NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 2

SPRING SESSION 1968

FALL SESSION 1968

RALEIGH

1969

CITE THIS VOLUME

2 N.C.App.

TABLE OF CONTENTS

Judges of the Court of Appeals v

Superior Court Judges vi

District Court Judges,
Members of Industrial and Utilities Commissions ..... vii, viii

Attorney General, Superior Court Solicitors ix

Court of Appeals Calendar x

Table of Cases Reported xii

Tables of General Statutes, N. C. Constitution,
and Rules of Court of Appeals Construed xvii

Opinions of the Court of Appeals 1-685

Appendix: Amendments to Rules 687

Word and Phrase Index 692

Analytical Index 720

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

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.

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.

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.

JUDGES OF THE DISTRICT COURT OF NORTH CAROLINA

Name	*District*	*Address*
Fentress Horner (Chief)	First	Elizabeth City
William S. Privott	First	Edenton
Hallett S. Ward (Chief)	Second	Washington
Charles H. Manning	Second	Williamston
J. W. H. Roberts (Chief)	Third	Greenville
Charles H. Whedbee	Third	Greenville
Herbert O. Phillips, III	Third	Morehead City
Robert D. Wheeler	Third	Grifton
Harvey Boney (Chief)	Fourth	Jacksonville
Paul M. Crumpler	Fourth	Clinton
Russell J. Lanier	Fourth	Beulaville
Walter P. Henderson	Fourth	Trenton
H. Winfield Smith (Chief)	Fifth	Wilmington
Bradford Tillery	Fifth	Wilmington
Gilbert H. Burnett	Fifth	Wilmington
J. T. Maddrey (Chief)	Sixth	Harrellsville
Joseph D. Blythe	Sixth	Ahoskie
Ballard S. Gay	Sixth	Jackson
J. Phil Carlton (Chief)	Seventh	Pinetops
Allen W. Harrell	Seventh	Wilson
Tom H. Matthews	Seventh	Rocky Mount
Ben H. Neville	Seventh	Whitakers
Charles P. Gaylor (Chief)	Eighth	Goldsboro
Herbert W. Hardy	Eighth	Maury
Emmett R. Wooten	Eighth	Kinston
Lester W. Pate	Eighth	Kinston
Julius Banzet (Chief)	Ninth	Warrenton
Claude W. Allen, Jr.	Ninth	Oxford
Linwood T. Peoples	Ninth	Henderson
George F. Bason (Chief)	Tenth	Raleigh
Edwin S. Preston, Jr.	Tenth	Raleigh
S. Pretlow Winborne	Tenth	Raleigh
Henry V. Barnette, Jr.	Tenth	Raleigh
N. F. Ransdell	Tenth	Fuquay-Varina
Robert B. Morgan, Sr. (Chief)	Eleventh	Lillington
W. Pope Lyon	Eleventh	Smithfield
William I. Godwin	Eleventh	Selma
Woodrow Hill	Eleventh	Dunn
Derb S. Carter (Chief)	Twelfth	Fayetteville
Joseph E. Dupree	Twelfth	Raeford
Darius B. Herring, Jr.	Twelfth	Fayetteville
George Z. Stuhl	Twelfth	Fayetteville
Ray H. Walton (Chief)	Thirteenth	Southport
Giles R. Clark	Thirteenth	Elizabethtown
E. Lawson Moore (Chief)	Fourteenth	Durham
Thomas H. Lee	Fourteenth	Durham
Samuel O. Riley	Fourteenth	Durham
Harry Horton (Chief)	Fifteenth	Pittsboro
L. J. Phipps	Fifteenth	Chapel Hill
D. Marsh McLelland	Fifteenth	Burlington
Coleman Cates	Fifteenth	Burlington
Robert F. Floyd (Chief)	Sixteenth	Fairmont
Samuel E. Britt	Sixteenth	Lumberton
John S. Gardner	Sixteenth	Lumberton

Name	*District*	*Address*
E. D. Kuykendall, Jr. (Chief)	Eighteenth	Greensboro
Herman G. Enochs, Jr.	Eighteenth	Greensboro
Byron Haworth	Eighteenth	High Point
Elreta M. Alexander	Eighteenth	Greensboro
B. Gordon Gentry	Eighteenth	Greensboro
Edward K. Washington	Eighteenth	Jamestown
F. Fetzer Mills (Chief)	Twentieth	Wadesboro
Edward E. Crutchfield	Twentieth	Albemarle
Walter M. Lampley	Twentieth	Rockingham
A. A. Webb	Twentieth	Rockingham
Abner Alexander (Chief)	Twenty-first	Winston-Salem
Buford T. Henderson	Twenty-first	Winston-Salem
Rhoda B. Billings	Twenty-first	Winston-Salem
John Clifford	Twenty-first	Winston-Salem
A. Lincoln Shuerk	Twenty-first	Winston-Salem
J. Ray Braswell (Chief)	Twenty-fourth	Newland
J. E. Holshouser, Sr.	Twenty-fourth	Boone
Mary Gaither Whitener (Chief)	Twenty-fifth	Hickory
Joe H. Evans	Twenty-fifth	Hickory
Keith S. Snyder	Twenty-fifth	Lenoir
Willard I. Gatling (Chief)	Twenty-sixth	Charlotte
William H. Abernathy	Twenty-sixth	Charlotte
Howard B. Arbuckle	Twenty-sixth	Charlotte
J. Edward Stukes	Twenty-sixth	Charlotte
Claudia E. Watkins	Twenty-sixth	Charlotte
P. B. Beachum, Jr.	Twenty-sixth	Charlotte
William James Allran, Jr.[1] (Chief)	Twenty-seventh	Cherryville
Oscar F. Mason, Jr.	Twenty-seventh	Gastonia
Lewis Bulwinkle[2]	Twenty-seventh	Gastonia
Joe F. Mull	Twenty-seventh	Shelby
John R. Friday	Twenty-seventh	Lincolnton
Forrest I. Robertson (Chief)	Twenty-ninth	Rutherfordton
Robert T. Gash	Twenty-ninth	Brevard
Wade B. Matheny	Twenty-ninth	Forest City
F. E. Alley, Jr. (Chief)	Thirtieth	Waynesville
Robert J. Leatherwood, III	Thirtieth	Bryson City

[1]Resigned effective 1 February 1969. Succeeded by William A. Mason, Belmont.
[2]Appointed Chief Judge 1 February 1969.

NORTH CAROLINA UTILITIES COMMISSION

Chairman

Harry T. Westcott

Commissioners

Thomas R. Eller, Jr.[1] — M. Alexander Biggs, Jr.
John W. McDevitt — 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 — C. A. Dandelake
W. C. Delbridge — A. E. Leake

[1]Resigned 19 December 1968. Succeeded by Marvin R. Wooten 20 December 1968.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

ROBERT MORGAN[1]

Deputy Attorneys General

HARRY W. MCGALLIARD
RALPH MOODY
HARRISON LEWIS
JAMES F. BULLOCK
JEAN A. BENOY[2]

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[3]

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

[1]Succeeded Thomas Wade Bruton 3 January 1969.
[2]Appointed 1 February 1969.
[3]Resigned effective 31 December 1968.

CALL OF THE CALENDAR IN THE COURT OF APPEALS

FALL SESSION, 1968

(Showing when records and briefs must be filed.)

The Court of Appeals will meet in the city of Raleigh in the Old Supreme Court (old library) Building, 3rd Floor Court of Appeals Courtroom, on Tuesdays for the Call of the Calendar as follows:

THIRD DIVISION

SEVENTEENTH AND TWENTY-FIRST DISTRICTS appeals will be called Tuesday, August 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, July 23, 1968.

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

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

EIGHTEENTH AND NINETEENTH DISTRICTS appeals will be called Tuesday, August 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, July 30.

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

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

TWENTIETH, TWENTY-SECOND AND TWENTY-THIRD DISTRICTS appeals will be called Tuesday, September 3, 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, August 6.

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

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

SECOND DIVISION

NINTH, TWELFTH AND THIRTEENTH DISTRICTS appeals will be called Tuesday, September 17, 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, August 20.

Appellant's brief must be filed by noon of August 27.

Appellee's brief must be filed by noon of September 3.

TENTH AND ELEVENTH DISTRICTS appeals will be called Tuesday, September 24, 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, August 27.

Appellant's brief must be filed by noon of September 3.

Appellee's brief must be filed by noon of September 10.

FOURTEENTH, FIFTEENTH AND SIXTEENTH DISTRICTS appeals will be called Tuesday, October 1, 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, September 3.

Appellant's brief must be filed by noon of September 10.

Appellee's brief must be filed by noon of September 17.

FOURTH DIVISION

TWENTY-SIXTH, TWENTY-NINTH AND THIRTIETH DISTRICTS appeals will be called Tuesday, October 22, 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, September 24.

Appellant's brief must be filed by noon of October 1.

Appellee's brief must be filed by noon of October 8.

TWENTY-FOURTH, TWENTY-FIFTH, TWENTY-SEVENTH AND TWENTY-EIGHTH DISTRICTS appeals will be called Tuesday, October 29, 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, October 1.

Appellant's brief must be filed by noon of October 8.

Appellee's brief must be filed by noon of October 15.

FIRST DIVISION

FIRST, SECOND, THIRD AND SEVENTH DISTRICTS appeals will be called Tuesday, November 19, 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, October 22.

Appellant's brief must be filed by noon of October 29.

Appellee's brief must be filed by noon of November 5.

FOURTH, FIFTH, SIXTH AND EIGHTH DISTRICTS appeals will be called Tuesday, November 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, October 29.

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

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

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

18 September	9 October	13 November	11 December
25 September	16 October	20 November	18 December
	23 October		

The following fees are payable in advance.

Upon docketing the appeal	$10.00
Motion to docket and dismiss Under Rule 17	14.00
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.

CASES REPORTED

PAGE

A

A. & P. Tea Co., Colclough v. 504
Acceptance Corp., Bank v. 319
Adams, S. v. 282
Ætna Casualty & Surety Company, Torres v. 208
Airport Authority v. Irvin. 341
Allen, Parker v. 436
Anderson v. Robinson. 191
Asheville, Cole v. 652
Atlantic Discount Corporation v. Mangel's. 472
Attorney General, Utilities Comm. v. 657
Auto Supply Co., Inc. v. Equipment Co., Inc. 531

B

Bailey v. Dept. of Mental Health. 645
Bailiff, S. v. 608
Bank v. Acceptance Corp. 319
Beamon, S. v. 583
Bell v. Page. 132
Berry, Church v. 617
Berry, Trust Co. v. 547
Bladen County ex rel Parker v. Allen. 436
Blakeney v. State. 312
Blue Bird Cab Company, Inc., Priddy v. 331
Board of Adjustment, Jackson v. 408
Brady v. Coach Co. 174
Bridgers, Builders, Inc. 662
Britton v. Gabriel. 213
Brooks, S. v. 115
Brooks v. University. 157
Bryan v. Elevator Co. 593
Buie v. Phillips. 447
Builders, Inc. v. Bridgers. 662
Burgess, S. v. 677
Burlington Belt Corp. v. Clark Bldg. Co. 97
Burlington Belt Corp., Pickard v. 97
Bynum, Pelkey v. 183
Byrd, S. v. 109

C

Cab Co., Priddy v. 331
Campbell, S. v. 406

PAGE

Carolina Coach Company, Brady v. 174
Carroll v. Parker. 573
Carter, Taylor v. 78
Casualty Co. v. Hall. 198
Cates, Massey v. 162
Causey, Daniels v. 456
Chambers v. Redevelopment Comm. 355
Charlotte Civil Service Board v. Page. 34
Charlotte Motor Speedway, Inc., Pardue v. 403
Charlotte v. Robinson. 429
Church v. Berry. 617
City of Asheville, Cole v. 652
City of Charlotte Civil Service Board v. Page. 34
City of Charlotte v. Robinson. 429
City of High Point Redevelopment Comm., Chambers v. 355
City of Randleman v. Hinshaw. 381
City of Randleman v. Hudson. 404
City of Winston-Salem v. Plemmons. 373
Civil Service Board v. Page. 34
Clark Building Co., Burlington Belt Corp. v. 97
Clark v. Morris. 388
Clayton, Comr. of Revenue, Rigby v. 57
Clemmons v. Insurance Co. 479
Coach Co., Brady v. 174
Colclough v. A. & P. Tea Co. 504
Cole v. City of Asheville. 652
Colvard Oil Company, Inc. v. Highway Comm. 1
Commissioner of Revenue, Rigby v. 57
Conyers, S. v. 637
Cooper, Puryear v. 517
Cotten, S. v. 305
County of Bladen ex rel Parker v. Allen. 436
County of Forsyth v. Plemmons. 373
County of Guilford Board of Adjustment, Jackson v. 408
Craven, S. v. 611

D

Daniels v. Causey. 456
Dean, Smith v. 553

PAGE

De Lotbiniere v. Trust Co..... 252
Department of Mental Health, Bailey v..... 645
Development Corp., Dorsett v..... 120
Development Corp., Mortgage Corp. v..... 138
Diamond Mills Co., Lewis v..... 400
Discount Corp. v. Mangel's..... 472
D. M. Wright Builders, Inc. v. Bridgers..... 662
Dorsett v. Development Corp..... 120
Dry Cleaners, Shelton v..... 528

E

Eaton v. Klopman Mills, Inc..... 363
Edens v. Foulks..... 325
Electric Motor & Repair Company, Inc. v. Morris & Associates..... 72
Elevator Co., Bryan v..... 593
Episcopal Church v. Berry..... 617
Equipment Co., Inc., Auto Supply Co., Inc. v..... 531
Equipment, Inc. v. Highway Comm. 1

F

Farmers Equipment, Inc. v. Highway Comm..... 1
Fayetteville Tractor and Equipment Co., Inc., Auto Supply Co., Inc. v..... 531
Fire Insurance Rating Bureau, *In re* Filing by..... 10
First-Citizens Bank & Trust Company v. Berry..... 547
Forsyth County v. Plemmons..... 373
Foster, S. v..... 109
Foulks, Edens v..... 325
Fuller, S. v..... 204
Furlong, S. v..... 115
Furniture Industries, Inc., Morgan v..... 126

G

Gabriel, Britton v..... 213
Gibson, S. v..... 187
Glass, Lienthall v..... 65
Glens Falls Insurance Co., Clemmons v..... 479
Goldston v. Lynch..... 291
Goodyear Mortgage Corp. v. Development Corp..... 138

PAGE

Great Atlantic & Pacific Tea Company, Inc., Colclough v..... 504
Green, S. v..... 170
Green, S. v..... 221
Green, S. v..... 391
Greensboro-High Point Airport Authority v. Irvin..... 341
Group Development Corporation, Dorsett v..... 120
Guilford County Board of Adjustment, Jackson v..... 408

H

Hall, Casualty Co. v..... 198
Hamrick, S. v..... 227
Harper, Inman v..... 103
Hickman, S. v..... 627
High Point Redevelopment Comm., Chambers v..... 355
Highway Comm., Equipment, Inc. v..... 1
Highway Comm., Hughes v..... 1
Highway Commission v. Matthis..... 233
Highway Comm. v. Mode..... 464
Highway Comm., Oil Co., Inc. v..... 1
Highway Commission v. Rankin..... 452
Highway Comm., Shephard v..... 223
Highway Comm. v. Thomas..... 679
Hill, Matthews v..... 350
Hinshaw, Randleman v..... 381
Hodge v. Robertson..... 216
Home Security Life Insurance Company, Kinney v..... 597
Hudson, Randleman v..... 404
Hughes v. Highway Comm..... 1
Hughes, Strickland v..... 395

I

Inman v. Harper..... 103
In re Custody of Pitts..... 211
In re Estate of Nixon..... 422
In re Filing by Fire Ins. Rating Bureau..... 10
Insurance Co., Clemmons v..... 479
Insurance Co., Kinney v..... 597
Insurance Co., Williams v..... 520
Irvin, Airport Authority v..... 341

J

Jackson v. Board of Adjustment..... 408
Jackson v. Jones..... 441
Johnson, Petree v..... 336
Jones, Jackson v..... 441

PAGE

K

Kinney v. Insurance Co. 597
Klopman Mills, Inc., Eaton v. 363

L

Lanier v. Roses Stores, Inc. 501
Leaf Tobacco Exporters Association, Utilities Comm. v. 657
Lewis v. Diamond Mills Co. 400
Lienthall v. Glass 65
L. M. Parker & Co., Patterson v. 43
Long, S. v. 398
Lovedahl, S. v. 513
Lowe, Payne v. 369
Lynch, Goldston v. 291

Mc

McDowell, Summey v. 360
McEachern, S. v. 115
McLean, S. v. 460

M

Madam (X), S. v. 615
Mangel's of North Carolina, Inc., Discount Corp. v. 472
Mann, S. v. 529
Martin, S. v. 148
Maryland Casualty Co. v. Hall 198
Massey v. Cates 162
Matthews v. Hill 350
Matthews v. Matthews 143
Matthis, Highway Commission v. 233
Maynor v. Townsend 19
Meir v. Walton 578
Mercer, S. v. 152
Mode, Highway Comm. v. 464
Montclair Development Corp., Mortgage Corp. v. 138
Morgan v. Furniture Industries, Inc. 126
Morris, Clark v. 388
Morris, S. v. 262
Morris, S. v. 611
Morris & Associates, Repair Co. v. 72
Mortgage Corp. v. Development Corp. 138
Morton, Womble v. 84
Moss v. Railway Co. 50

N

Nance v. Williams 345
Newman Machine Co. v. Newman 491
Newman, Newman Machine Co. v. 491
Newman, York v. 484
Nixon, *In re* Estate of 422
Nolan, S. v. 513
N. C. Attorney General, Utilities Comm. v. 657
N. C. Commissioner of Revenue, Rigby v. 57
N. C. Department of Mental Health, Bailey v. 645
N. C. Fire Insurance Rating Bureau, *In re* Filing by 10
N. C. Highway Comm., Equipment, Inc. v. 1
N. C. Highway Comm., Hughes v. 1
N. C. Highway Commission v. Matthis 233
N. C. Highway Comm. v. Mode 464
N. C. Highway Comm., Oil Co., Inc., v. 1
N. C. Highway Comm. v. Rankin 452
N. C. Highway Comm., Shephard v. 223
N. C. Highway Comm. v. Thomas 679
N. C. State Bar v. Temple 91
North Carolina University, Brooks v. 157

O

Oil Company, Inc. v. Highway Comm. 1
Otis Elevator Company, Bryan v. 593
Owens v. Taylor 178

P

Page, Bell v. 132
Page, Civil Service Board v. 34
Pardue v. Speedway, Inc. 403
Parker v. Allen 436
Parker, Carroll v. 573
Parker & Co., Patterson v. 43
Parker v. State 27
Parrish, S. v. 587
Patterson v. Parker & Co. 43
Patton, S. v. 605
Payne v. Lowe 369
Peguise, S. v. 526
Pelkey v. Bynum 183
Petree v. Johnson 336
Petroleum Transportation, Inc., Utilities Comm. v. 566
Phillips, Buie v. 447
Pickard v. Burlington Belt Corp. 97
Pitts, *In re* Custody of 211

PAGE

Plemmons, Forsyth County v. 373
Plemmons, Winston-Salem v. 373
Priddy v. Cab Co. 331
Puryear v. Cooper 517
Pyramid Life Insurance Co., Williams v. 520

R

Railway Co., Moss v. 50
Randleman v. Hinshaw 381
Randleman v. Hudson 404
Rankin, Highway Commission v. 452
Ransom, S. v. 613
Rating Bureau, *In re* Filing by 10
Redevelopment Comm. of High Point, Chambers v. 355
Rehm v. Rehm 298
Repair Co. v. Morris & Associates 72
Richardson, S. v. 523
Rigby v. Clayton, Comr. of Revenue 57
Robertson, Hodge v. 216
Robinson, Anderson v. 191
Robinson, Charlotte v. 429
Rogers v. Rogers 668
Roses Stores, Inc., Lanier v. 501
Russ, S. v. 377

S

St. Luke's Episcopal Church v. Berry 617
Schlosser, Smothers v. 272
Shelton v. Dry Cleaners 528
Shephard v. Highway Comm. 223
Siler, S. v. 683
Smith v. Dean 553
Smothers v. Schlosser 272
Snead, S. v. 407
Southern National Bank of N. C. v. Acceptance Corp. 319
Southern Railway Co., Moss v. 50
Speedway, Inc., Pardue v. 403
Spic and Span Dry Cleaners, Shelton v. 528
S. v. Adams 282
S. v. Bailiff 608
S. v. Beamon 583
State, Blakeney v. 312
S. v. Brooks 115
S. v. Burgess 677
S. v. Byrd 109
S. v. Campbell 406
S. v. Conyers 637

