motion for Continuance.

It is customary and proper for a lawyer to request a continuance when he has a conflict if he wants the case continued. *Bost v. Bank*, 470.

TRIAL—*Continued.*

§ 5. Course and Conduct of Trial in General.

The practice of reading the pleadings to the jury is not a matter of right but is to be determined by the trial court in its discretion. *Jackson v. Jones*, 71.

§ 13. Allowing Jury to Visit Exhibits or Scene.

It is within the discretion of the trial court to allow the jury to view the scene of an automobile collision. *Toler v. Brink's, Inc.*, 315.

An instruction permitting the jury to consider information obtained from a jury view as substantive evidence is error, the purpose of the jury view being solely to illustrate the testimony in the case. *Ibid.*

§ 18. Province of the Court and Jury in General.

Where the matter for determination raised by pleadings is an issue of law and not of fact, a motion for trial by jury is properly denied. *Bost v. Bank*, 470.

§ 19. Office and Effect of Motion to Nonsuit.

On motion to nonsuit, plaintiff's evidence is to be considered in the light most favorable to him. *R. R. Co. v. Dockery*, 195.

§ 21. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, plaintiff's evidence must be taken as true and considered in the light most favorable to him. *Wilson v. Dunn Co.*, 65; *Wilson v. Lee*, 119; *Geltman Corp. v. Neisler Mills*, 627; *Williams v. Hall*, 508.

On motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff, and the court may consider so much of defendant's evidence that tends to clarify or explain plaintiff's evidence. *Boyd v. Blake*, 20.

Discrepancies and contradictions even in plaintiff's evidence are matters for the jury and not the judge. *Williams v. Hall*, 508.

§ 33. Instructions as to Statement of Evidence and Application of Law Thereto.

It is the duty of the trial court to explain and apply the law arising on the evidence as to all substantial features of the case, and a statement of the contentions of the parties with respect to a particular issue is not sufficient to comply with G.S. 1-180. *Tate v. Golding*, 38.

The trial court is not required to give a verbatim recital of the testimony but must review the evidence only to the extent necessary to explain the application of the law thereto. G.S. 1-180. *In re Will of Head*, 575.

If trial judge's statement of the evidence does not correctly reflect the testimony of a witness in any particular respect, it must be called to his attention in apt time for correction. *Ibid.*

§ 34. Instructions on Burden of Proof.

Defendant cannot complain of an instruction which required plaintiffs to establish defendant's negligence "beyond a reasonable doubt". *Buffkin v. Gaskin*, 563.

§ 36. Instructions on Credibility of Witness.

It is not mandatory on the trial judge to charge the jury as to their consideration of the testimony of interested witnesses. *In re Will of Head*, 575.

§ 51. Setting Aside Verdict as Contrary to Weight of Evidence.

The granting of motion to set aside the verdict is within the discretion of

TRIAL—*Continued.*

the trial court where no question or law or legal inference is involved. *Paper Co. v. Multi-Ply Corp.*, 164.

§ 56. Trial and Hearing by the Court.

In a trial before the judge without a jury the presumption arises that the court disregarded incompetent evidence. *Construction Co. v. Housing Authority*, 181.

§ 57. Findings and Judgment of the Court, Appeal and Review.

A court sitting without a jury must find the ultimate facts necessary to support its conclusions, and its failure to do so is reversible error. *Watts v. Supt. of Building Inspection*, 292.

TRUSTS.

§ 1. Creation of Written Trusts in General.

The essentials for creation of a valid trust are sufficient words manifesting an intent to raise a trust, a definite subject or trust *res*, and an ascertained object. *Starling v. Taylor*, 287.

§ 5. Trusts for Private Beneficiaries: Construction, Operation and Modification.

An agreement between beneficiaries and the settlor of a trust to extend the life of the trust for ten years is invalid when all the beneficiaries did not consent thereto. *Starling v. Taylor*, 287.

§ 9. Revocation of Trusts.

A trust indenture containing no provision for revocation is an irrevocable trust. *Starling v. Taylor*, 287.

VENDOR AND PURCHASER.

§ 1. Requisites, Validity and Construction of Options in General.

The lease is a sufficient consideration to support specific performance of an option of purchase granted therein. *Speedways, Inc. v. Aman*, 227.

§ 2. Duration of Option and Time of Performance or Tender.

Where the terms of an option do not require payment of any part of the purchase price before the option is exercised but require merely that notice be given of the election to exercise the option, tender of the purchase price is not a prerequisite to the exercise of the option. *Speedways, Inc. v. Aman*, 227.

An option in a lease giving lessee the right to purchase the premises at any time is a continuing offer to sell and may not be withdrawn by the lessor within the time limited. *Ibid.*

VENUE.

§ 8. Removal for Convenience of Parties and Witnesses.

Motion to change venue for the convenience of witnesses is addressed to the trial court's discretion. *McLeod v. McLeod*, 396.

WILLS.

§ 22. Instructions Generally in Caveat Proceedings.

Trial court's reference in caveat proceedings to "the will" and "the codicil" of decedent will not be held for prejudicial error where the jury is clearly instructed that it is the sole judge of the facts. *In re Will of Honeycutt*, 595.