PAGE

S. v. Cotten 305
S. v. Craven 611
S. v. Foster 109
S. v. Fuller 204
S. v. Furlong 115
S. v. Gibson 187
S. v. Green 170
S. v. Green 221
S. v. Green 391
S. v. Hamrick 227
S. v. Hickman 627
S. v. Long 398
S. v. Lovedahl 513
S. v. McEachern 115
S. v. McLean 460
S. v. Madam (X) 615
S. v. Mann 529
S. v. Martin 148
S. v. Mercer 152
S. v. Morris 262
S. v. Morris 611
S. v. Nolan 513
State, Parker v. 27
S. v. Parrish 587
S. v. Patton 605
S. v. Peguise 526
S. v. Ransom 613
S. v. Richardson 523
S. v. Russ 377
S. v. Siler 683
S. v. Snead 407
S. v. Thompson 508
S. v. Walker 148
S. v. White 398
S. v. Whitt 601
S. v. Williams 194
S. v. Withers 201
S. v. Woodlief 495
S. *ex rel* Parker v. Allen 436
S. *ex rel* Utilities Comm. v. Petroleum Transportation, Inc. 566
S. *ex rel* Utilities Comm. v. Tobacco Association 657
State Bar v. Temple 91
State Commissioner of Revenue, Rigby v. 57
State Department of Mental Health, Bailey v. 645
State Highway Comm., Equipment, Inc. v. 1
State Highway Comm., Hughes v. 1
State Highway Commission v. Matthis 233

	PAGE
State Highway Comm. v. Mode	464
State Highway Comm., Oil Co., Inc. v.	1
State Highway Commission v. Rankin	452
State Highway Comm., Shephard v.	223
State Highway Comm. v. Thomas	679
Strickland v. Hughes	395
Summey v. McDowell	360
Surety Co., Torres v.	208

T

Taylor v. Carter	78
Taylor, Owens v.	178
Temple, State Bar v.	91
Thomas, Highway Comm. v.	679
Thomasville Furniture Industries, Inc., Morgan v.	126
Thompson, S. v.	508
Tobacco Association, Utilities Comm. v.	657
Torrence, Warner v.	384
Torres v. Surety Co.	208
Townsend, Maynor v.	19
Tractor and Auto Supply Company, Inc. v. Equipment Co., Inc.	531
Trammell v. Trammell	166
Trust Co. v. Berry	547
Trust Co., De Lotbiniere v.	252

U

Universal Acceptance Corp., Bank v.	319
University of North Carolina, Brooks v.	157
Utilities Comm. v. Petroleum Transportation, Inc.	566
Utilities Comm. v. Tobacco Association	657

W

Wachovia Bank and Trust Co., De Lotbiniere v.	252
Walker, S. v.	148
Walton, Meir v.	578
Warner v. Torrence	384
Watkins, Yancey v.	672
White, S. v.	398
Whitt, S. v.	601
Williams v. Insurance Co.	520
Williams, Nance v.	345
Williams, S. v.	194
Willis v. Willis	219
Winston-Salem v. Plemmons	373
Withers, S. v.	201
Womble v. Morton	84
Woodlief, S. v.	495
Wright Builders, Inc. v. Bridgers	662

Y

Yancey v. Watkins	672
York v. Newman	484

G.S.	
1-65.2	*De Lotbiniere v. Trust Co.*, 252.
1-65.4	*De Lotbiniere v. Trust Co.*, 252.
1-69	*Torres v. Surety Co.*, 208.
1-73	*Casualty Co. v. Hall*, 198.
1-122	*Highway Commission v. Matthis*, 233.
1-131	*Pardue v. Speedway, Inc.*, 403.
1-151	*Auto Supply Co., Inc. v. Equipment Co., Inc.*, 531.
1-180	*Pickard v. Burlington Belt Corp.*, 97.
	Nance v. Williams, 345.
	Payne v. Lowe, 369.
	Smith v. Dean, 553.
	State v. Patton, 605.
1-189(1)	*Britton v. Gabriel*, 213.
1-201	*State v. Peguise*, 526.
1-220	*Meir v. Walton*, 578.
1-240	*Casualty Co. v. Hall*, 198.
1-253	*Newman Machine Co. v. Newman*, 491.
1-261	*York v. Newman*, 484.
1-276	*In re Estate of Nixon*, 422.
1-282	*State v. Hickman*, 627.
1-283	*State v. Hickman*, 627.
1-352	*Massey v. Cates*, 162.
1-363	*Massey v. Cates*, 162.
1-507.2	*Trust Co. v. Berry*, 547.
1-507.3	*Trust Co. v. Berry*, 547.
1-507.6	*Auto Supply Co., Inc. v. Equipment Co., Inc.*, 531.
	Trust Co. v. Berry, 547.
6-21.1	*Rogers v. Rogers*, 668.
7-166	*Rehm v. Rehm*, 298.
7-296	*Rehm v. Rehm*, 298.
7A-196(e)	*State v. Thompson*, 508.
Ch. 7A, Art. 22	*State v. Thompson*, 508.
7A-272	*State v. Thompson*, 508.
7A-288	*State v. Thompson*, 508.
8-34	*State v. Beamon*, 583.
8-51	*Smith v. Dean*, 553.
14-27.1	*State v. Thompson*, 508.
14-34	*State v. Adams*, 282.
14-52	*Parker v. State*, 27.
14-54	*Blakeney v. State*, 312.
14-72	*State v. Cotten*, 306.
14-72.1	*State v. Thompson*, 508.
14-136	*Pickard v. Burlington Belt Corp.*, 97.
14-140	*Pickard v. Burlington Belt Corp.*, 97.
14-256	*State v. Whitt*, 601.
15-162.1	*Parker v. State*, 27.
15-170	*State v. McLean*, 460.
15-177.1	*State v. Morris*, 262.
	State v. Thompson, 508.
15-179	*State v. Peguise*, 526.
15-180	*State v. Hickman*, 627.
15-217	*Parker v. State*, 27.
	State v. Hamrick, 227.
15-218	*State v. Green*, 391.

15-222	*State v. Green*, 391.
17-3	*State v. Hamrick*, 227.
17-7	*State v. Green*, 391.
20-71.1	*State v. Cotten*, 306.
20-134	*Puryear v. Cooper*, 517.
20-140	*Nance v. Williams*, 345.
20-141(a)	*Pelkey v. Bynum*, 183.
20-141(c)	*Pelkey v. Bynum*, 183.
	Rogers v. Rogers, 668.
20-149(b)	*Inman v. Harper*, 103.
20-154(a)	*Petree v. Johnson*, 336.
20-156(a)	*Payne v. Lowe*, 369.
20-158(a)	*Payne v. Lowe*, 369.
20-161(a)	*Puryear v. Cooper*, 517.
20-161.1	*Lienthall v. Glass*, 65.
Ch. 40	*Highway Commission v. Matthis*, 233.
	Highway Comm. v. Mode, 464.
40-11	*Hughes v. Highway Comm.*, 1.
	Highway Commission v. Matthis, 233.
40-12	*Highway Commission v. Matthis*, 233.
40-19	*Airport Authority v. Irvin*, 341.
40-26	*Hughes v. Highway Comm.*, 1.
41-10	*York v. Newman*, 484.
46-34	*In re Estate of Nixon*, 422.
47-39	*Trammell v. Trammell*, 166.
50-11.1	*Rehm v. Rehm*, 298.
50-13.2(a)	*In re Custody of Pitts*, 211.
52-6	*Trammell v. Trammell*, 166.
58-131.2	*In re Filing by Fire Ins. Rating Bureau*, 10.
58-176	*In re Filing by Fire Ins. Rating Bureau*, 10.
62-49	*Utilities Comm. v. Petroleum Transportation, Inc.*, 566.
62-146(g)	*Utilities Comm. v. Tobacco Association*, 657.
84-28	*State Bar v. Temple*, 91.
97-2(1)	*Patterson v. Parker & Co.*, 43.
97-13	*Patterson v. Parker & Co.*, 43.
97-24	*Shelton v. Dry Cleaners*, 528.
97-80	*Hodge v. Robertson*, 216.
97-85	*Eaton v. Klopman Mills, Inc.*, 363.
97-86	*Morgan v. Furniture Industries, Inc.*, 126.
97-90(c)	*Priddy v. Cab Co.*, 331.
105-21	*Rigby v. Clayton, Comr. of Revenue*, 57.
116-22	*In re Estate of Nixon*, 422.
116-23	*In re Estate of Nixon*, 422.
Ch. 136	*Highway Commission v. Matthis*, 233.
	City of Charlotte v. Robinson, 429.
	Highway Comm. v. Mode, 464.
	Highway Commission v. Thomas, 678.
136-19	*Hughes v. Highway Comm.*, 1.
	Highway Commission v. Matthis, 233.
136-72	*Shephard v. Highway Comm.*, 223.
136-103	*City of Charlotte v. Robinson*, 429.
Ch. 143, Art. 33	*Civil Service Bd. v. Page*, 34.
153-9(17)	*Owens v. Taylor*, 178.
153-220	*State v. Whitt*, 601.
153-266.17	*Jackson v. Board of Adjustment*, 408.

CONSTITUTION OF NORTH CAROLINA CONSTRUED

Art. III, § 13	*State v. Hickman*, 627.
Art. VII, § 6	*Cole v. City of Asheville*, 652.

RULES OF PRACTICE CONSTRUED

No. 19	*Civil Service Board v. Page*, 34. *Auto Supply Co., Inc. v. Equipment Co., Inc.*, 531. *State v. Hickman*, 627.
No. 19(a)	*State v. Martin*, 148.
No. 19(c)	*State v. Martin*, 148. *State v. Green*, 170. *Hodge v. Robertson*, 216. *State v. Cotten*, 305.
No. 19(d)(2)	*Inman v. Harper*, 103. *State v. Mercer*, 152. *Shephard v. Highway Comm.*, 223. *State v. Cotten*, 305.
No. 20(c)	*Moss v. Railway Co.*, 50. *Yancey v. Watkins*, 672.
No. 21	*State v. Green*, 170.
No. 28	*State v. Martin*, 103. *Goldston v. Lynch*, 291. *Trust Co. v. Berry*, 547.
No. 31	*Highway Comm. v. Mode*, 467.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

SPRING SESSION, 1968

WILLIAM L. HUGHES, JR., v. NORTH CAROLINA STATE HIGHWAY COMMISSION

AND

COLVARD OIL COMPANY, INC., v. NORTH CAROLINA STATE HIGHWAY COMMISSION

AND

FARMERS EQUIPMENT, INC., v. NORTH CAROLINA STATE HIGHWAY COMMISSION

No. 68SC92

(Filed 14 August 1968)

1. Eminent Domain § 7; Highways and Cartways § 5— rights of way — acquisition by Highway Commission

The State Highway Commission can acquire right-of-way easements by (1) purchase or agreement, (2) donation, (3) dedication, (4) prescription, or (5) condemnation.

2. Eminent Domain § 7; Highways and Cartways §§ 1, 5— rights of way — acquisition by condemnation or seizure

As written prior to 1959, G.S. 136-19 authorized the Highway Commission to acquire land for highway rights of way by condemnation or by merely seizing the property and appropriating it to public use.

3. Eminent Domain §§ 7, 13; Highways and Cartways § 9— rights of way — acquisition by seizure — owner's remedy

When the Highway Commission entered and seized land for highway purposes without instituting condemnation proceedings, the owner's remedy was to institute proceedings for compensation under G.S. 136-19 and G.S. 40-11 *et seq.*

4. Eminent Domain § 1— condemnation and eminent domain — definition

The terms "condemnation" and "eminent domain" by definition admit

that the condemnor did not own or have title to the land, but that it took or appropriated the property of another for a public use.

5. Eminent Domain §§ 7, 13— rights of way — proceeding by owner for compensation

A proceeding instituted pursuant to G.S. 136-19 and G.S. 40-11 *et seq.* seeking compensation for land appropriated by the Highway Commission for highway rights of way is a condemnation proceeding rather than an action to try title.

6. Eminent Domain §§ 7, 15— rights of way — condemnation — time of passage of title

Under the 1959 amendment to G.S. 136-19, title to property condemned passes to the Highway Commission upon the filing of a petition and declaration of taking and the deposit of certain funds with the clerk of court.

7. Eminent Domain §§ 7, 15— rights of way — condemnation — time of passage of title

Prior to the 1959 amendment to G.S. 136-19, the title to property condemned was not divested from the owner unless and until the Highway Commission obtained a final judgment in its favor and paid the owner the damages fixed by the judgment.

8. Eminent Domain § 13; Lis Pendens— condemnation proceedings by owner — grantees take title subject to proceedings

A proceeding in condemnation under G.S. 136-19 and G.S. 40-11 *et seq.* instituted by the owner prior to the owner's conveyance of the property in question may be carried on and perfected as if no conveyance had been made, G.S. 40-26, and the proceeding constitutes a *lis pendens* so that persons acquiring title by *mesne* conveyances from the owner after the proceeding was begun take title to the land subject to the special proceeding and the judgment entered therein.

9. Deeds § 14; Easements § 2— reservation of highway rights of way — description

A statement in a deed following the description that the property conveyed consisted of all the land of the grantor lying between the main right of way of a designated highway and a certain road, "not including any part of said highways within said right of way lines" *is held* sufficiently definite to reserve title to the highway rights of way in the grantor.

APPEAL by defendant from *Gwyn, J.*, at the December 1967 Session of WILKES Superior Court.

This appeal consists of three separate civil actions involving claims against the North Carolina State Highway Commission (Commission) for alleged damages resulting from the widening of N. C. Highways 268 and 18 in the Town of North Wilkesboro, N. C. By agreement the three actions were consolidated for purpose of hearing and were submitted upon an agreed statement of facts.

Plaintiffs Colvard Oil Company, Inc. (Colvard) and Farmers Equipment, Inc., (Farmers) own certain property located adjacent to the highways aforesaid; plaintiff W. L. Hughes, Jr., (Hughes) is the lessee of the land owned by Colvard which is the subject of Colvard's action.

In 1911, one Henry T. Blair (Blair) acquired title to a tract of land in Wilkes County, in or near the Town of North Wilkesboro (Town). In 1938, the Commission, acting in accordance with an agreement with the Town, started its project No. 7806 for the improvement of what are now designated as Highways 268 and 18. A section of this project went through a portion of Blair's land, and construction was completed on 7 July 1940.

On 27 January 1940, Blair instituted a special proceeding before the Clerk of Superior Court for Wilkes County against Commission and the Town pursuant to Chapter 40 of the General Statutes. In his petition, Blair alleged that Commission and Town took a 100-foot right-of-way through his land for the construction of three roads during the year 1939, that Commission and Town had refused to pay him for the land taken, that said taking was done over his protest, and that he was entitled to recover $10,000 compensation. Answers were filed by Town and Commission admitting the taking of right-of-way but denying damages to Blair's property.

In August, 1945, Blair conveyed certain lands, including the lands in question now owned by Colvard and Farmers, to T. J. Frazier and wife (Frazier). The deed, duly recorded, contained the following language after the description: ". . . being all of the land of Henry T. Blair lying between the main right of way of Highway 268, the southern connecting road between Highway 268 and Highway 18, not including any part of said highways within said right of way lines." Thereafter, Frazier prepared a subdivision map of the property which was recorded in Wilkes County Registry on 12 July 1946; the map was entitled "Sunset Hills Addition to the Town of North Wilkesboro, Section 1" and indicated the location of Highways 268 and 18 but did not indicate the width of the right-of-way for said highways.

On 12 July 1946, Frazier conveyed Lot No. 1, as shown on the recorded map, to Colvard, and the deed contains the following language: "This deed is made subject to and shall conform with the State Highway right of way." Colvard proceeded to construct a gasoline service station on its lot and caused the area from its building to the edge of the highway pavement to be paved.

By deed dated 11 July 1946, Frazier conveyed certain lots as

shown on the recorded map to one Crawford and Eller; by *mesne* conveyances, Farmers acquired title to the Crawford and Eller property. At least one of the deeds in the chain of title between Frazier and Farmers contained the following language after the description: "This deed shall conform and is subject to the State Highway right of way."

On 23 November 1951, the Clerk of Wilkes County Superior Court terminated the special proceeding between Blair and Commission and Town by entering a judgment consented to by Blair, the Commission, the Town, and their attorneys. The judgment, *inter alia,* decreed that Commission acquired certain easements of rights-of-way prior to 7 July 1940, said easements being described by courses and distances with a width of 100 feet or more for Highways 268 and 18; the judgment provided that Blair was being paid $750.00 as just compensation for the taking.

In February, 1964, Commission let the contract for its Project 6.800573, Wilkes County, which project consisted of grading, draining, widening, surfacing, and installing combination curb and gutter from a point at the intersection of Highways 268 and 18 along Highway 268 for approximately 0.9 mile. The project was duly completed on 1 November 1964, and all of the work done was within the 100-foot right-of-way embraced in the Blair consent judgment aforesaid.

Plaintiffs filed separate actions alleging damages. Colvard and Farmers alleged that Commission took a portion of their lands for highway purposes. Hughes alleged that he was the lessee of Colvard and that he was damaged by the taking. Commission filed answer in each of the three cases, denied the taking, and pleaded the Blair judgment in bar of any recovery.

Plaintiffs contend that Commission did not own a 100-foot wide right-of-way but that it owned only an easement between two ditches.

Following the hearing, Judge Gwyn entered judgment as follows:

> "Upon the agreed statement of facts the Court is of the opinion that by the Judgment in the Blair case dated November 23, 1951, the plaintiffs were not divested of their title to the lands in controversy;
>
> "IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the plaintiffs are the owners of the lands described in the Petition in the Blair case as embraced within the 100-foot right-of-way, exclusive of so much of the right-of-way as was used, from ditch to ditch, for the actual construction of the highway. It is

further adjudged that the plaintiffs are entitled to compensation for their lands embraced within the 100-foot right-of-way and which were appropriated for the widening of Highway 268 and Highway 18, as alleged in the pleadings.

"The plaintiffs are permitted to amend their pleadings to make more definite, by metes, bounds and markers, the description of the lands alleged to have been appropriated by the State Highway Commission as embraced within the said 100-foot right-of-way."

Commission entered various exceptions to the judgment and appealed.

McElwee & Hall by John E. Hall and Moore & Rousseau by Julius A. Rousseau, Jr., attorneys for plaintiff appellees.

T. Wade Bruton, Attorney General, by Harrison Lewis, Deputy Attorney General, and Charles M. Hensey, Trial Attorney, for defendant appellant.

BRITT, J.

The question presented by this appeal can be stated as follows: Did Commission, by virtue of the 1951 judgment in the special proceeding instituted by Blair in 1940, acquire an easement approximately 100 feet wide in the land in question as against plaintiffs who were not parties to the special proceeding and acquired their title indirectly from Blair between 1945 and 1951? The answer is yes.

The proceeding instituted by Blair in 1940 was initiated pursuant to the provisions of G.S. 40-12 *et seq.* (Vol. 2A, G.S. N.C., 1950 Recompilation). This procedure was directed by G.S. 136-19, which — prior to the 1959 amendment — provided in relevant part as follows:

"The State Highway and Public Works Commission is vested with the power to acquire such rights of way and title to such land . . . as it may deem necessary and suitable for road construction . . . either by purchase, donation, or condemnation, in the manner hereinafter set out.

"Whenever the Commission and the owner or owners of the lands . . . required by the Commission . . . are unable to agree as to the price thereof, the Commission is hereby vested with the power to condemn the lands . . . and in so doing the ways, means, methods, and procedure of Chapter 40, entitled

'Eminent Domain,' shall be used by it as near as the same is suitable for the purposes of this section. . . .

"In case condemnation shall become necessary, the Commission is authorized to enter the lands and take possession of the same . . . prior to bringing the proceedings for condemnation, and prior to the payment of the money for said property.

"In the event the owner or owners shall appeal from the report of the commissioners, it shall not be necessary for the Commission to deposit the money assessed with the clerk, but it may proceed and use the property to be condemned until the final determination."

[1] North Carolina statutes and court decisions set forth the following methods by which the Highway Commission can acquire right-of-way easements: (1) purchase or agreement; (2) donation; (3) dedication; (4) prescription; or (5) condemnation.

Obviously, the Commission acquired a right-of-way easement over a portion of the Blair property; a consideration of the various methods leads us to conclude that the easement the Commission acquired was by condemnation.

[2] The statutory and case law of our State provide without question that the Highway Commission can acquire highway rights-of-way by condemnation. G.S. 136-19; *Browning v. Highway Commission,* 263 N.C. 130, 139 S.E. 2d 227. As written prior to 1959, G.S. 136-19 provided that the Commission could acquire land for highway rights-of-way by condemnation and that the Commission could enter lands and take possession prior to bringing the condemnation proceeding. In discussing G.S. 136-19 in *Moore v. Clark,* 235 N.C. 364, 70 S.E. 2d 182, Ervin, J., said:

"The State Highway . . . Commission possesses the sovereign power of eminent domain, and by reason thereof can take private property for public use for highway purposes. G.S. 136-19 . . . The Commission may do this either by bringing a special proceeding against the owner for the condemnation of the property under G.S. 136-19, or by actually seizing the property and appropriating it to public use. . . . *The owner is at liberty to bring such proceeding against the Commission in case the latter takes his property merely by seizing it and appropriating it to public use for highway purposes. . . .*" (Emphasis added.)

[3] For the purposes of this appeal, it can be assumed that the Commission entered and seized a portion of Blair's land in 1938 or

1939. When this occurred, the proper remedy was to institute proceedings under G.S. 136-19. *Moore v. Clark, supra; McKinney v. Highway Commission,* 192 N.C. 670, 135 S.E. 772; *Jennings v. Highway Commission,* 183 N.C. 68, 110 S.E. 583. At that time, G.S. 136-19 provided that — as nearly as possible — the procedures and methods provided in G.S. 40-11 *et seq.* should be used. *Williams v. Highway Commission,* 252 N.C. 772, 114 S.E. 2d 782; *Gallimore v. Highway Commission,* 241 N.C. 350, 85 S.E. 2d 392. Pursuant to the provisions of G.S. 40-12 *et seq.,* Blair on 27 January 1940 filed his proceeding alleging a taking and seeking compensation. Judgment was not entered in this proceeding until 23 November 1951. In the stipulated facts for the instant action, it is agreed that Commission "did not file a *lis pendens* nor did the defendant cross-index the pending suit."

[4, 5] The phrase "condemnation" or "exercise of the power of eminent domain" by its very definition admits the condemnor did not own or have title to the land, but rather that it took or appropriated the property of another for public use. *Wescott v. Highway Commission,* 262 N.C. 522, 138 S.E. 2d 133. Thus, Blair's proceeding under G.S. 136-19 and G.S. 40-12 *et seq.* was a condemnation proceeding rather than one to try title.

[6, 7] The 1959 amendment to the condemnation statutes provides that title passes to the Highway Commission upon the filing of a petition and declaration of taking and payment of certain funds into the Clerk of Court's Office. In *Highway Commission v. Industrial Center,* 263 N.C. 230, 139 S.E. 2d 253, the Supreme Court pointed out that prior to 1959, the Highway Commission, when it had to acquire title by condemnation, was to act under the provisions of G.S. 40-12 *et seq.* The court pointed out: "In proceedings instituted pursuant to the provisions of c. 40, '[t]he title of the landowner is not divested unless and until the condemnor obtains a *final judgment* in his favor *and* pays to the landowner *the amount of the damages fixed by such final judgment.*'"

[8] G.S. 40-26 provides as follows:

> "§ 40-26. Change of ownership pending proceeding. — When any proceedings of appraisal shall have been commenced, no change of ownership by voluntary conveyance or transfer of the real estate or other subject matter of the appraisal, or any interest therein, shall in any manner affect such proceedings, but the same may be carried on and perfected as if no such conveyance or transfer had been made or attempted to be made. (1871-2, c. 138, s. 22; Code, s. 1950; Rev., s. 2594; C.S., s. 1730.)"

Chapter 40 of the General Statutes, entitled "Eminent Domain," provides for procedure in condemnation cases, not only by the Highway Commission but by other corporations or agencies entitled to exercise the right of eminent domain. The agencies or corporations are set out in G.S. 40-2; this statute, with certain modifications, has been a part of our law since 1871. Railroad companies are included in the list, and decisions of our Supreme Court relating to condemnation by railroad companies are helpful in determining the law in the case at bar.

In *Abernathy v. R. R.*, 159 N.C. 340, 74 S.E. 890, the defendant railroad entered upon the land of plaintiff and constructed a roadbed. Plaintiff, the sole owner of the property at the time of the taking, instituted an action for compensation under the statute. While the action was pending, but before the judgment was rendered, he conveyed a one-third interest in the land to one Berry. Defendant railroad contended it had to pay only two thirds of the compensation to plaintiff, relying on the cases of *Liverman v. R. R.*, 109 N.C. 52, 13 S.E. 734, *Phillips v. Telegraph Co.*, 130 N.C. 513, 41 S.E. 1022, and *Beal v. R. R.*, 136 N.C. 298, 48 S.E. 674. The court distinguished those cases on the grounds that the transfer of title occurred before the proceeding of an appraisal or condemnation had commenced. It cited G.S. 40-26 and held that the case was governed by that section since conveyance of title to Berry was not made until after the proceeding was commenced. "We are not required to consider what claim Berry may have upon the plaintiff, as that matter is not before us. L. A. Berry is not a party to this suit."

In *Caveness v. R. R.*, 172 N.C. 305, 90 S.E. 244, plaintiff brought an action to recover permanent damages by reason of the construction and operation of defendant railroad. The railroad was not constructed through plaintiff's lot but along the street adjacent to plaintiff's lot. It does not appear that any of his land was taken but that he was injured by impairment of value, noise, smoke, cinders, dust, etc. While his suit was pending, plaintiff sold to one Sanders, who in turn conveyed to others. The railroad contended a judgment for plaintiff could not be sustained because it appeared that plaintiff had conveyed the title to another and the right of recovery followed as an incident to the title. The court — through Hoke, J. — held this position untenable.

After quoting Revisal, sec. 2594 (now G.S. 40-26), the court declared:

> "The proceedings by this section are constituted a *lis pendens*, and, although the grantee, as stated, prior to payment of the

amount may be entitled to this compensation, if proceedings have been instituted, he must assert his right by action or appropriate proceedings in the cause. *Abernathy v. R. R., (supra).* And so, under our decisions, in case of suit the railroad company acquires the right to remain and construct its road when the owner enters suit for permanent damages for trespass. He thereby assents to the company's right to occupy and build its road upon the land upon the payment of the amount due, and the entire compensation for the easement should inure to the owner, who recognizes the railroad's right by entering this character of suit. *Liverman v. R. R., (supra); White v. R. R.,* 113 N.C., at p. 622; *Staton v. R. R.,* 147 N.C., at p. 443.

"Under any view of the matter, therefore, the present recovery must be sustained, it appearing from the record that plaintiff owned the land when the railroad entered and constructed its road, and pending his ownership and before conveyance he entered suit and filed his complaint for permanent damages."

[8] This case is controlled by the provisions of G.S. 40-26. Therefore, in the light of that statute and the decisions of our Supreme Court applying it, we hold that in this case the special proceeding instituted by Blair in 1940 constituted a *lis pendens* and that plaintiffs took title to their lands and interests therein subject to the special proceeding and judgment entered therein in 1951. *Lis pendens* notice under G.S. 1-116 is not exclusive. *Whitehurst v. Abbott,* 225 N.C. 1, 33 S.E. 2d 129.

Furthermore, plaintiffs were provided with additional notice of existence of Commission's right-of-way easement. In the deed executed by Blair to Frazier, plaintiffs' predecessor in title, Blair reserved his rights in the highway rights-of-way. In the deeds from Frazier to plaintiffs or their predecessors in title, the highway rights-of-way were expressly excepted.

[9] Plaintiffs strenuously argue that the reservation of title to the rights-of-way set forth in the deed from Blair was ineffective because of ambiguity in the description of the land in which he purported to reserve his rights. Our Supreme Court has not applied a rule of strict construction on conveyances or reservations of easements. In *Borders v. Yarbrough,* 237 N.C. 540, 75 S.E. 2d 541, in an opinion by Parker, J. (now C.J.), the court upheld an easement set forth in a deed as follows: "This lot is sold subject to an easement across the same (lot No. 6 of a subdivision) for a sewerage line running from lot No. 5 to the disposal in the street. This shall be a perpetual easement under this lot." Also in *Bender v. Tel. Co.,* 201

N.C. 355, 160 S.E. 352, the court upheld an easement for telephone and telegraph lines across a sizeable tract of land, described only by adjoining land owners and there being no description or designation of the particular part of the land that the lines could be constructed on.

Blair instituted his proceeding under G.S. 40-12 *et seq.* in 1940, alleging that Commission and Town had taken rights-of-way 100 feet wide. Title passed to Commission and Town when judgment was entered in the proceeding in 1951 and the money ordered paid by the judgment was paid. *Highway Commission v. Industrial Center, supra.* Plaintiffs were and are bound by said judgment. G.S. 40-26; *Abernathy v. R. R., supra; Caveness v. R. R., supra.* Furthermore, Blair, in his deed to plaintiffs' predecessor in title, expressly reserved his right to collect for the rights-of-way.

Defendant's assignments of error to Judge Gwyn's judgment are sustained. The judgment is vacated and this action is remanded for proper judgment consistent with this opinion.

Error and remanded.

CAMPBELL and MORRIS, JJ., concur.

IN THE MATTER OF: A FILING MADE BY THE NORTH CAROLINA FIRE INSURANCE RATING BUREAU FOR A REVIEW OF EXPERIENCE OF FIRE INSURANCE

No. 68SC155

(Filed 14 August 1968)

1. Insurance § 113— fire insurance — necessity — rates

The necessity of fire insurance and the desirability of regulating rates charged by fire insurance companies have long been recognized in this State.

2. Insurance § 116— fire insurance — Rating Bureau — experience statistics

All companies writing fire insurance in this State are required by statute to be members of the North Carolina Rating Bureau and to file annual statistical reports showing their respective underwriting experience.

3. Insurance § 116— fire insurance rates — approval of Commissioner

No fire insurance rates become effective until approved by the Commissioner of Insurance.

4. Insurance § 116— fire insurance rates — profit

Fire insurance rates should produce a fair and reasonable profit only.

5. Insurance § 116— fire insurance companies — expenses and profits

A fire insurance company must pay its cost of doing business, including payment of losses incurred, and obtain a fair profit from money derived from insurance premiums paid at the inception of an insurance contract.

6. Insurance §§ 113, 131— fire insurance — standard policy — payment for loss

The standard fire insurance policy in effect in this State requires the insurance company to pay losses to the extent of the actual cash value of the property at the time of the loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quantity within a reasonable time after such loss. G.S. 58-176.

7. Insurance § 116— fire insurance — determining rates

The problem in formulating a fire insurance rate is to determine what is a fair and reasonable rate to charge now for coverage over a future period when the loss cannot be ascertained until later and payment is based on actual cash value at the time of the loss.

8. Insurance § 116— fire insurance rates — experience standard

Fire insurance rates are based upon at least a five year experience standard derived from the cumulative experience of all fire insurance companies doing business within the State.

9. Insurance § 116— fire insurance rates — adjustment of losses

One element in the formula for determining a fire insurance rate is the "adjustment of losses" which is ascertained by applying the Consumer Price Index and the Construction Cost Index to the actual losses during the experience years.

10. Insurance § 116— request for rate change — burden of proof

Upon the hearing of a request by the Rating Bureau for a change in fire insurance rates, the burden is upon the Rating Bureau to establish its contentions.

11. Insurance § 116— fire insurance rates — Commissioner's decision

The order or decision of the Commissioner of Insurance upon a requested increase in fire insurance rates is presumed to be correct and proper if supported by substantial evidence.

12. Insurance § 116— fire insurance rates — adjustment of losses — prospective loss experience — method of determining

In determining the "adjustment of losses," the Commissioner of Insurance has the discretion to reject the "trending projection" method proposed by the Rating Bureau and to use a method by which greater weight is given to the actual loss experience in the more recent years in the study period, the latter method complying with the requirement of G.S. 58-131.2 that in determining the necessity for an adjustment in fire insurance rates the Commissioner must consider "prospective loss experience, including loss trend at the time the investigation is made."

13. Insurance §§ 1, 116— rate-making procedure — determination by Commissioner

The formulation of new rate-making procedures is a policy matter to be determined by the Commissioner of Insurance.

14. Insurance § 116— fire insurance rates — statistical evidence

Statistical evidence which becomes available at any time during a public hearing for the establishment of insurance rates should be admitted and taken into consideration in fixing the rates where the use of such evidence will not result in unreasonable delay.

15. Insurance § 116— fire insurance rates — use of current statistics in determining

Since there is of necessity a lag between the fixing of fire insurance rates and the use of proceeds generated thereby, it is incumbent upon the Commissioner of Insurance in the interest of the public and for the protection of the insurance business to use the very latest available statistics to establish a rate which will produce a fair and reasonable profit only.

16. Insurance § 116— fire insurance rates — consideration of current cost indices

At a rehearing upon a request by the Rating Bureau for an increase in fire insurance rates, it is error for the Commissioner of Insurance to refuse to admit and consider the latest cost index statistics which became available only after the request for an increase in rates had been filed.

APPEAL by the petitioner, the North Carolina Fire Insurance Rating Bureau, from *Copeland, S.J.*, March 1968, Non-Jury Civil Assigned Session, WAKE County Superior Court.

This is an appeal from a judgment of the Superior Court affirming an order of the Commissioner of Insurance wherein he refused to approve any change in fire insurance rates.

The North Carolina Fire Insurance Rating Bureau, hereinafter called Rating Bureau, under date of 21 July 1967, filed a review of fire insurance experience for the years 1961 through 1966 and requested the Commissioner of Insurance, hereinafter called Commissioner, to approve an overall increase in fire insurance rates of 2.54 per cent.

"The Rating Bureau is an agency created pursuant to Article 13 of Chapter 58 of the North Carolina General Statutes. All companies writing fire insurance in North Carolina are required by statute to be members of the Rating Bureau. It is charged with the responsibility of making and filing rates, rating plans, classifications, schedules, rules and standards for fire insurance, subject to the approval of the Commissioner." *In re Rating Bureau,* 245 N.C. 444, 96 S.E. 2d 344.

After due notice, as provided by law, a public hearing was held on 19 September 1967, and thereafter the Commissioner rendered his decision 17 October 1967 in which he denied any increase in rates. The Rating Bureau filed a petition to rehear pursuant to G.S. 58-131.5. The rehearing was held 21 November 1967, and the Commissioner on 20 December 1967 rendered his decision affirming his earlier decision and again denying any increase in rates.

In accordance with G.S. 58-9.3, the Rating Bureau filed a petition for review in the Superior Court of Wake County, and under date of 22 March 1968, Judge Copeland entered a judgment affirming the orders of the Commissioner and dismissed the appeal.

T. W. Bruton, Attorney General, Bernard A. Harrell, Assistant Attorney General, for the North Carolina Commissioner of Insurance.

William T. Joyner and William T. Joyner, Jr., attorneys for the North Carolina Fire Insurance Rating Bureau.

CAMPBELL, J.

[1] Article 13 of Chapter 58 of the General Statutes was enacted in 1945 by the General Assembly of North Carolina. Prior to that time the Commissioner had no power to fix or regulate rates for fire insurance (Statement of Governor J. Melville Broughton in appointing the Commission on Revision of the Insurance Laws of North Carolina as contained in report of said Commission to Governor R. Gregg Cherry, 30 January 1945). The necessity of fire insurance and the desirabiltiy of regulating rates charged by fire insurance companies have long been recognized in this state. Governor Locke Craig in addressing the General Assembly on 7 January 1915 stated: "The protection from fire of our homes and families, of our property and industry is a necessity. We must have insurance, and we must take this insurance under the present law, from a monopoly exercising its powers unrestrained by law * * *. * * * However, this may be, this monopoly is a public service concern."

[2, 3] As a result of the 1945 action of the General Assembly creating the Rating Bureau, all companies writing fire insurance in North Carolina are now required to be members of the Rating Bureau. All such companies are required to file annually statistical reports showing their respective underwriting experience. It is provided that rates "shall not unfairly discriminate", and no rates become effective until submitted to and approved by the Commissioner.

[4] The Rating Bureau is closely affiliated with the companies who not only must belong to it but who support it. Nevertheless, as Governor Craig stated in his address to the General Assembly in 1915, the people of North Carolina must have insurance and it is a necessity. While it is bad for the people to have rates which are too high, it is, likewise, bad for the people to have rates which are too low and which would thereby tend to cause insurance companies to discontinue their business in North Carolina and, thus, deprive the people of this necessity. In order to serve the best interests of the people of North Carolina, the rates should "produce a fair and reasonable profit only." To this end, the General Assembly enacted:

> G.S. 58-131.2. *"Reduction or increase of rates.* — The Commissioner is hereby empowered to investigate at any time the necessity for a reduction or increase in rates. If upon such investigation it appears that the rates charged are producing a profit in excess of what is fair and reasonable, he shall order such reduction of rates as will produce a fair and reasonable profit only.
>
> If upon such investigation it appears that the rates charged are inadequate and are not producing a profit which is fair and reasonable, he shall order such increase of rates as will produce a fair and reasonable profit.
>
> In determining the necessity for an adjustment of rates, the Commissioner shall give consideration to all reasonable and related factors, to the conflagration and catastrophe hazard, both within and without the State, to the past and prospective loss experience, including the loss trend at the time the investigation is being made, and in the case of fire insurance rates, to the experience of the fire insurance business during a period of not less than five years next preceding the year in which the review is made.
>
> Any reduction or increase of rates ordered by the Commissioner shall be applied by the rating bureau subject to his approval within sixty (60) days and shall become effective solely to such insurance as is written having an inception date on and after the date of such approval.
>
> Whenever the Commissioner finds, after notice and hearing, that the bureau's application of an approved rating method, schedule, classification, underwriting rule, bylaw or regulation is unwarranted, unreasonable, improper or unfairly discriminatory he shall order the bureau to revise or alter the application of such rating method, schedule, classification, underwriting

rule, bylaw or regulation in the manner and to the extent set out in the order."

[4] It is much easier to state that the rates for fire insurance should be such "as will produce a fair and reasonable profit only" than it is to put the statement into practice by formulating such a rate.

The problem is stated:

"Insurance rate making is a technical, complicated and involved procedure carried on by trained men. It is not an exact science. Judgment based upon a thorough knowledge of the problem must be applied. Courts cannot abdicate their duty to examine the evidence and the adjudication, and to interpret and apply the law, but they must recognize the value of the judgment of an Insurance Commissioner who is specializing in the field of insurance and the efficacy of an adjudication supported by evidence of experts who devoted a lifetime of service to rate making." *Insurance Department v. City of Philadelphia*, 196 Pa. Super. 221, 173 A. 2d 811.

[5-7] Some of the difficulty is because the approved rate is applied and paid by the policyholder to the insurance company at the inception of the insurance contract. From money thus derived, the insurance company pays its costs of doing business and must obtain a fair profit, if it is to stay in business. The costs of doing business include the payment of losses incurred. G.S. 58-176 provides for a standard fire insurance policy for North Carolina and it requires that the insurance company shall pay losses "to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss." The evidence in the instant case showed that the vast majority of all insurance policies issued in North Carolina covered a period of three years. Thus, the problem presented is what will be a fair and reasonable rate to charge now for coverage over a three year period when the loss cannot be ascertained until later and payment is based on "actual cash value of the property at the time of the loss." There is a built-in lag between receipts and disbursements, and much clairvoyance is required to formulate a "fair and reasonable" rate. This is a matter for trained actuaries.

[8] Fire insurance rates, by the statute, are based upon at least a five year experience standard; the experience being a measure of premiums collected against losses incurred. The cumulative experience of all fire insurance companies doing business within the State

is employed in the rate filing. In the instant case the experience years were the calendar years 1961 through 1966 or a total of six years. In calculating the rate, the most recent experience year (in this case 1966) is given the heaviest weighting. The next most recent year is given the next heaviest weighting and so forth in inverse order until the most remote year. This is done to anticipate the prospective loss experience based on current loss trend as provided in the statute.

[9] By various mathematical calculations, the expert actuaries in rate making derive a formula which is applied and results in the approved rate. All parties were in agreement that one of the elements in the formula is the "adjustment of losses." The "adjustment of losses" is determined by the application of the "Composite Current Cost Index." The Composite Current Cost Index is ascertained by taking the actual losses for the experience years and then adjusting them by applying the "Consumer Price Index" and "Construction Cost Index." These two indices are blended together at a weight of 40 per cent for the Consumer Price Index and 60 per cent for the Construction Cost Index. This weighing of the two on the 40 per cent/60 per cent ratio is on the theory that when a fire occurs 40 per cent of the loss is for chattels and goods, and 60 per cent is for the building. The losses for each year are computed and adjusted separately by application of the Composite Current Cost Index. The Consumer Price Index is published by the United States Department of Labor, Bureau of Labor Statistics. The Construction Cost Index is published by the Department of Commerce. Each of these indices compares the levels of subsequent years with the base level of 100 for the period 1957-1959. For example, on 31 December 1966 the Consumer Cost Index stood at 114.7 and the Construction Cost Index at 123. At the time of filing on 21 July 1967, the latest compiled statistics available as to the Consumer Price Index and the Construction Cost Index was 31 December 1966. By adjusting losses in accordance with those available statistics (31 December 1966), the indicated rate of change in fire insurance rates was 0 per cent.

Up to this point all the expert actuaries on rate making who appeared at the hearing before the Commissioner were in agreement.

The Rating Bureau offered testimony of expert actuaries to the effect that proper rate making required the projection of adjusted losses through June 1968. This projection was to be done by a recognized statistical and mathematical calculation known as "least

squares" method and was referred to in the testimony as the "trending projection" method.

Using the 31 December 1966 statistics and giving 40 per cent weight to the Consumer Price Index and 60 per cent weight to the Construction Cost Index, the resulting Composite Current Cost Index factor for December 1966 was 119.7. Applying the "trending projection" method, the Rating Bureau produced a Composite Current Cost Index figure as of 30 June 1968 of 123.3. Thereafter, using approved and unquestioned rate-making procedures, the Rating Bureau determined that there was a deficiency in rates for the contemplated future period of 2.9 per cent and the Bureau requested increases in rates which produced an overall increase of 2.54 per cent. The Rating Bureau was seeking a fair and reasonable rate as of 30 June 1968 which would be the median point of a three year insurance policy.

In addition to the expert actuaries who testified on behalf of the Rating Bureau, there was another expert actuary who is with the North Carolina Insurance Department. He is Mr. R. E. Holcombe and he testified to the effect that he did not consider the "trending projection" method employed by the Rating Bureau to arrive at a figure as of 30 June 1968 to be "conservative" rate making. He stated: "My position is that you should go no further than the actual events that have been demonstrated." In other words, do not project what the government published statistics might be, but apply only those statistics already published.

[12] The Rating Bureau makes a strong and plausible contention to the effect that the "trending projection" method is a new rate-making device in order to arrive at a fair and reasonable profit for the insurance companies and that such a method complies with the statute, G.S. 58-131.2 wherein it is provided that the Commissioner shall give consideration to all reasonable and related factors and "prospective loss experience, including the loss trend at the time the investigation is being made." The Rating Bureau points out that this method is rapidly finding approval in formulating fire insurance rates for the future and that the regulatory bodies of several states have adopted such a plan.

[10, 11] The Rating Bureau is the movant and the burden is upon it to establish its contentions. Its requests in connection with rates is not "presumptively correct and proper"; whereas, the statute provides: "The order or decision of the Commissioner if supported by substantial evidence shall be presumed to be correct and proper." G.S. 58-9.3(b). *In re Rating Bureau, supra.*

[12, 13] We cannot say that the method used by the Commissioner in giving greater weight to the loss experience in the most recent year in the study period and less weight to each year involved in inverse order does not fully comply with statutory requirements of considering "prospective loss experience" based on current loss trend. The Commissioner is a specialist in the field, and he has the responsibility and duty under the law to derive rates which "will produce a fair and reasonable profit only." For the accomplishment of this, the Commissioner is the proper source to evolve policy. Formulating new rate-making procedures is a policy matter and should rest with the Commissioner, and we so hold.

All of the evidence in this case, both that introduced by the Rating Bureau and that of Mr. Holcombe for the Department, indicated that there had been a change in the Consumer Price Index and in the Construction Cost Index since the figures of 31 December 1966. Mr. Holcombe testified that the Consumer Price Index available through June 1967 showed an increase of 1.3 over December 1966, and the Construction Cost Index through June 1967 showed an increase of 3.0 over the December 1966 figure.

[16] The Rating Bureau in apt time petitioned for a rehearing under the statute and in the petition to rehear set forth the latest statistics obtainable from the United States Deparment of Labor, Bureau of Labor Statistics, with regard to the Cost Price Index and, likewise, the latest statistics from the United States Department of Commerce, Bureau of the Census, as to the Construction Cost Index. These statistics showed the figures for August 1967.

These published figures were in accord with the statement of Mr. Holcombe, "My position is that you should go no further than the actual events that have been demonstrated." It was recognized by all witnesses in this proceeding that those published government statistics were proper to be used in deriving the formula on which rates were based. In this instance, if those later figures had been used, it would have resulted in an increased rate basis. The Commissioner refused to consider those figures, however, for that this was evidence originating subsequent to the date of the filing. The evidence in this case shows that those well-recognized statistics could have been applied to the necessary formula without difficulty and without any loss of time. In fact, the evidence reveals that one of the expert witnesses testified that the new available figures could be adopted and a new result obtained within "ten minutes" time.

[14, 15] The law places a duty upon the Commissioner to arrive at rates that are "fair and reasonable" and which will "produce a

fair and reasonable profit" and to that end the Commissioner is "Empowered to investigate *at any time* the necessity for a reduction or increase in rates." (emphasis added) G.S. 58-131.2. Statistical evidence which becomes available "at any time" during a public hearing for the establishment of fire insurance rates and the use of which will produce no unreasonable delay should be admitted and taken into consideration in fixing rates. As heretofore pointed out, there is of necessity a lag between the fixing of rates and the use of the proceeds thereby generated and it is incumbent upon the Commissioner in the interest of the public and the protection of the insurance business which "is a necessity" to use the very latest statistics which are available in order to establish a rate which "will produce a fair and reasonable profit only."

Bonum necessarium extra terminos necessitatis non est bonum. (A good thing required by necessity is not good beyond the limits of such necessity.) Hobarts' English Kings' Bench Reports, 144.

[16] In light of the provisions of the statutes above quoted and the evidence disclosed on the record, the rulings of the Commissioner in refusing to consider the statistical data, which was admitted to be correct, because it became available only after the filing date and which rulings were upheld in the Superior Court, in our opinion, were improper and this cause is remanded for further proceedings consistent with this opinion.

Remanded.

BRITT and MORRIS, JJ., concur.

AGGIE NEIL MAYNOR v. WILLIAM J. TOWNSEND, ADMINISTRATOR OF THE ESTATE OF BERLINE CARTER

No. 68SC63

(Filed 14 August 1968)

1. Death § 7— wrongful death — damages

The Wrongful Death Act does not permit the recovery of nominal or punitive damages, but limits recovery to the net pecuniary loss to decedent's estate resulting from the death.

2. Death § 7— wrongful death — evidence of pecuniary loss

While plaintiff must offer some evidence tending to show that decedent was potentially capable of earning money in excess of that which would

be required for her support, direct evidence of earnings is not essential, it being sufficient to present evidence of decedent's health, age, industry, means and business.

3. Death § 7— wrongful death — damages — sufficiency of evidence

In a wrongful death action, evidence that at the time of the accident causing her death decedent was thirty years old, that she was in good health, and that she was able to take care of her five children and do house work and farm work *is held* sufficient to be submitted to the jury on the question of pecuniary loss to decedent's estate.

4. Automobiles § 66— identity of driver — presence of owner

The presence of the owner in his car at the time of a wreck raises no presumption that he was the operator.

5. Automobiles § 66— identity of driver — type of evidence

The identity of the driver of an automobile involved in a wreck may be established by any combination of circumstantial and direct evidence.

6. Automobiles § 66— identity of driver — conflicting evidence — jury issue

In a counterclaim for wrongful death arising out of an automobile accident, where defendant presented evidence that on the day after the accident plaintiff had stated that she was driving the automobile at the time of the accident, but plaintiff testified that she had never operated a car, did not know how to operate a car, had no driver's license, and that defendant's intestate was operating the car when the accident occurred, and plaintiff presented numerous witnesses who testified that they had never seen plaintiff drive a car, a question of fact as to who was driving the car is raised for the jury.

7. Death § 3— wrongful death — burden of proof

The party seeking recovery in a wrongful death action has the burden of proving actionable negligence.

8. Death § 3; Trial § 23— wrongful death — sufficiency of evidence — prima facie case

In an action for wrongful death, motion for nonsuit should be denied when the evidence offered by both plaintiff and defendant, construed in the light most favorable to plaintiff, is sufficient to make out a *prima facie* case of actionable negligence.

9. Automobiles § 44— wrongful death — automobile leaving road without collision — sufficiency of evidence

In a counterclaim for wrongful death, evidence tending to show that defendant's decedent was a passenger in an automobile operated by plaintiff, that upon entering a curve the automobile swerved into the oncoming traffic lane, crossed back over its proper lane, traveled along the shoulder of the road, and then struck a bank and entered a ditch, *is held* sufficient to make out a *prima facie* case of negligence on the part of plaintiff in the operation of the car.

10. Automobiles §§ 66, 91— identity of driver — negligence — separate issues submitted

In an action for wrongful death arising out of an automobile accident in which the identity of the driver is in dispute, separate issues should be submitted to the jury with respect to the identity of the driver and negligence.

11. Automobiles §§ 44, 50; Trial § 23— prima facie showing of negligence — explanation by defense — jury question

In an action for wrongful death arising out of an automobile accident in which plaintiff has made out a *prima facie* case of actionable negligence by showing that the automobile failed to negotiate a curve, it is for the jury to determine the issue of actionable negligence by weighing against the plaintiff's *prima facie* case any evidence in explanation offered by defendant, including evidence that the automobile had slick tires and that the highway was wet.

APPEAL by defendant from *McKinnon, J.*, 9 October 1967 Session ROBESON Superior Court.

Plaintiff instituted this action on 22 September 1966, alleging that on 7 February 1964 she was a passenger in a 1956 Ford operated by defendant's intestate and was injured when, due to intestate's negligent operation of the automobile, it left the road and went into a ditch. Plaintiff sought to recover $75,000.00 for serious and permanent injuries.

Defendant answered, denying the allegations of negligence and alleging that plaintiff, and not defendant's intestate, was the operator of the automobile. As a defense in bar, defendant further alleged that the automobile was registered in plaintiff's name and that, even if it should be determined that defendant's intestate was operating the automobile at the time of the accident, the plaintiff was contributorily negligent in that she had the right to direct, and was directing, the operation of the car at the time of the accident; further, that any negligence on the part of defendant's intestate was imputed to plaintiff.

Defendant further alleged, by way of counterclaim, a cause of action against plaintiff to recover damages in the amount of $50,000.00 for the wrongful death of defendant's intestate, alleging that the wreck was caused by the negligence of the plaintiff in operating the car and that the defendant's intestate, who was thirty years of age and in good health prior to the wreck, was killed as a result of it.

Plaintiff replied, denying the material allegations of the counterclaim, except with respect to decedent's health at the time of the wreck, and praying for dismissal of the counterclaim and recovery on her original cause of action for damages for her personal injuries.

At trial, the parties stipulated that plaintiff was injured and defendant's intestate killed as the result of the wreck.

Testifying for the plaintiff, Highway Patrolman Kimball's evidence tended to establish these circumstances surrounding the wreck: U. S. Highway 301-A, a two-lane highway of either asphalt and gravel or tar and gravel, runs north from Lumberton toward Fayetteville. At a point about two miles north of Lumberton, the highway curves toward the west, or left, and the Barker Ten Mile Road goes off toward the east, or right. The apex of the curve is just north of the Barker Ten Mile Road intersection. On the east or right-hand side of the highway, the shoulder is seven and one-half to eight feet wide and leads to a ditch about two feet deep, behind which is a bank going up. The speed limit in this area is 55 miles per hour.

On the evening of 7 February 1964, when Officer Kimball arrived at the scene, he found the following: It was raining and the highway was wet. Four hundred feet north of the intersection of Barker Ten Mile Road and 301-A, a 1956 Ford automobile was in the ditch on the east side of the highway with the front facing southward, back toward Lumberton. Faint tire marks were visible on the surface of the road, beginning in the northbound lane, crossing the center line into the southbound lane, recrossing into the northbound lane and running up to the edge of the highway 129 feet or more from where they began. The marks continued from the edge of the road onto and along the east shoulder in the form of disturbed grass and dirt leading in a northerly direction for a distance of approximately 129 feet, continuing up to the rear of the vehicle. In addition, for a distance of 75 feet from the vehicle southward, the bank beyond the ditch was "scarred" with "grass . . . pulled out of the ground; the area wiped clean or the grass pushed over and leaning in the direction of Fayetteville." The car itself was damaged "along the complete left side" and had one or more slick tires. The occupants of the automobile were being removed from the scene when Officer Kimball arrived.

At the close of the plaintiff's evidence, defendant's motion for nonsuit was denied and, thereafter, the parties announced that they had reached a settlement with respect to plaintiff's cause of action.

The defendant then proceeded with evidence relevant to his counterclaim. His evidence tended to show that on the day after the wreck, the plaintiff made the statement that she (plaintiff) was driving the car at the time of the wreck.

Plaintiff, in rebuttal, again took the stand and testified that the

defendant's intestate was driving at the time of the wreck and that just before the wreck, she (defendant's intestate) was "working the windshield button."

At the close of all the evidence, plaintiff's motion for judgment as of nonsuit was granted. From that judgment, defendant appeals, assigning as his only error the allowance of that motion.

Bryan, Bryan & Johnson, attorneys for plaintiff appellee.
William J. Townsend, attorney for defendant appellant.

BRITT, J.

In determining the propriety of the court's allowance of the motion for nonsuit of defendant's counterclaim, the question arises as to the sufficiency of the evidence to be submitted to the jury on three crucial points: (1) Whether there was pecuniary loss to the estate of the defendant's decedent; (2) Whether the plaintiff was the driver of the automobile; and (3) Whether the plaintiff was actionably negligent. We will discuss the points in the order listed.

(1) Was the evidence sufficient to present a jury question with respect to whether there was a pecuniary loss to the estate of defendant's decedent?

It was established in the pleadings — alleged by the defendant and "not denied" by the plaintiff — "[t]hat prior to said automobile accident Berline Carter was in good health and was thirty (30) years of age, being born on May 10, 1933, and as a result of said automobile accident received injuries resulting in her death." At the trial, the decedent's husband, Wade Lee Carter, testified that his wife "was in good health" at the time of the accident and able to take care of their five children and keep house; that she was able to do "house work" and "most any kind of farm work. She was raised on a farm."

[1, 2] On these facts, the evidence of pecuniary loss to the estate of Berline Carter was sufficient to require submission to the jury. Recovery under the North Carolina Wrongful Death Act, G.S. 28-173, 174, is limited by § 174 to "such damages as are a fair and just compensation for the pecuniary injury resulting from such death." Thus, the statute permits recovery of neither nominal nor punitive damages and the burden is on the party seeking recovery "to prove that the estate of his intestate suffered a net pecuniary loss as a result of her death." *Greene v. Nichols,* 274 N.C. 18, 161 S.E. 2d 521. Direct evidence of earnings is not essential, it being sufficient to present evidence of "health, age, industry, means and business," *Reeves v. Hill,*

272 N.C. 352, 158 S.E. 2d 529, but "it is required that plaintiff offer some evidence tending to show that intestate was potentially capable of earning money in excess of that which would be required for her support." *Greene v. Nichols, supra.* See also *Stetson v. Easterling,* 274 N.C. 152, 161 S.E. 2d 531.

[3] Here, evidence of the decedent's age, general health and capacity to work was sufficient to present a question for the jury with respect to the question of damages.

(2) Was the evidence sufficient to present a jury question with respect to whether the defendant's decedent was driving the automobile at the time of the wreck?

This issue drew the sharpest conflict in the evidence adduced at the trial. No less than eight witnesses, who knew the plaintiff Aggie Maynor as relatives, friends and neighbors in Saint Pauls, and whose periods of acquaintance ranged from three to 15 or 20 years, testified in her behalf that they had never seen her drive a car. Some of the witnesses testified to having seen Aggie Maynor and Berline Carter in the 1956 Ford, always with Berline driving.

Plaintiff herself took the stand and testified that she had never owned a car, had never operated a car, did not know how to operate a car, and had no driver's license. She further testified that she had contributed about $200.00 toward the purchase price of the 1956 Ford on the understanding that Berline would take her places when she had to go. She further stated that on the night of the wreck, Berline was driving and she was a passenger in the front seat.

Defendant put on two witnesses who testified that they visited Aggie Maynor in the hospital on the morning of 8 February 1964, some twelve hours after the wreck. Mrs. Pauline Davis, a sister of Berline Carter, testified that while she was in Mrs. Maynor's room, in the presence of two other people: "I spoke to her; she spoke. I asked her who was driving and she said 'I was.' Then she changed the subject and said, 'We wasn't driving fast.'" Brady Locklear testified that he also visited plaintiff in the hospital on the morning of 8 February and that, in response to a question by his brother, Mrs. Maynor said that she was driving.

Dr. Biggs had testified earlier in behalf of the plaintiff that plaintiff was in such condition due to concussion and shock and other physical injuries that he was unable to administer anesthetic to her until 11 February. Plaintiff testified in rebuttal that she remembered seeing no one at the hospital on 8 February and knew nothing at all for three or four days after the wreck.

[4, 5] The presence of the owner in his car at the time of a wreck raises no presumption that he was the operator. *Greene v. Nichols, supra; Johnson v. Fox,* 254 N.C. 454, 119 S.E. 2d 185; *Parker v. Wilson,* 247 N.C. 47, 100 S.E. 2d 258. But the identity of the driver at the time may be established by any combination of circumstantial and direct evidence. *Greene v. Nichols, supra.*

[6] Here, there was no evidence as to the positions of the two occupants after the wreck; apparently they were both thrown from the car. There was, however, direct evidence tending to show that defendant's intestate was driving and direct evidence tending to show plaintiff was driving. This conflicting evidence clearly raised a question of fact for the jury. *Myers v. Utilities Co.,* 208 N.C. 293, 180 S.E. 694.

(3) Was the evidence sufficient to present a jury question with respect to whether the plaintiff was actionably negligent?

[7, 8] The burden of proving actionable negligence in an action for damages for wrongful death grounded in negligence is, of course, on the party seeking recovery. *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670. But if the evidence, that offered by both plaintiff and defendant, construed in the light most favorable to the party with the burden of proof, *Boyd v. Blake,* 1 N.C.App. 20, 159 S.E. 2d 256, is sufficient to make out a *prima facie* case of actionable negligence, a motion for nonsuit should be denied and the case submitted to the jury. *Mills, Inc. v. Terminal, Inc.,* 273 N.C. 519, 160 S.E. 2d 735.

The facts in the case at bar are similar to the facts in *Greene v. Nichols, supra,* which our Supreme Court held were sufficient to make out a case of actionable negligence. There, an automobile left the highway on a curve and crashed into a tree, killing all three occupants. There were no eyewitnesses. An action for wrongful death was brought by the administrator of one occupant against the administrator of another. At the trial, the plaintiff introduced no evidence tending to show why the car left the highway and, from a judgment of nonsuit, appealed to the Supreme Court. The Court held that the evidence was sufficient to present a jury question with respect to whether defendant's intestate was the driver of the car. Then, reviewing prior decisions in this jurisdiction, and other authority, the Court held that the evidence was sufficient to present a jury question with respect to the actionable negligence of the defendant's intestate. Sharp, J., writing for the majority, explained the Court's reasoning:

> "It is generally accepted that an automobile which has been traveling on the highway, following 'the thread of the road,'

does not suddenly leave it if the driver uses proper care. Such an occurrence is an unusual event when the one in control is keeping a proper lookout and driving at a speed which is reasonable under existing highway and weather conditions. * * * The inference of driver-negligence from such a departure is not based upon mere speculation and conjecture; it is based upon collective experience which has shown it to be the 'more reasonable probability.' * * *

"When a motor vehicle leaves the highway for no apparent cause, it is not for the court to imagine possible explanations. *Prima facie,* it may accept the normal and probable one of driver-negligence and leave it to the jury to determine the true cause after considering all the evidence — that of defendant as well as plaintiff."

The Court concluded that, on the basis of this rationale, the plaintiff had made out a *prima facie* case of actionable negligence.

[9] In the instant case, the evidence, in the light most favorable to the defendant, tends to show these facts: On the evening of Friday, 7 February 1964, the defendant's decedent was a passenger in an automobile being operated by the plaintiff. Traveling north toward Fayetteville on U. S. 301-A, the car came to a left-hand curve about two miles north of Lumberton. As it went into the curve, the car swerved across the center line into the southbound lane, came back into the northbound lane, left the pavement on the right-hand side, traveled along the shoulder, struck the bank beyond the ditch, and finally came to rest facing back toward Lumberton, at least 258 feet from where it first began to swerve.

[10, 11] The jury should first consider the issue of who was driving the car. If it concludes, as plaintiff's evidence tended to show, that defendant's decedent was the driver, then the issue of negligence will not be reached. But if it finds that plaintiff was the driver, as defendant's evidence tended to show, then it must determine the issue of actionable negligence, weighing against the defendant's *prima facie* case any evidence in explanation offered by the plaintiff, including the evidence which tended to show that the car had slick tires and that the highway was wet. It would seem that separate issues should be submitted with respect to the identity of the driver and negligence.

* * * * * *

We conclude that in the light of *Greene v. Nichols, supra,* filed

on 14 June 1968 — since the trial of the case at bar — defendant was entitled to have a jury pass upon his counterclaim.

The judgment of compulsory nonsuit to the counterclaim is Reversed.

CAMPBELL and MORRIS, JJ., concur.

CHARLES LEE PARKER v. STATE OF NORTH CAROLINA
No. 68SC125

(Filed 14 August 1968)

1. Grand Jury § 3— challenge to composition — time of objection

Objection to composition of the grand jury is deemed waived unless raised in apt time by motion to quash the indictment; such a motion may be made as a matter of right up to the time defendant is arraigned and enters his plea.

2. Indictment and Warrant § 15— allowance of motion to quash — discretionary power of court

The presiding judge as a matter of grace has discretionary power to permit the accused to make a motion to quash the indictment after his plea is entered and until the petit jury is sworn and impaneled to try the case on the merits; thereafter the presiding judge has no power at all to entertain a motion to quash the indictment.

3. Grand Jury § 3; Constitutional Law § 29— challenge to racial composition — effect of guilty plea

If an objection to the racial composition of the grand jury is made in apt time, by making a motion to quash before entering a plea, a subsequent plea of guilty does not waive the objection.

4. Grand Jury § 3— racial composition — waiver of objection

Under the criminal procedure of the State, petitioner's objection to the racial composition of the grand jury is deemed waived (1) where petitioner raised it for the first time in post-conviction proceedings commenced approximately three years after entry of his plea of guilty and the judgment sentencing him to life imprisonment and (2) where petitioner was represented in the trial by experienced and competent counsel employed by his family.

5. Constitutional Law § 32— unfamiliarity with criminal procedure — necessity of counsel

The rules of criminal procedure are necessary for an orderly administration of justice, and it is precisely for the reason that defendants in

criminal cases may not be familiar with all of their rights and the means of protecting them that the courts require they be represented by counsel.

6. Criminal Law § 181— post-conviction review — validity of guilty plea

In a post-conviction review of the proceedings leading to the petitioner's sentence of imprisonment, there is no merit in the petitioner's argument that his plea of guilty entered in the trial was a product of his prior coerced confession, when there is evidence in the record tending to show (1) that petitioner, in the presence of his mother, had freely acknowledged his guilt to his trial attorney, (2) that petitioner, on the morning following his arrest and within a few minutes after his confession, had told his attorney that no threats or promises had been made to him and that he was not scared, and (3) that petitioner himself had testified that he was questioned only an hour or two on the night of his arrest and that he had refused at that time to disclose his name and the names of his lawyer and his mother.

7. Constitutional Law §§ 29, 30; Criminal Law § 24— capital cases — right to jury trial — effect of guilty plea

In view of the rigid court supervision which G.S. 15-162.1 requires before a guilty plea may be entered to a charge of first degree burglary, the interplay of that statute with statutes such as G.S. 14-52, which impose the death penalty where the defendant is convicted of first degree burglary after a plea of not guilty and the jury fails to recommend life imprisonment, does not result in any substantial denial of a defendant's constitutional rights.

8. Criminal Law § 181— Post-Conviction Hearing Act — purpose

The purpose of the proceeding under the Post-Conviction Hearing Act, G.S. 15-217, *et seq.*, is not to determine petitioner's guilt or innocence, which matter has already been determined in the trial and judgment which is the subject of the post-conviction review; rather its purpose is to determine whether in the proceedings leading to the conviction there occurred any substantial denial of petitioner's constitutional rights. G.S. 15-217.

9. Criminal Law § 181— post-conviction hearing — relevancy of evidence — petitioner's guilt or innocence

Testimony as to petitioner's guilt is not relevant in a post-conviction proceeding; however, its admission in no way prejudices petitioner's opportunity to develop fully the testimony which is relevant to the constitutional issues raised by him, and its admission is at most harmless error.

ON Writ of *Certiorari* to review an order of *Parker, Joseph W., J.*, at the 13 November 1967 Special Civil Session of Superior Court of HALIFAX County.

At the August 1964 Session of Halifax Superior Court petitioner, Charles Lee Parker, pleaded guilty to an indictment for first-degree burglary and was sentenced to life imprisonment. The present proceedings were commenced in 1967 by petition filed under the North Carolina Post-Conviction Hearing Act, G.S. 15-217, *et seq.* Petitioner

challenges the constitutional validity of the judgment sentencing him to prison on two grounds: (1) That the indictment against him was invalid in that members of his race had been systematically excluded from the grand jury which returned it against him and he had not waived this jurisdictional defect; and (2) that his plea of guilty was a product of his prior coerced confession. Hearings were held on this petition in the Superior Court of Halifax County on 13 November and 19 December 1967.

Evidence submitted by petitioner and by the State at the post-conviction hearings indicated the following facts: On Thursday night, 16 July 1964, about 11:00 p.m. the petitioner, Charles Lee Parker, a Negro boy then 15 years old, was arrested by the police officers as he walked into a yard and went up to a door of a house in Roanoke Rapids. On the preceding Sunday night at approximately 11:00 p.m. someone had broken into this same house and had raped a female occupant. Following his arrest petitioner was taken to the police station where he was questioned as to whether he had broken into any houses. He refused to tell his name or where he was from. The questioning continued for an hour or two, after which he was placed in an unlighted cell for the remainder of the night. There was a drinking fountain in the cell, but no water in it. Petitioner was not given anything to eat that night. The following morning he was again questioned for about an hour, at which time he signed a confession. During the night the officers in some manner learned his identity and about 4:30 a.m. the officers went to his home and informed his mother that he had been arrested. Early the following morning the mother employed the services of an attorney in Roanoke Rapids to represent her son. On the same morning the attorney went to the police station and there talked with petitioner who told him he had already confessed to the police. The attorney questioned him as to whether, when he made the confession, he had been threatened in any manner, whether any promises were made to him, and whether he was scared at the time he made the statement. He told his attorney that no threats and no promises had been made and that he was not scared. Petitioner was given drinking water the second time he was interrogated and was given two sandwiches after he had confessed. At the trial in Halifax Superior Court which occurred on 17 and 18 August 1964, the mother was present and the attorney discussed with her and with the petitioner the nature and seriousness of the charge of first-degree burglary against petitioner, and both the mother and the petitioner signed written statements authorizing the entry of a plea of guilty to first-degree burglary. At the time these statements were signed petitioner and his mother

realized that by entering such a plea he would be sentenced to life imprisonment. In petitioner's statement he also acknowledged that he had not been threatened or abused in any manner by any person and that no promises had been made to him if he pleaded guilty to any charge. Prior to imposing sentence, the judge presiding at the trial examined the petitioner and his mother and made a finding that the petitioner understood the import of his plea and that it was made freely and voluntarily. Sentence of life imprisonment was thereupon imposed. Petitioner's attorney at no time discussed with him the racial makeup of the grand juries in Halifax County or the possibility of quashing the bill of indictment.

From order denying any relief, petitioner made application for Writ of *Certiorari,* which was granted.

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

Norman B. Smith for the petitioner.

PARKER, J.

At his post-conviction hearing petitioner introduced evidence tending to show a statistical disparity between the racial composition of the adult population of Halifax County as compared with the racial composition of the grand juries of the county at the time of his indictment and for a substantial period prior thereto. He contends that this evidence made a *prima facie* case that members of his race had been systematically excluded from the grand jury which had indicted him, that the State had introduced no competent evidence to rebut such *prima facie* case, and that the court's finding of fact to the effect that there had been no systematic exclusion of Negroes from such jury was not supported by competent evidence. In support of his contention petitioner cites: *Arnold v. North Carolina* 376 U.S. 773, 84 S. Ct. 1032, 12 L. ed. 2d 77; *State v. Lowry,* 263 N.C. 536, 139 S.E. 2d 870; *State v. Wilson,* 262 N.C. 419, 137 S.E. 2d 109.

[1-3] Under the criminal procedure of this State, however, objection to the grand jury is deemed waived unless raised in apt time by motion to quash the indictment. *State v. Rorie,* 258 N.C. 162, 128 S.E. 2d 229. Such a motion may be made as a matter of right up to the time defendant is arraigned and enters his plea. The presiding judge as a matter of grace has discretionary power to permit the accused to make the motion to quash the indictment after his plea is entered and until the petit jury is sworn and impaneled to try the

case on the merits. Thereafter the presiding judge has no power at all to entertain a motion to quash the indictment. *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513. If the objection is raised in apt time, by making the motion to quash before entering a plea, a subsequent plea of guilty does not waive the objection. *State v. Covington,* 258 N.C. 501, 128 S.E. 2d 827.

[4] In the present case petitioner did not raise the objection prior to entering his plea of guilty. He raised it for the first time in the post-conviction proceedings commenced approximately three years after entry of his plea of guilty and the judgment sentencing him to life imprisonment. Under the established criminal procedure of this State, petitioner's objection comes too late. G.S. 9-26.

[4, 5] It may be granted that petitioner, as many other defendants in criminal cases, was not familiar with the rules of criminal procedure. Nevertheless, such rules are necessary for an orderly administration of justice. It is precisely for the reason that defendants in criminal cases may not be familiar with all of their rights and the means of protecting them that we require they be represented by counsel. Petitioner here was represented by experienced and competent trial counsel employed by his family for that purpose.

> "It is inherent in the judicial process that courts must deal with litigants as though they were acting in the persons of their attorneys. For this reason, the law confers upon the attorney for the defense in a criminal case the power to take such steps in matters of practice and procedure as he deems appropriate to protect the interests of the accused, and decrees that the accused is bound by his action as to those matters. . . . It necessarily follows that the attorney for the defense in a criminal action may waive a constitutional right of his client relating to a matter of practice or procedure. . . . The right of a Negro defendant to object to a grand or petit jury upon the ground of discrimination against members of his race in the selection of such jury is waived by failing to pursue the proper remedy." *Miller v. State, supra.*

[4] In conformity with the decisions of the Supreme Court of North Carolina, we hold that petitioner, acting through his employed attorney, waived any objection to the grand jury by his failure to move in apt time to quash the indictment. Petitioner cites, *contra, McNeill v. North Carolina,* 368 F. 2d 313, a decision of the United States Fourth Circuit Court of Appeals.

[6] In his order denying petitioner relief the superior court judge found as a fact that petitioner had "freely, voluntarily, without

threat, coercion or duress entered a plea of guilty to the offense of first-degree burglary" at the August, 1964 Term of Halifax Superior Court. Petitioner excepts to this finding as not being supported by sufficient evidence. In his brief petitioner's counsel argues that "logic compels that the petitioner's guilty plea be considered a product of his involuntary confession, and that therefore it must be determined that the petitioner's guilty plea was coerced and the Court was without jurisdiction to sentence the petitioner." This argument is valid only if the evidence at the post-conviction hearing would as a matter of law compel the finding of two things: First, that absent the confession the guilty plea would not have been entered; and second, that the confession was in fact involuntary. In our opinion, the evidence does not as a matter of law compel such a finding as to either. As to the first, there may well have been strong evidence to establish defendant's guilt available to the State had the plea of guilty not been entered, and it may have been that petitioner and his trial counsel were aware of such evidence. The record clearly discloses that petitioner, in the presence of his mother freely acknowledged his guilt to his trial attorney. We cannot say as a matter of law that "logic compels" that petitioner's guilty plea was the product of his prior confession to the police. Nor does a careful examination of the entire record, with particular attention being given to petitioner's own testimony, compel the conclusion as a matter of law that petitioner's confession to the police was coerced or otherwise obtained in an unconstitutional manner. There was no prolonged or continuous interrogation by the officers. By his own testimony he was questioned only "an hour or two" on the night of his arrest, at which time he refused to disclose even his name. He was questioned "about an hour" the next morning, when he confessed. He does not contend he was in any way physically abused. He told his attorney, who visited him a few minutes after his confession, that no threats and no promises had been made and that he was not scared.

At the post-conviction hearing petitioner testified that on the night of his arrest he had asked to see his attorney and his mother, but he admits that at that time he refused to tell the officers what his name was, or the name of his mother, or who his lawyer was. At the post-conviction hearing he also testified that on the night of his arrest he was not given anything to eat or drink, but even if true this hardly seems coercive in view of the fact he admitted having had supper that night. At his post-conviction hearing he also testified that prior to his confession the officers had promised to help him as best they could but didn't say what they would do. All of this testimony, that he had asked and been denied the right to see his

lawyer, that he had been denied food and water, and that the officers had made promises to him, was first given by petitioner at his post-conviction hearing more than three years after his arrest. And it is inconsistent with what he himself told his lawyer on the morning following his arrest. The evidence in the record simply does not, at a matter of law, compel a finding that petitioner's confession was involuntary or that in obtaining it the police violated any of his constitutional rights.

[7] Petitioner also contends that his plea of guilty was involuntary because of his fear of receiving a death sentence if he had risked a jury trial by a plea of not guilty. He argues that this was an inherently coercive factor which necessarily deprived him of freedom of choice in making his plea, thereby imposing an impermissible burden upon his exercise of his Fifth and Sixth Amendment rights under the Federal Constitution. *United States v. Jackson,* 390 U.S. 570, 88 S. Ct. 1209, 20 L. ed. 2d 138. The North Carolina Supreme Court, however, has had occasion recently to point out the material differences in the Federal Kidnapping Act with which the United States Supreme Court was concerned in *Jackson,* and the North Carolina Statutes relating to the death penalty and to the permissive tender of a plea of guilty. In *State v. Peele,* 274 N.C. 106, filed 14 June 1968, the North Carolina Supreme Court pointed out that:

> "G.S. 15-162.1 is for the benefit of a defendant and may be invoked only on his and his counsel's written application. It provides that the State and the defendant, under rigid court supervision, may, without the ordeal of a trial, agree on a result which will vindicate the law and save the defendant's life. As stated in the *Jackson* case, there are 'defendants who would greatly prefer not to contest their guilt.' Practical experience indicates only in extreme cases does the jury fail to recommend life imprisonment rather than the death penalty."

In view of the rigid court supervision which G.S. 15-162.1 requires before a guilty plea may be entered, we hold that the interplay of that statute with statutes such as G.S. 14-52 which impose the death penalty in cases where the defendant is convicted after a plea of not guilty and the jury fails to recommend life imprisonment, does not result in any substantial denial of a defendant's constitutional rights.

[8, 9] Petitioner also assigns as error the court's admission of evidence relative to petitioner's guilt of the crime for which he had been convicted. At the post-conviction hearing the petitioner, on

cross-examination by the solicitor and over objection by his counsel, freely admitted that he had entered the house which he was charged with having burglarized and there having intercourse with a female occupant who had not been previously known to him. The purpose of the proceeding under the North Carolina Post-Conviction Hearing Act, G.S. 15-217, *et seq.*, is not to determine petitioner's guilt or innocence. That matter has already been determined in the trial and judgment which is the subject of post-conviction review. The purpose of post-conviction review is to determine whether in the proceedings leading to the conviction there occurred any substantial denial of petitioner's constitutional rights. G.S. 15-217. Therefore, testimony as to petitioner's guilt was not relevant in the post-conviction proceedings. However, its admission in no way prejudiced petitioner's opportunity to develop fully the testimony which was relevant to the constitutional issues raised by him and its admission was at most harmless error.

Petitioner has made other assignments of error relating to admission or exclusion of evidence and to the court's failure to rule on objections to evidence. We have examined these carefully but find no prejudicial error.

The judgment is

Affirmed.

CAMPBELL and BROCK, JJ., concur.

CIVIL SERVICE BOARD OF THE CITY OF CHARLOTTE v. RICHARD S. PAGE

No. 68SC110

(Filed 14 August 1968)

1. **Administrative Law § 4; Municipal Corporations § 11— hearing by municipal administrative agency — notice of charges**

Where no statute, rule or regulation establishes the kind and contents of a notice of charges against a municipal employee to be heard by a municipal administrative agency, the notice is governed by established rules of procedure applicable generally to administrative tribunals.

2. **Administrative Law § 4— due process — fair hearing**

The constitutional requirement of due process is met by a fair hearing before a regularly established administrative tribunal.

3. Administrative Law § 4— fair hearing — notice of charges

The right to a hearing embraces the right to a reasonable opportunity to know the claims of the opposing party and to meet them.

4. Administrative Law § 4; Municipal Corporations § 11— hearing before municipal civil service board — notice of charges

In a proceeding before a municipal civil service board to determine whether a fire department employee should be discharged, the employee was sufficiently apprised of the derelictions with which he was charged, thereby giving him the opportunity to meet them, by (1) written notices of his temporary suspension from the fire department and of the hearing before the civil service board upon charges of "gross insubordination or willful disobedience of any order lawfully issued by a superior in the department," and by (2) the hearing itself, wherein the employee fully participated with counsel, in which evidence was presented that the employee disobeyed an order to help set up tents for a "Festival in the Park."

5. Administrative Law § 4; Municipal Corporations § 11— wilfully disobeying lawful order — burden of proof

A municipal fireman charged with wilfully disobeying an order lawfully issued has the burden of showing that the order was unlawful.

6. Public Officers § 8; Municipal Corporations § 9— acts of public officers presumed proper

It is presumed that acts of a public officer within the sphere of his official duties and purportedly exercised in an official capacity and by public authority are within the scope of his authority and in compliance with controlling statutory provisions; this presumption, however, is one of law and not of fact and may be rebutted by competent evidence.

7. Appeal and Error § 40— record on appeal — brief

A brief is not a part of the record on appeal. Rule of Practice in Court of Appeals No. 19.

8. Appeal and Error § 42— assertions in brief not supported by record on appeal

The Court of Appeals will not consider as facts assertions set forth in the brief which are not supported by evidence or any other portion of the record on appeal.

9. Municipal Corporations § 9— municipal firemen — performing various public duties

A municipality can require firemen employees to perform public duties other than those relating to the fighting or prevention of fires.

10. Administrative Law § 5; Municipal Corporations § 11— discharged Charlotte fireman — appeal

An employee of the Charlotte Fire Department who is discharged after a hearing by the civil service board may appeal to the Mecklenburg County Superior Court, and such appeal is governed by the provisions of Article 33, Chapter 143 of the General Statutes. Section 4.61(6), Chapter 713, Session Laws of 1965.

11. Administrative Law § 4; Municipal Corporations § 11— civil service board — quasi-judicial function

A civil service board acts in a quasi-judicial capacity when passing on the dismissal of an employee.

12. Administrative Law § 5; Municipal Corporations § 11— civil service board — findings conclusive when supported by evidence

The findings of fact of the Charlotte Civil Service Board are conclusive on appeal when supported by competent, material and substantial evidence in view of the entire record as submitted. G.S. 143-315.

13. Administrative Law § 5; Municipal Corporations § 11— findings of fact supported by the evidence

Findings of fact by a municipal civil service board in an order dismissing a fire department employee for violating the fire department rules and regulations by wilfully disobeying an order of a superior officer to help erect tents for a "Festival in the Park" *are held* supported by competent, material and substantial evidence in view of the record as submitted, and are therefore conclusive on appeal.

14. Administrative Law § 4; Municipal Corporations § 11— civil service board — requisites of fair hearing

In a proceeding before a municipal civil service board to determine whether a fire department employee should be discharged, the employee was accorded a fair hearing where he was given timely notice of the charges against him, a reasonable opportunity to confront and examine witnesses against him, the right to inspect documents, and where he was present with counsel at the hearing, was permitted to offer evidence, and was given a hearing by a duly constituted agency within a reasonable time after the charges were filed against him.

APPEAL by respondent Richard S. Page from *Brewer, J.*, 4 December 1967 Schedule D Non-Jury Session of Superior Court of MECKLENBURG County.

After a hearing the Civil Service Board of the City of Charlotte found, among other things, that the respondent Page, a fire alarm dispatcher of the Charlotte Fire Department, was guilty of willful disobedience of a lawful order issued to him by a superior officer in the department, in violation of Rule 2 of the Rules and Regulations of the Fire Department of the City of Charlotte. Thereupon, the Civil Service Board discharged the respondent from the service of the Charlotte Fire Department. Upon review by the superior court, judgment was entered confirming the order of the Civil Service Board, and the respondent appeals to the Court of Appeals.

W. A. Watts for Civil Service Board of the City of Charlotte appellee.

John D. Warren for respondent appellant.

MALLARD, C.J.

Respondent brings forward two assignments of error. In the first one he asserts that the charges against him were in the alternative and were not sufficiently specific to inform him of the nature thereof, and therefore he was not afforded the opportunity to prepare and present the evidence necessary to defend himself.

In the other assignment of error brought forward respondent asserts that the court committed error in upholding the order of the Civil Service Board discharging the respondent for willful disobedience of a lawful order issued to him by a superior officer in the department.

The parties stipulated that the Civil Service Board of the City of Charlotte was "a properly constituted administrative agency." It was also stipulated "that the copy of notice of the hearing of the Civil Service Board was timely received by the respondent. . . ."

The pertinent parts of the notice of hearing read as follows:

> "This is to notify you that the Civil Service Board will hold a hearing in the Council Chamber in the City Hall, on Wednesday, September 20, 1967, at 1:00 o'clock P.M., in regard to your citation by Chief Walter J. Black on September 8, 1967, for the alleged violation of Rule 2 of the Rules and Regulations of the Charlotte Fire Department, which reads as follows:
>
> 'For gross insubordination or willful disobedience of any order lawfully issued to him by a superior officer in the department.' You will please be present at that time to be heard in your defense. You are at liberty to have any witnesses that you wish present to testify in your behalf."

The evidence tends to show that C. W. Robinson was the immediate superior of the respondent. That Mr. Robinson on 7 September 1967 told respondent Page to report for work at 9:00 a.m. on 8 September 1967 at Freedom Park to assist in getting the "Festival in the Park" ready. He did not go. Walter J. Black, Chief of the Charlotte Fire Department, testified that on 8 September 1967 at about 10:00 a.m. "I . . . called Page over to my office and asked him why he had refused to go to the park. He said he thought his work in the Dispatcher Room was more important and he didn't intend to go. I told him, under those conditions, I would have to suspend him, for insubordination. Then he mentioned the allergy. At that time, he was verbally suspended, and the allergy did not enter into it. I wrote out his suspension orders and gave them to him."

Under a stipulation of the parties certain rules and regulations

of the Fire Department of the City of Charlotte were admitted in evidence. Among these was Rule 2 as contained in the copy of the notice of hearing, a violation of which subjects one to a fine, suspension, dismissal, or other disciplinary measures. Also among these were sections five and six relating to the duties and responsibilities of the Chief of the Fire Department. Section five authorizes the chief to suspend a member of the fire department. No question is raised on this appeal with respect to the written order of temporary suspension entered by the Chief of the Fire Department. The respondent did not appeal therefrom to the Civil Service Board as provided in Section 4.61 of Chapter 713 of the Session Laws of 1965. There is no copy of this order in the record. Section six of the rules and regulations authorizes the chief to make all duty assignments.

Subsection 6 of Section 4.61 of Chapter 713 of the 1965 Session Laws reads in part as follows:

> "No officer or employee of the Fire or Police Department of the City of Charlotte shall be dismissed, removed, or discharged except for cause, upon written complaint, signed by the Chief of either the Fire or Police Department in which said officer or employee is employed making said complaint and until after the said officer or employee has been given an opportunity to be heard by the Civil Service Board in his own defense, and in the event such officer or employee is convicted of violating the Rules and Regulations of the respective department, said Board may discharge said employee or officer from the service, . . ."

[1] The statute is silent as to the kind and contents of notice required. Whether there are any rules or regulations establishing a procedure relating to the kind and the contents of notice to a respondent of charges against him has not been called to our attention. In the absence of such, the notice must be governed by established rules of procedure applicable generally to administrative tribunals. *Jarrell v. Board of Adjustment,* 258 N.C. 476, 128 S.E. 2d 879.

[2] "The constitutional requirement of due process is met by a fair hearing before a regularly established administrative tribunal." 42 Am. Jur., Public Administrative Law, § 137.

[3] "The right to a hearing embraces the right to a reasonable opportunity to know the claims of the opposing party, and to meet them." 42 Am. Jur., Public Administrative Law, § 139.

[4] The respondent had been temporarily suspended on 8 September 1967 for insubordination. The notice of hearing dated 11

September 1967, fairly interpreted, contained two charges in the alternate. One of "gross insubordination" and the other of "willful disobedience of an order lawfully issued." Respondent did not ask for a continuance when the matter came on for a hearing but contended, without contradiction, that gross insubordination was different from ordinary insubordination and that willful disobedience of an order lawfully issued by a superior officer was different from gross insubordination.

The respondent, after inquiring if he was charged with both offenses, did not make the assertion before or at the time of the hearing that he was not informed of the charges against him sufficiently so that he could have a fair and full hearing. Neither did he assert prior to or at the time of the hearing that he was not afforded the opportunity to prepare and present the evidence necessary to defend himself in the alternative or that he was taken by surprise. He makes that assertion for the first time in his brief. In his brief, and at the hearing, the respondent contended that the Board refused to state whether the hearing was one for insubordination or disobedience of an order lawfully issued, or both, and that the Board proceeded to try him for a willful disobedience of an order lawfully given, never having informed him that such was the charge against him. The respondent was told by the Chief of the Fire Department specifically why he was being suspended. He also received a written notice of his suspension. In the stipulation the respondent stipulates that he received a copy of the notice "timely." In this notice appears the following charges: "For gross insubordination or willful disobedience of any order lawfully issued to him by a superior officer in the department."

We are of the opinion and so decide that under the circumstances shown here, the notice of suspension, the notice of hearing, and the hearing plainly conveyed to the respondent the charges against him with sufficient clarity to enable him to know the derelictions he was being accused of and to give him opportunity to meet them, and that he has had a full and fair hearing, after timely notice.

Respondent was present at the hearing, represented by counsel, cross-examined witnesses, offered evidence, and otherwise participated therein. He did not contend at the time of the hearing that he had not had time to prepare to defend against both charges.

Respondent contended that no order was given him by his superior, Mr. Robinson, and if there was, it was not an order lawfully given because he contended Mr. Robinson did not have the authority to order him to go to Freedom Park to set up tents.

There was no contention here that Mr. Robinson was not the superior officer of the respondent. There was ample evidence that an order was given by Mr. Robinson to respondent to report for work in the park and that respondent willfully disobeyed the order.

[5] The Chief of the Fire Department testified that the officials of the Fire Department had the authority to send firemen to the park for the purpose of erecting tents. That this had been the custom for several years. The burden was on the respondent to show, if he could, that the order was unlawful. This he failed to do. *Huntley v. Potter,* 255 N.C. 619, 122 S.E. 2d 681.

[6] The Chief of the Fire Department of the City of Charlotte is a public officer. The presumption of regularity supports the official acts of public officers. It is presumed, in the absence of evidence to the contrary, that acts of a public officer within the sphere of his official duties, and purporting to be exercised in an official capacity and by public authority, are within the scope of his authority and in compliance with controlling statutory provisions. This presumption, however, is one of law, and not of fact, and may be rebutted or overthrown by competent evidence. 29 Am. Jur. 2d, Evidence, § 171; *United States v. Chemical Foundation,* 272 U.S. 1, 71 L. ed. 131; *Huntley v. Potter, supra.*

The evidence and the record in this case are silent as to what the tents were to be used for. The respondent did not offer any evidence as to the purpose of the erection of the tents in Freedom Park for a project known as "Festival in the Park" except to say that the tents had nothing to do with fighting or prevention of fires.

[7, 8] Respondent in his brief makes assertions that the tents were to be used for a purpose that was not of a public nature but were for a private function. These assertions are not supported by the evidence or any other portion of the record on appeal. We do not consider as facts in the case matters not supported by the evidence or any other part of the *record on appeal.* A brief is not a part of the *record on appeal.* See Rule 19 of the Rules of Practice in the Court of Appeals for contents of the record on appeal.

[9] It is common knowledge that municipal fire departments are sometimes called upon to perform public duties unrelated to the fighting or prevention of fires. For instance, firemen are frequently called upon to help quell riots.

[9] Respondent has cited no authority, and we have found none, holding that a municipality cannot require firemen employees to perform public duties other than those relating to the fighting or prevention of fires.

Respondent does not testify that he was physically unable to go to the park and assist in the work there. He said he had an allergy but did not testify that it was a condition that would prohibit him from working in the park. The evidence was conflicting as to whether he told his superiors of his allergy before he was suspended for refusing to go to the park. He insists that he had the right to determine which job was more important for him to do. The Rules and Regulations of the Fire Department of the City of Charlotte did not give him this right.

After hearing all the evidence, including respondent's evidence of having an allergy, the Civil Service Board made and entered the following findings of fact and order:

"(1) That on Thursday night, September 7, 1967, at about 8:30 P.M., Deputy Fire Chief C. W. Robinson called Richard S. Page, a fire alarm dispatcher of the Charlotte Fire Department, and ordered Page to report for duty on Friday, September 8, 1967, at 9 a.m. at Freedom Park to work with other members of the Fire Department.

(2) That Deputy Fire Chief C. W. Robinson is the immediate superior officer of Richard S. Page, and as such, it is Chief Robinson's duty to assign Richard S. Page his work details.

(3) That Richard S. Page willfully failed and refused to obey the order given to him by his immediate superior; did fail and refuse to report for duty at 9 a.m. on Friday, September 8, 1967, at Freedom Park as ordered; did fail and refuse to report to Freedom Park at any time thereafter; and did fail and refuse to give any adequate or reasonable grounds for his failure and refusal to obey the order.

Based on the foregoing findings of fact, the Charlotte Civil Service Board finds Richard S. Page guilty of willful disobedience of a lawful order issued to him by a superior officer in the department, in violation of Rule 2 of the Rules and Regulations of the Fire Department, Charlotte, North Carolina, as adopted by this Board on March 31, 1960, and adopted by City Council on October 31, 1960.

Wherefore, the Charlotte Civil Service Board orders that Richard S. Page be, and he is hereby discharged from service of the Charlotte Fire Department, effective September 20, 1967; and be it further ordered that the suspension of Richard S. Page from and since September 8, 1967, be without pay."

[10] It is provided in Section 4.61(6) of Chapter 713 of the 1965

Session Laws, among other things, that if an employee of the Fire Department of the City of Charlotte shall be discharged, after a hearing, by the Civil Service Board of the City of Charlotte that he may appeal from the order of the board to the superior court of Mecklenburg County. It is further provided therein that the appeal shall be governed by the provisions of Article 33, Chapter 143 of the General Statutes. This article relates to the judicial review of decisions of certain administrative agencies.

[11, 12] A civil service board, when passing on the dismissal of an employee, is acting in a quasi-judicial capacity. *Bratcher v. Winters,* 269 N.C. 636; 15 Am. Jur. 2d, Civil Service, § 38. The findings of fact of the Civil Service Board of the City of Charlotte are conclusive on appeal when supported "by competent, material, and substantial evidence in view of the entire record as submitted." G.S. 143-315.

[13] We are of the opinion and so decide that the facts found by the Civil Service Board of the City of Charlotte are supported "by competent, material, and substantial evidence in view of the entire record as submitted."

[14] Respondent had due and timely notice of the charges against him. He had reasonable opportunity, after being informed of the charges against him, to prepare his defense and to meet the charges. He had the opportunity to confront and examine the witnesses against him. The right to inspect documents was not denied him. He had the right to and was present at the hearing and was represented by counsel. His counsel was heard. He was permitted to offer evidence to meet the charges against him. He was given a hearing within a reasonable time after the charges were filed against him by a duly constituted agency. *Jarrell v. Board of Adjustment, supra; Branche v. Board of Trustees,* 141 N.Y.S. 2d 477; *State v. Board of Commissioners of Fargo,* 63 N.D. 33, 245 N.W. 887; *State v. Milwaukee,* 157 Wis. 505, 511, 147 N.W. 50. The respondent has been accorded a fair hearing; none of his rights have been violated. We are of the opinion and so decide that the order of the superior court in upholding the order of the Civil Service Board discharging the respondent for willful disobedience of a lawful order issued to him by his superior was proper and should be

Affirmed.

BROCK and PARKER, JJ., concur.

CHARLES PATTERSON, EMPLOYEE, v. L. M. PARKER & COMPANY, EMPLOYER, NON-INSURER

No. 68SC80

(Filed 14 August 1968)

1. Master and Servant § 96— Industrial Commission — review — conclusiveness of jurisdictional facts

The Industrial Commission's findings of jurisdictional facts are not conclusive on appeal to the Superior Court, even though they may be supported by competent evidence.

2. Master and Servant § 96— Industrial Commission — improper findings of jurisdiction — duty of reviewing court

Where the judge is of the opinion, upon a fair and impartial consideration of the evidence in the record, that the Commission's findings of jurisdictional facts lead to an improper assumption or rejection of jurisdiction by the Commission, he has the duty to make independent findings of jurisdictional facts and to set them out in the judgment.

3. Master and Servant § 96— review — adoption of Commission's jurisdictional findings

If a party to the proceedings requests the court to make independent findings of jurisdictional facts, it is error for the court to fail to do so; but if the court's findings are in agreement with the Commission's, he may by reference thereto in the judgment adopt them as his own.

4. Master and Servant § 97— judgment of Superior Court — conclusiveness of jurisdictional findings on appeal

If the independent findings of fact of the trial court relating to the jurisdiction of the Industrial Commission are supported by competent evidence, and if the findings support his conclusions of law, they are binding on appeal.

5. Master and Servant § 48— employers subject to the Act — five or more employees — sufficiency of evidence

Jurisdictional findings of fact by the Superior Court that during at least twenty-eight weeks of a 44-week period the defendant had less than five employees, that during the remaining sixteen weeks of the period the defendant paid more than four persons during each weekly pay period but that many of the persons worked only a few hours or days during the total 44 week period and not on a regular basis, and that on the date of the plaintiff's accident and injury, and for a period of six weeks prior thereto, the defendant had four or less employees, *are held* supported by sufficient and competent evidence.

6. Master and Servant § 48— employers subject to the Act — five or more employees

If an employer does not "regularly employ" five or more employees, he is not subject to the Workmen's Compensation Act. G.S. 97-2(1), G.S. 97-13.

7. Master and Servant § 48— definition of "regularly employed"

The term "regularly employed" connotes employment of the same number of persons throughout the period with some constancy.

8. Master and Servant § 48— insufficiency of findings to subject employer to jurisdiction of the Act

There are insufficient facts to indicate the employment of five or more employees with sufficient constancy or regularity so as to bring an employer under the provisions of the Act where the findings of fact are to the effect that (1) during at least twenty-eight weeks of a 44-week period prior to the accident the employer had less than five employees, (2) that during the remaining sixteen weeks of the period the defendant paid more than four persons during each weekly pay period but that many of the persons worked only a few hours or days during the total 44-week period and not on a regular basis, and (3) that on the date of the plaintiff's accident and injury, and for a period of six weeks prior thereto, the defendant had four or less employees.

APPEAL by plaintiff from *Godwin, J.*, January 1968 Non-Jury Assigned Civil Session, WAKE Superior Court.

Plaintiff was injured on 22 December 1965. It was stipulated that he was injured as the result of an accident arising out of and in the course of his employment with defendant. Plaintiff filed a claim with the North Carolina Industrial Commission. When the case came on for hearing before Deputy Commissioner Dandelake, the defendant, at the end of plaintiff's evidence, moved for dismissal for lack of jurisdiction, contending that plaintiff had the burden of showing that defendant is covered by the Act and that he had not borne the burden of showing that defendant had as many as five employees regularly employed. The deputy commissioner did not rule on the motion, and defendant presented his evidence. The deputy commissioner filed an opinion and award finding that "defendant regularly employed five or more employees in the same business or establishment". Based thereon he concluded that defendant was subject to and bound by the Act and was non-insured. Upon appeal to the Full Commission, the findings of fact, conclusions of law, and award of the deputy commissioner were adopted by the Full Commission and defendant's exceptions overruled. Defendant appealed to the Superior Court and Judge Godwin, after reviewing the record, made independent findings of fact and conclusions of law. Based on his findings of fact he concluded that the North Carolina Industrial Commission has no jurisdiction over the matter because, "at the time of plaintiff's injury, defendant regularly employed less than 5 employees and the defendant was not subject to or bound by the provisions of the Workmen's Compensation Act". From judgment entered in accordance therewith, plaintiff appeals.

Manning, Fulton and Skinner by Jack P. Gulley and Howard E. Manning for plaintiff appellant.

Purrington, Joslin, Culbertson and Sedberry by Charles H. Sedberry for defendant appellee.

MORRIS, J.

[1-3] It is now well established that the Industrial Commission's findings of jurisdictional facts are not conclusive on appeal to the superior court, even though they may be supported by competent evidence. In *Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280, Justice Moore, after considering and discussing the cases interpreting and applying the rule, set out certain principles; among them, this:

> "Where the judge is of the opinion, upon a fair and impartial consideration of the evidence in the record, that the Commission's findings of jurisdictional facts lead to an improper assumption or rejection of jurisdiction by the Commission, he has the duty to make independent findings of jurisdictional facts and to set them out in the judgment."

If a party to the proceedings requests the court to make independent findings of jurisdictional facts, it is error to fail to do so, but if the court's findings are in agreement with the Commission's, he may by reference thereto in the judgment adopt them as his own. *Askew v. Tire Co., supra.* The trial court made independent findings of jurisdictional facts which are not in agreement with the facts found by the Industrial Commission.

The sole question before us on appeal, therefore, is whether, at the time of plaintiff's injury, defendant regularly employed five or more persons and was subject to and bound by the Workmen's Compensation Act.

The sections of the Act with which we are concerned are these:

> "§ 97-2(1) Employment. — The term 'employment' includes employment by the State and all political subdivisions thereof, and all public and *quasi*-public corporations therein and all private employments in which five or more employees are regularly employed in the same business or establishment, except agriculture and domestic services, and an individual sawmill and logging operator with less than ten (10) employees, who saws and logs less than sixty (60) days in any six consecutive months and whose principal business is unrelated to saw milling or logging."

"§ 97-13 *Exceptions from provisions of article.*—. . . (b) Casual Employment, Domestic Servants, Farm Laborers, Federal Government *(sic)* Employer of Less than Five Employees. —This article shall not apply to casual employees, farm laborers, federal government employees in North Carolina, and domestic servants, nor to employees of such persons, nor to any person, firm or private corporation that has regularly in service less than five employees in the same business within this State, except that any employer without regard to number of employees, including an employer of domestic servants, farm laborers, or one who previously had exempted himself, who has purchased workmen's compensation insurance to cover his compensation liability shall be conclusively presumed during life of the policy to have accepted the provisions of this article from the effective date of said policy and his employees shall be so bound unless waived as provided in this article."

The trial court found as facts the following:

"1. The defendant, L. M. Parker and Company is a sole proprietorship, owned and operated by L. M. Parker. The company is engaged in the cotton and fertilizer business. The plaintiff was an employee of L. M. Parker and Company, and was in regular employment, during the period beginning with the week ending October 9, 1965 and ending on December 22, 1965, and the plaintiff was engaged to work in the office of L. M. Parker and Company in a clerical and supervisory capacity. That the plaintiff, while an employee of the Company, incurred the injury which is the subject of this case on December 22, 1965.

2. That during the 44 week period from March, 1965 through December, 1965, the defendant had less than 5 employees during at least twenty-eight weeks. That during the remaining sixteen weeks of said period, the defendant paid more than 4 persons during each weekly pay period, but many of the persons paid by defendant worked only a few hours or days during the total 44 week period and did not work for defendant on a regular basis throughout the period; and that during the period from March, 1965 through December, 1965, the defendant regularly employed in his business 4 or less employees. That from November 6, 1965 through December, 1965, the defendant had 4 or less employees at any time; that defendant uttered and delivered a check in the sum of $15.00 to James Watson, a former employee of the defendant, in the week ending December 4, 1965; that the said James Watson became partially paralyzed

on October 5, 1965, and did not work for fifteen months thereafter, and was not in the employ of defendant during said term, and that checks made payable to Watson by defendant after the week ending October 9, 1965 were a gratuity and not in payment for labor performed in the defendant's business.

3. That at the time of the accident and plaintiff's complained of injury on December 22, 1965, the defendant had 4 employees only, and that during each of the weeks ending November 13, 20, 27 December 4, 11, and 18 and during the week ending December 25, the defendant had four or less employees."

From the foregoing findings of fact, the court made the following conclusions of law:

"1. That at the time of the plaintiff's injury, the defendant regularly employed less than 5 employees and the defendant was not subject to or bound by the provisions of the Workmen's Compensation Act.

2. That the North Carolina Industrial Commission does not have jurisdiction over this case.

3. That the opinion and award of the North Carolina Industrial Commission entered on July 3, 1967 in this case should be reversed and the judgment, based on said order of the North Carolina Industrial Commission, entered on July 11, 1967 in the Wake County Superior Court by the Honorable Harry E. Canaday, Superior Court Judge, should be vacated."

[4] If the findings of fact of the trial court are supported by competent evidence, and if they support his conclusions of law, we are bound by them. See *Hart v. Motors,* 244 N.C. 84, 92 S.E. 2d 673; *Richards v. Nationwide Homes,* 263 N.C. 295, 139 S.E. 2d 645.

[5] The payroll records and canceled checks to employees show that during the period from March 1965 through December 1965, there were 28 weeks during which defendant paid less than five employees. During that period there were 16 weeks during which defendant paid five or more employees. Plaintiff testified that in his opinion the business required one person to operate the fork lift, one to weigh and tag, one or two to do the sampling, one to bale, and at least one and sometimes two in the office, but that the number varied. Defendant testified he never had more than four employees at any one time; that he normally had no reason to have any use for over four; that he didn't have jobs for but four people; that he needed a man in the office, a man to operate the fork lift and two others; that the same employee could do two or more jobs; that although he

might have at times written payroll checks to as many as seven people for a week, they were not all employed at the same time and some of them would work a few hours and he would not see them again; that he knew that one employee to whom he paid wages during the period was regularly employed by someone else and had worked for a few hours; that he had only enough office work for one man. Plaintiff also testified on cross-examination that he and one other employee were paid a salary; that while he was employed some of the "guys" would come in for one day and he wouldn't see them anymore; that there was quite a turnover in labor; that some days defendant might have three people at work and some days he might have five; that it would vary.

We hold that there is sufficient evidence to support the findings of fact of the trial court.

Whether these facts bring defendant within the jurisdiction of the Workmen's Compensation Act is a more difficult problem.

[6] If defendant did not "regularly employ" five or more employees, he is not subject to and bound by the Act. Our statute does not define "regularly employed". The evidence is undisputed that on the day the injury occurred defendant had less than five employees. We do not believe, however, that this alone is determinative. If the defendant had five or more "regularly employed" employees, the fact that he fell below the minimum requirement on the actual date of injury would not preclude coverage. Larson, *Workmen's Compensation Law,* Vol. 1A, § 52.20.

In defining the word "regular", Webster's Third New International Dictionary says: "Regular may imply conformity to a prescribed rule, standard, or established pattern." "Regularly" is defined therein as "in a regular, orderly, lawful, or methodical way."

The Connecticut Court has held that "regularly" means "in accordance with some constant or periodic rule or practice". *Jenkins v. Reichert et al,* 125 Conn. 258, 5 A. 2d 6. In applying this definition, the Court held that where seven employees were engaged at various times in construction work, but no more than four worked on any one day prior to claimant's injury, and those who worked irregularly were not under contract to work whenever they might be called, the employer regularly employed less than five persons and was not covered under the Act. *Schneider v. Raymond,* 103 Conn. 49, 130 A. 73.

[7] We believe that the term "regularly employed" connotes employment of the same number of persons throughout the period

with some constancy. It would not seem that the purpose of the Act would be accomplished by making it applicable to an employer who may have had, in the total number of persons entering and leaving his service during the period, more than the minimum number required by the Act. Here, there was evidence that rarely did defendant have more than four employees on any one day, although at the end of some weeks his records showed that he paid more than four.

Plaintiff relies on the case of *Hunter v. Peirson,* 229 N.C. 356, 49 S.E. 2d 653. There the facts were that defendant was engaged in the general mercantile business which included selling fertilizer. The two decedents had been employed, when the business required, to handle the fertilizer and drive the truck to deliver it to the purchasers. The accident which resulted in the death of the decedents occurred on 15 March 1944. The decedents had been employed by defendant engaged in the hauling of fertilizer from the last of October, 1943, to the date of their death. The defendant admitted that the two were employed whenever a carload of fertilizer arrived. It also appeared that the decedents lived on defendant's farm and that in the late fall they were employed to haul farm produce and from early January they were employed to handle fertilizer and make deliveries. Defendant otherwise had three employees. He contended these two were not regularly employed but were casual labor and he came within that exception. The Court held that they were not casual labor and said:

> "The admitted employment of the decedents in the business of the defendant extended over a period of two months during which they worked, not by chance or for a particular occasion, but according to a definite employment, at stated wages, for a purpose in the usual course of defendant's business."

The Court upheld the ruling of the Commission that the defendant had five or more regular employees during the fertilizer season and was bound by the Act.

[8] There the employment of the same two persons was constant throughout the period. We cannot say that the facts in the case *sub judice* meet that test. The record shows that certainly for six weeks prior to the claimant's injury and for the week of his injury, there were less than five employees each week. The facts do not indicate the employment by defendant of five or more employees with sufficient constancy or regularity to bring him under the provisions of the Act.

This case presents another instance in which the Court is called upon to construe a statute which should more appropriately be im-

proved by legislation. We refer particularly to the lack of a definition of "regularly employed" resulting in confusion as to coverage in seasonal employment situations.

For the reasons stated in this opinion the judgment of the trial court is

Affirmed.

CAMPBELL and BRITT, JJ., concur.

JACKIE RAY MOSS, BY HER NEXT FRIEND, ERNEST MOSS, JR., v. SOUTHERN RAILWAY COMPANY, A CORPORATION, AND J. A. BEAL

No. 68SC182

(Filed 14 August 1968)

1. Appeal and Error § 40— record proper — statement of case on appeal

A statement of case on appeal is not an essential part of the record on appeal. Rule of Practice in the Court of Appeals No. 19(a).

2. Railroads § 5— crossing accidents — sufficiency of evidence

In an action by a 13-year-old plaintiff to recover for injuries sustained in a collision with defendant's train while she attempted to cross the defendant's tracks on a bicycle, there is sufficient evidence of actionable negligence to withstand motion for judgment as of nonsuit.

3. Railroads § 5— crossing accidents — instructions — liability for growth of weeds

In an action by a 13-year-old plaintiff to recover for injuries sustained in a collision with defendant's train while she attempted to cross the tracks on a bicycle, there is error in an instruction which permitted the jury to find defendant negligent solely upon a finding that defendant caused the plaintiff's view of the approaching train at the crossing to be obstructed by a growth of weeds and brushes.

4. Railroads § 5— dangerous crossing — actionable negligence — obstacles on right of way

Permitting obstacles along the right of way of its tracks and near a crossing does not in itself constitute actionable negligence on the part of a railroad, and independently would not give rise to a cause of action; the cause of action depends upon whether or not the train crew gave the warning and took the precautions which an unusually dangerous crossing required.

5. Damages § 16— instructions on future damages

In an action by a 13-year-old plaintiff to recover damages for injuries

sustained in a railroad crossing accident, the trial court committed error in failing to instruct the jury that any award on account of damages which plaintiff might sustain in the future should be limited to the present cash value of such loss or damages.

6. Appeal and Error § 10— amendment of answer on appeal

Defendant's motion in the Court of Appeals to be permitted to amend its answer is allowed. Rule of Practice in the Court of Appeals No. 20(c).

APPEAL by defendant Southern Railway Company from *Martin, Robert M., S.J.*, at the February 1968 Civil Session of WAKE County Superior Court.

Plaintiff institutes this action by her next friend alleging that she was thirteen years of age and was injured on 28 July 1961 by the negligence of the defendants. That she was struck by a train of the defendant Southern Railway Company which was being operated by its employee, the defendant J. A. Beal, while she was riding a bicycle and attempting to cross the tracks of the Southern Railway Company on St. Mary's Street in the Town of Garner. Plaintiff, seeking to recover for personal injuries, alleges that her injuries are permanent and were proximately caused by the negligence of the defendant J. A. Beal in the manner alleged and by the negligence of the defendant Southern Railway Company in that:

"Defendant Southern Railway Company permitted, and failed to cut, a growth of weeds and bushes upon its right of way and along its tracks in such a manner as to obstruct the view of this minor plaintiff when approaching the crossing and to hinder and prevent her from seeing the approaching train;

. . .

Defendant Southern Railway Company, by and through its employees, failed to maintain a reasonable and proper and lawful lookout so as to ascertain this minor plaintiff's position upon entering and crossing the tracks;

Defendant Southern Railway Company, knowing this particular crossing to be heavily traveled, and being fully apprised of the obstruction to the view of travelers approaching the crossing, and especially with regard to allowing its train to approach and pass through the crossing at speeds in excess of 50 miles per hour, failed and neglected to provide adequate and timely control and signal devices designed to warn the public, and this minor plaintiff in particular, of the approach of its train and the danger so created; . . ."

The defendant answering plaintiff's complaint denies that it was

negligent and as a further answer and defense alleges that plaintiff was riding a bicycle in a southerly direction on St. Mary's Street in Garner, and as she approached the railway crossing, she carelessly and negligently rode her bicycle onto the main line track in front of defendant's train. Defendants in answering assert that:

"6. The injuries of plaintiff were not caused by reason of any negligence on the part of these defendants, it being denied that defendants were negligent, but were proximately caused by the negligence of plaintiff herself, in the following respects:

(a) She failed to exercise that degree of care for her own safety which an ordinarily prudent person would and should have exercised under the same or similar circumstances and conditions;

(b) She failed to keep and observe a lookout for approaching trains at said crossing;

(c) She approached said grade crossing in a careless and negligent manner and rode a bicycle upon the main line track of defendant Southern Railway Company in front of said defendant's eastbound freight train when said train was approaching from the west in full view and was very close to said crossing;

(d) She rode said bicycle upon the railway track of defendant Southern Railway Company without stopping, looking and listening for approaching trains, when, by stopping and looking, or by looking without stopping, she could have seen said train approaching with its headlight burning, and by listening, she could have heard the whistle of said train sounding the crossing signal, the bell ringing and the other loud noises made by a moving train, and could easily have stopped said bicycle before entering said crossing and avoided the accident;

(e) She carelessly and negligently rode the bicycle on to the railway track immediately in front of the defendant Southern Railway Company's approaching train, in such manner and at such time as to render the accident inevitable and its avoidance by the defendants impossible, notwithstanding the utmost efforts on the part of the engineer and others on the train to avoid the accident.

7. Said negligence on the part of the plaintiff was the proximate cause or one of the proximate causes of the injuries of plaintiff, and these defendants plead such negligence in bar of any recovery against them herein."

There are no allegations of any other negligence or contributory negligence of the plaintiff.

At the 29 May 1967 Session of the Superior Court of Wake County issues were submitted to and answered by the jury as follows:

"1. Was plaintiff injured and damaged by the negligence of the defendant Southern Railway Company, as alleged in the Complaint?

ANSWER: Yes.

2. Was plaintiff injured and damaged by the negligence of the defendant J. A. Beal, as alleged in the Complaint?

ANSWER: No.

3. Did plaintiff, by her own negligence, contribute to her injury as alleged in the Answer?

ANSWER: No.

4. What amount, if any, is plaintiff entitled to recover?

ANSWER: $50,000.00."

From a judgment on the verdict ordering that the plaintiff recover nothing of either of the defendants and that the costs be taxed against her, the plaintiff appealed to the Supreme Court of North Carolina. (This was prior to the existence of the Court of Appeals.) Upon hearing the appeal, the Supreme Court of North Carolina in an opinion written by Justice Higgins, and reported in *Moss v. R. R. Company,* 272 N.C. 613, 158 S.E. 2d 789, reversed and remanded the case, stating:

"The plaintiff in this case alleged and testified that bushes and weeds were permitted to grow near the track which partially obstructed her view of the approaching train. This situation increased the need for vigilence in approaching the crossing. *Parrish v. R. R.,* 221 N.C. 292, 20 S.E. 2d 299. As the train approached from the west, at 50 miles per hour, Engineer Beal was on the right (south) side of the engine. The plaintiff approached the crossing from the north. Fireman Wrenn and Denkins, defendant's General Foreman of Engineers, were on the left of the engine. According to his evidence, Denkins saw the plaintiff 'a small child, a girl, on a bicycle' approaching from the north at a time when the train was 1400 feet from the crossing. All he did was tell the Engineer to cut down on his whistle. The plaintiff alleged the Southern Railway Company was negligent 'by and through its employees' for failure to maintain a reasonable and proper and lawful lookout so as to ascertain the minor plaintiff's approach and to give due and adequate warning and take proper precautions for the child's safety.

Wrenn saw the child 'in the motion of trying to stop.' Instead of calling on the Engineer to apply the emergency brakes, he actually said nothing but relied on the notice given by Denkins 'to cut down on the whistle.'

The finding of negligence against the railroad may well have been based on the failure of an agent other than Beal to exercise due care which the little girl's safety required. The only fact the verdict established as against the plaintiff was that Engineer Beal was not guilty of negligence. The verdict exonerated only Beal. This is understandable. The first time he ever saw the little girl was at the trial of this action in the Superior Court. He was at his position on the engine which did not permit him to see her approach from his left. The other members of the train crew gave him inadequate warning.

The Court committed error in holding the answer to the second issue (exonerating Beal) also exonerated the Southern Railway Company. The cause is remanded to the Superior Court for the entry of a judgment in favor of the plaintiff for the amount of damages fixed by the jury. From the judgment, the defendant railroad will have the right to note its appeal and have the trial reviewed by the Court of Appeals. The judgment dismissing the action as to the railroad company is set aside and the cause is remanded for judgment in accordance with the verdict."

Thereafter, Judge Robert M. Martin at the February 1968 Civil Session of Superior Court of Wake County entered judgment in favor of the plaintiff and against the defendant Southern Railway Company for the sum of fifty thousand dollars, and to the signing and entry thereof, the defendant Southern Railway Company excepted and gave notice of appeal to the Court of Appeals.

Dupree, Weaver, Horton, Cockman & Alvis by Jerry S. Alvis for plaintiff appellee.

William T. Joyner and Smith, Leach, Anderson & Dorsett by John H. Anderson for defendant Southern Railway Company, appellant.

MALLARD, C.J.

At the outset it should be noted that there is nothing before us with respect to the plaintiff's case against the engineer, J. A. Beal.

[1] There appears, beginning on page 16 of the record on appeal, what is entitled, "Statement of Case on Appeal," which seems to be an introductory statement or summary of the case. In this it is as-

serted that Judge *Harry C. Martin* at the February 11, *1967* Session of Wake County Superior Court rendered the judgment appealed from herein. All the remainder of the record on appeal indicates that the hearing was before Judge *Robert M. Martin* at the February *1968* Civil Session of Wake County Superior Court and that he signed the judgment. Also, the statement appears therein that the defendant "alleged that the plaintiff was herself contributorily negligent, as set forth in the answer." From reading the appellee's brief and a motion filed in this Court by appellant to amend its answer, the question of whether defendant alleged contributory negligence on the part of the plaintiff appears now to be controverted. This contradicts the stipulation. This introductory statement or summary called "Statement of Case on Appeal" is not an essential part of the record on appeal. For what the record on appeal should contain, see Rule 19(a) of the Rules of Practice in the Court of Appeals. If this "Statement of Case on Appeal" was in the brief of appellant, it would give us no difficulty. But when counsel for appellant and appellee stipulate and agree, as appears on the last page of the *record on appeal,* "that the foregoing shall constitute the *statement of case on appeal* in this action," (meaning as we construe it that the foregoing constitutes the record on appeal), and then take different positions with respect to portions of the stipulated record on appeal, it becomes difficult to determine the true facts.

[2] Defendant contends that its motions for nonsuit should have been allowed at the close of the evidence. In view of the summary of the evidence by Justice Higgins in the opinion of the Supreme Court in this case, as hereinabove set out, and in view of the holding herein ordering a new trial, we deem it unnecessary to recapitulate or summarize the evidence. We are of the opinion that there was ample evidence of actionable negligence, resulting in injury to plaintiff to withstand the motion for judgment as of nonsuit. *Coltrain v. R. R.,* 216 N.C. 263, 4 S.E. 2d 853.

[3] The defendant contends, and we agree, that the court committed error in its instructions with respect to the effect of weeds and bushes upon its right of way. The court charged the jury that:

> "I instruct you that it is negligence for a railroad company to allow weeds and bushes to grow upon its right-of-way and along its track to a height which would obstruct the view of a traveler upon a roadway intersecting and crossing the railroad, so as to prevent, by the growth and height of such weeds and bushes, the view of a traveler from having a reasonable opportunity to see the approaching train. . . .

So, as to the first issue, I charge and instruct you that if the plaintiff has fulfilled the responsibility cast upon her by the law to the extent that the evidence, by its quality and convincing power, has satisfied you by its greater weight, that at the time and place complained of the defendant Southern Railroad Company was negligent, either in that it failed to cut a growth of weeds and bushes upon its right-of-way and along its tracks, which growth obstructed the view of the plaintiff and prevented her from seeing the approaching train; or . . .

(I)f the plaintiff has proven any of those things and proven by the greater weight of the evidence that the negligence of the defendant railroad company in any one or more of these regards not only exists, but that such negligence was one of the proximate causes of the collision, injury and damages, then it would be your duty to answer this first issue in the plaintiff's favor, and that is 'yes.' "

The error in the above instruction, which relates to the first issue, is that the jury was permitted to find the defendant negligent upon the sole basis of a finding that the defendant allowed the view at the crossing to be obstructed.

[4] A jury could find that where the view at a crossing was obstructed such would not constitute negligence if the jury should find that the railroad company gave adequate warning of the approach of the train. In *May v. R. R.*, 259 N.C. 43, 129 S.E. 2d 624, it is stated: "If obstructions made a blind crossing, they were a vital factor in determining the duty which defendants owed her as well as in determining whether intestate herself was guilty of contributory negligence in going upon the tracks. However, '(o)bstructions in themselves have never been considered negligent, . . . but if they exist, and the railroad is aware of them, it is then incumbent on the railroad to take proper precautions to protect travelers who use the crossing and to warn them of the approach of trains.' *Parrish v. R. R.*, 221 N.C. 292, 20 S.E. 2d 299; *Coltrain v. R. R.*, 216 N.C. 263, 4 S.E. 2d 853.

"Permitting such obstacles on the right of way and near the crossing would not in itself constitute actionable negligence, and independently would not give rise to a cause of action. *Childress v. Lake Erie & W. R. Co.*, 182 Ind. 251, 105 N.E. 467. The cause of action depends upon whether or not the train crew gave the warning and took the precautions which an unusually dangerous crossing required."

[5] The appellant contends, and we agree, that the court committed error in failing to instruct the jury that any award on account of damages which plaintiff might sustain in the future should be limited to the present cash value of such loss or damage. In this connection the court should have, but did not, instruct the jury in substance that for any future suffering or damages or decreased earning power they should decrease any award they might make for such down to its present cash value, upon the theory that a dollar to be paid now for something that will occur in the future is worth more than if paid later, and for them to award on that phase of the case, if they award anything on that phase of the case, the present cash value of any future loss they find she may sustain. *Faison v. Cribb*, 241 N.C. 303, 85 S.E. 2d 139.

[6] We do not decide the question whether the defendant's further answer alleges contributory negligence. The case was first tried on the assumption that such was alleged. The defendant has made a motion in this Court to be permitted to amend its answer by adding in paragraph six of the Further Answer at the end of line five and before the words "in the following respects" (R p 11) the following: "but if the defendant Southern Railway Company was negligent as alleged in the complaint, then and in that event the plaintiff was also negligent in". This amendment is allowed pursuant to the provisions of Rule 20(c) of the Rules of Practice in the Court of Appeals.

We refrain from discussing the other assignments of error since the questions presented may not arise on retrial.

New trial.

BROCK and PARKER, JJ., concur.

MARY SUE RIGBY, EXECUTRIX UNDER THE WILL OF DAN WILLIAMS RIGBY, AND MARY SUE RIGBY, INDIVIDUALLY, PLAINTIFFS, v. I. L. CLAYTON, COMMISSIONER OF REVENUE OF NORTH CAROLINA, DEFENDANT

No. 68SC111

(Filed 14 August 1968)

1. Taxation § 17— nature of inheritance tax

The North Carolina inheritance tax is not a tax upon property itself, but is a tax imposed on the privilege to succeed to property upon the death of the former owner.

2. Taxation § 2— inheritance tax — power of legislature to classify

The broad power of a state legislature to classify and thus to discriminate for purposes of inheritance taxation has been fully established.

3. Taxation §§ 2, 17— inheritance tax — power of legislature — distinction between two classes of decedents

The State Legislature is not so limited in its power to make classifications for purposes of its inheritance tax laws that it could not make a distinction between decedents leaving property solely within the State and decedents leaving property both within and without the State, even though such classification results in differing amounts of tax. G.S. 105-21 as amended by Sec. 19, Chap. 127, Session Laws of 1937.

4. Taxation § 17— constitutionality of inheritance tax — inclusion of decedent's property outside the State for purpose of computation

G.S. 105-21, which imposes an inheritance tax upon the transfer of property within the State but at a rate determined by reference to the decedent's entire estate wherever located, *is held* constitutional.

APPEAL by plaintiffs from *Ervin, J.*, October 1967 Session of IREDELL Superior Court.

Dan Williams Rigby, a resident of Iredell County, North Carolina, died on 17 March 1964 leaving a will under which his wife, the plaintiff, was sole beneficiary and executrix. At the time of his death he owned property within the State of North Carolina having an appraised value of $110,021.49 and real property located in South Carolina having an appraised value of $61,000.00. Deductions amounted to $31,957.02. Plaintiff executrix filed with the defendant, who is Commissioner of Revenue of North Carolina, an inheritance tax return for the estate of her decedent in which she listed all property of the decedent located in North Carolina, claimed the full amount of the deductions and the specific exemptions allowed by G.S. 105-4, but omitted any property located outside of North Carolina, and paid an inheritance tax to the State of North Carolina computed without reference to the South Carolina property. Defendant, by computing the inheritance tax due the State of North Carolina in accordance with the provisions of G.S. 105-21, which requires all of decedent's property, wherever located, to be used in establishing the rate at which the decedent's property in North Carolina is taxed, assessed an additional inheritance tax on the transfer of the North Carolina property. Plaintiffs paid the additional tax under protest and thereafter filed timely claim for refund, which was denied by defendant. Plaintiffs, contending that G.S. 105-21 is unconstitutional, bring this action to recover the additional tax assessed. The case was heard upon an agreed statement of facts. From

judgment holding that G.S. 105-21 does not violate the State or the Federal Constitution and adjudging that plaintiffs take nothing by this action, plaintiffs appeal.

Adams and Dearman, by C. H. Dearman and Raymer, Lewis, and Eisele, by Douglas G. Eisele, for plaintiff appellants.

T. W. Bruton, Attorney General, and Myron C. Banks, Assistant Attorney General, for defendant appellee.

PARKER, J.

The sole question presented by this appeal is the constitutionality of G.S. 105-21, which reads as follows:

> "A tax shall be assessed on the transfer of property, including property specifically devised or bequeathed, made subject to tax as aforesaid in this State of a resident or nonresident decedent, if all or any part of the estate of such decedent, wherever situated, shall pass to persons or corporations taxable under this article, which tax shall bear the same ratio to the entire tax which the said estate would have been subject to under this article if such decedent had been a resident of this State, and all his property, real and personal, had been located within this State, as such taxable property within this State bears to the entire estate, wherever situated. It shall be the duty of the personal representative to furnish to the Commissioner of Revenue such information as may be necessary or required to enable the Commissioner to ascertain a proper computation of his tax. Where the personal representative fails or refuses to furnish information from which this assessment can be made, the property in this State liable to tax under this article shall be taxed at the highest rate applicable to those who are strangers in blood."

Appellants attack this statute as being unconstitutional on the grounds that, because it requires inclusion of property outside the State in the base upon which the North Carolina inheritance tax is computed, the necessary effect is to tax the outside property over which the State has no taxing jurisdiction. In support of their contentions appellants cite: *Frick v. Pennsylvania*, 268 U.S. 473, 45 S. Ct. 603, 69 L. ed. 1058; *Treichler v. Wisconsin*, 338 U.S. 251, 70 S. Ct. 1, 94 L. ed. 37; and refer to the dissenting opinion of Justice Holmes in *Maxwell v. Bugbee*, 250 U.S. 525, 40 S. Ct. 2, 63 L. ed. 1124. In considering appellants' contention, a look at the history of

the statute and examination of the nature of the State's inheritance tax will be helpful.

G.S. 105-21 is derived from a statute which first appeared in the North Carolina Revenue Act in 1921 (Sec. 12, Chap. 34, P.L. 1921). As originally enacted the statute applied only to estates of nonresident decedents who owned property within the state, and in those instances did not apply to specific bequests or devises. In 1925 the Legislature removed the proviso exempting application to property specifically devised and bequeathed (see Sec. 13, Chap. 101, P.L. 1925), and in 1937 broadened the statute to make it applicable to estates of all decedents, both resident and nonresident, who die owning property both within and without the state (see Sec. 19, Chap. 127, Session Laws 1937). Since 1937 the statute has remained in its present form.

The 1921 Act was identical in language with and obviously was copied from a New Jersey statute which had been approved by the United States Supreme Court in a decision handed down in October, 1919, in the case of *Maxwell v. Bugbee, supra.* In that case the constitutionality of the statute was attacked on the same grounds appellants here assert to attack G.S. 105-21. A majority of the United States Supreme Court, however, found the statute constitutional. Justice Day, speaking for the majority, said (page 539):

> "It is not to be disputed that, consistently with the Federal Constitution, a State may not tax property beyond its territorial jurisdiction, but the subject-matter here regulated is a privilege to succeed to property which is within the jurisdiction of the State. When the State levies taxes within its authority, property not in itself taxable by the State, may be used as a measure of the tax imposed. . . . In the present case the State imposes a privilege tax, clearly within its authority, and it has adopted as a measure of that tax the proportion which the specified local property bears to the entire estate of the decedent. That it may do so within limitations which do not really make the tax one upon property beyond its jurisdiction, the decisions to which we have referred clearly establish. The transfer of certain property within the State is taxed by a rule which considers the entire estate in arriving at the amount of the tax. It is in no just sense a tax upon the foreign property, real or personal. It is only in instances where the State exceeds its authority in imposing a tax upon a subject-matter within its jurisdiction in such a way as to really amount to taxing that which

is beyond its authority that such exercise of power by the State is held void."

[1] The North Carolina inheritance tax is not a tax upon property itself, but is a tax imposed on the privilege to succeed to property upon the death of the former owner. In the case of *In re Morris Estate,* 138 N.C. 259, 50 S.E. 682, the North Carolina Supreme Court, in declaring the State's inheritance tax statute to be constitutional against the objection that it was discriminatory and not uniform in application, said (page 262):

"The fallacy in the argument of counsel for the executors is in assuming that the tax is a tax upon property, and therefore should be uniform and levied in conformity with the requirements of the Constitution. If we conceded his premise, we should have no difficulty in arriving at his conclusion. The theory on which taxation of this kind on the devolution of estates is based and its legality upheld is clearly established and is founded upon two principles: (1) A succession tax is a tax on the right of succession to property, and not on the property itself. (2) The right to take property by devise or descent is not one of the natural rights of man, but is the creature of the law. Should the supreme law abolish such rights, the property would escheat to the Government or fall to the first occupant. The authority which confers such rights may impose conditions upon them, or take them away entirely. Accordingly, it is held that the States may tax the privilege, grant exemptions, discriminate between relatives and between these and strangers, and are not precluded from the exercise of this power by constitutional provisions requiring uniformity and equality of taxation."

From the foregoing it is apparent that the constitutionality of G.S. 105-21 has already been established unless, as appellants contend, either: (1) The legislative amendments of 1925 or 1937 served to render unconstitutional a statute which was expressly held to be constitutional in *Maxwell v. Bugbee, supra;* or (2) the authority of that case has been so weakened by subsequent decisions as to make it no longer controlling. We have carefully examined both of these contentions and do not agree with either. In our view *Maxwell v. Bugbee, supra,* is still controlling and is determinative of the constitutionality of G.S. 105-21 in its present form.

[2, 3] As to the effect of the subsequent legislative amendments, appellants have made no point as to the 1925 amendment nor are we able to see any manner in which it could have a bearing on the question now before us. Appellants do contend that the 1937 amendment,

which made the statute applicable to estates of resident as well as to estates of nonresident decedents, had the effect of eliminating the basis for classification which the United States Supreme Court found to be reasonable in *Maxwell v. Bugbee, supra.* But we do not agree that the State Legislature is so limited in its power to make classifications for purposes of its inheritance tax laws that it could not adopt the new classifications effected by the 1937 amendment. The distinction made by the classification before the court in *Maxwell v. Bugbee* and as made in the North Carolina Revenue Act prior to 1937 was between resident and nonresident decedents. The distinction made by the classification in G.S. 105-21 as it has existed since 1937 is between decedents leaving property solely within this State and decedents leaving property both within and without this State. If there is any real difference between the New Jersey statute which was upheld in *Maxwell v. Bugbee* and in G.S. 105-21, it is that the latter statute provides more reasonable, less arbitrary, classifications. Even though such classifications result in differing amounts of tax, they are no more discriminatory than classifications based upon relationship to the decedent, which were held constitutional and proper in the case of *In re Morris Estate, supra.* The broad power of a state legislature to classify and thus to discriminate for purposes of inheritance taxation has been fully established. *In re Morris Estate, supra;* 28 Am. Jur., Inheritance, Estate, and Gift Taxes, § 30.

In our opinion the authority of *Maxwell v. Bugbee,* has been in no way weakened by the subsequent decisions of the United States Supreme Court cited by appellants. In *Frick v. Pennsylvania, supra,* the State of Pennsylvania sought to include in the gross estate of a Pennsylvania decedent the value of tangible personal property located outside the state. To this total, Pennsylvania applied its inheritance tax. The court held Pennsylvania had no constitutional power to do this. However, *Frick* in no way overrules *Maxwell,* but expressly distinguishes one from the other, saying of the *Maxwell* situation (page 495):

> "The only bearing which the property without the state had on the tax imposed in respect of the property within was that it affected the *rate* of the tax. Thus, if the entire estate had a value which put it within the class for which the rate was 3 per cent, that rate was to be applied to the value of the property within the state in computing the tax on its transfer, although its value, separately taken, would put it within the class for which the rate was 2 per cent. There was no attempt, as here, to compute the tax in respect of the part within the state on the value of the whole." (Emphasis added.)

Therefore, rather than overruling *Maxwell,* the *Frick* case sustains its validity by recognizing the difference between an attempt to tax succession to property within the State in an amount computed on the value of the entire estate wherever located (which *Frick* held a state had no constitutional power to do), and a statute which merely uses the value of the entire estate wherever located to determine the *rate* of tax to be applied to transfer of property within the state (which *Maxwell* held a state does have constitutional power to do). Nor was the *Maxwell* holding changed by the decision in *Treichler v. Wisconsin, supra.* In that case Wisconsin had attempted to levy an additional inheritance tax based solely upon the amount of the credit for state inheritance taxes allowed by the Federal Estate Tax law and the amount of such taxes paid in other states, without reflecting any influence exerted by the ratio of Wisconsin property to the total estates. The court held that Wisconsin could not do this, saying (page 256):

> "Wisconsin's statute may be more sophisticated than Pennsylvania's, but in terms of ultimate consequences this case and the *Frick* Case are one. It is quite unnecessary to know in either case what property is located within the taxing jurisdiction in order to compute the challenged exaction."

It should be noted that after the *Treichler* case was remanded to the Wisconsin Supreme Court, the Wisconsin authorities apportioned the challenged tax on the ratio which the Wisconsin property bore to the whole estate. *In re Miller's Estate,* 257 Wis. 439, 43 N.W. 2d 428. On a second appeal to the United States Supreme Court, that Court upheld the tax as so apportioned, *Treichler v. Wisconsin,* 340 U.S. 868, 71 S. Ct. 120, 95 L. ed. 633, once again approving the doctrine of *Maxwell v. Bugbee.*

The principle of *Maxwell v. Bugbee* was further approved in *Great Atlantic & Pacific Tea Co. v. Grosjean,* 301 U.S. 412, 57 S. Ct. 772, 81 L. ed. 1193, in which the Court held that a state may lawfully provide that the *rate* of a tax imposed upon activities within its borders may be affected by the taxpayer's extraterritorial activities. In that case the Court approved the constitutionality of a Louisiana statute under which the rate of a tax imposed upon each unit of a chain store operated within its borders was fixed by reference to the number of units in the entire chain wherever located. Holding this legislation valid as against the attack that it was an attempt to tax property and activities beyond the taxing state's jurisdiction, the Court said (page 424):

"The state may not tax real property or tangible personal prop-

erty lying outside her borders; nor may she lay an excise or privilege tax upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed. But, as we have seen, the subject of the tax in question is the prosecution of a defined business activity within the State of Louisiana, — the conduct of a retail store which is a part of a chain under a single management, ownership or control, — a legitimate subject of a license or occupation tax. The measure of the exaction is the number of units of the chain within the state, — a measure sanctioned by our decisions. The rate of tax for each such unit is fixed by reference to the size of the entire chain. In legal contemplation the state does not lay a tax upon property lying beyond her borders nor does she tax any privilege exercised and enjoyed by the taxpayer in other states."

[4] North Carolina is not alone in imposing an inheritance tax upon succession to property within its borders but at a rate determined by reference to the decedent's entire estate wherever located. Reference to Prentice-Hall, State Inheritance Taxes, Vol. 1, Paragraphs 695, 696, reveals that at least ten other states use a similar taxing method. The Court of Appeals of New York upheld a similar statute of that State against the same attack as is here being made against the North Carolina statute. *In re Lagergren's Estate,* 276 N.Y. 184, 11 N.E. 2d 722.

In the light of the above cases we find no warrant for appellants' assertion that the point of constitutional law announced in *Maxwell v. Bugbee* has been repudiated. We think the principle announced in that case is still valid and is as equally applicable to sustain the validity of G.S. 105-21 as it was when applied to the statute as originally enacted. The judgment appealed from is

Affirmed.

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

HOMER LIENTHALL, ADMINISTRATOR OF THE ESTATE OF BLENNER KIDD SMOTHERS, JR., DECEASED, v. JUANITA KASPROURITZ GLASS, JERRY LOGAN GLASS, ELBERT LEE HARRELL, EDGAR GRADY AND HELEN GRADY

No. 68SC219

(Filed 14 August 1968)

1. Death § 3— wrongful death — burden of proof

In an action for wrongful death, plaintiff must allege and prove the death of the intestate, defendant's causal negligence, and pecuniary loss.

2. Trial § 21— motion for nonsuit — consideration of evidence

In passing upon a motion for judgment of nonsuit, all the evidence and stipulations favorable to the plaintiff must be taken as true and interpreted in the light most favorable to him.

3. Pleadings § 37; Evidence § 23— admissions and new matter in answer — proof not necessary

Allegations in the complaint which are admitted in the answer and allegations of new matter in the further answer which are favorable to the plaintiff are established without the necessity of introducing them in evidence.

4. Trial § 21— motion for nonsuit — consideration of facts admitted and new matter in further answer

On motion for nonsuit, facts alleged in the complaint which are admitted by the answer and allegations of new matter in defendant's further answer which are favorable to plaintiff are taken as true and are to be considered along with the evidence.

5. Automobiles §§ 10, 13— parking with bright lights facing oncoming traffic

It is not necessary to a violation of G.S. 20-161.1 that the vehicle be entirely on the highway, but the statute is violated when a vehicle is parked or left standing at night with its bright lights burning in the face of oncoming traffic even though it is on the shoulder of the road as far as practicable.

6. Automobiles § 94— contributory negligence — failure to move to position of safety because of intoxication

In an action for the wrongful death of a passenger in an automobile involved in a collision, plaintiff's intestate will not be held contributorily negligent as a matter of law in failing to move to a position of safety where the evidence tends to show that he could not move because he was drunk and had passed out.

7. Automobiles § 94— contributory negligence of passenger — driver intoxicated — passenger intoxicated

In an action for wrongful death, plaintiff's intestate will not be held contributorily negligent as a matter of law in riding in an automobile with an intoxicated driver where there is evidence that would permit the jury to find that plaintiff's intestate was drunk and had passed out be-

fore beginning the trip, it being for the jury to determine whether he knew what was going on and consciously committed himself to the assumption of risk of the trip.

8. Negligence § 35— nonsuit for contributory negligence

Nonsuit on the ground of contributory negligence will be granted only where the evidence, taken in the light most favorable to plaintiff, establishes contributory negligence so clearly that no other reasonable inference can be drawn therefrom.

9. Automobiles § 50— parking with bright lights facing oncoming traffic — sufficiency of evidence

In an action for wrongful death, the evidence *is held* sufficient to be submitted to the jury on the issue of defendant's negligence in violating G.S. 20-161.1 where there is evidence tending to show that defendant had stopped or parked his automobile partially on the road and in the proper lane of travel of the automobile in which plaintiff's intestate was a passenger, that defendant's automobile was standing behind another automobile which was entirely on the shoulder, that defendant's automobile was facing the oncoming automobile in which plaintiff's intestate was riding, that the driver of that automobile was temporarily blinded by a bright light on defendant's vehicle, and that the automobile in which plaintiff's intestate was riding struck defendant's automobile, resulting in the death of plaintiff's intestate.

APPEAL by plaintiff from *Peel, J.*, 4 March 1968 Civil Session of Superior Court of CARTERET County.

Homer Lienthall, as administrator of the estate of Blenner Kidd Smothers, Jr., deceased, filed his complaint, in which he seeks to recover from the defendants, alleging negligence resulting in the wrongful death of the deceased.

Before answering, the defendants Grady demurred to the complaint. The demurrer was allowed, dismissing the action as to them. There was no exception taken to the judgment dismissing the action as to the defendants Grady.

The defendants Glass, answering the complaint, deny negligence on their part, and in the alternative allege that if they were guilty of negligence, the deceased, Blenner Kidd Smothers, Jr., was guilty of contributory negligence.

The defendant Harrell denies any negligence on his part, and in the alternative alleges that if he was guilty of negligence, the deceased, Blenner Kidd Smothers, Jr., was guilty of contributory negligence.

At the close of all the evidence, the court denied the motion of the defendants Glass and granted the motion of the defendant Harrell for judgment of nonsuit. The plaintiff thereupon took a voluntary

nonsuit as to the defendants Glass, excepted to the granting of the motion of defendant Harrell, and appealed to the Court of Appeals assigning error.

Wheatley & Bennett by Thomas S. Bennett for plaintiff appellant.

Ward & Tucker by David L. Ward, Jr., for defendant Harrell appellee.

MALLARD, C.J.

[1] "In an action for wrongful death, plaintiff must allege, and has the burden of proving, the death of the intestate, defendant's causal negligence, and pecuniary loss." 3 Strong, N. C. Index 2d, Death, § 3, p. 208.

Plaintiff brings forward five assignments of error. The first three relate to the admissibility of the testimony of two witnesses. In view of the granting of a new trial herein as to the defendant Harrell on other grounds, we consider it unnecessary to discuss these three assignments of error. The fifth assignment being purely formal does not require discussion.

The plaintiff's main exception and assignment of error, upon which this case turns, is to the judgment of nonsuit entered at the close of all the evidence upon the motion of the defendant Harrell.

[2] It is elementary that in passing upon a motion by a defendant for judgment of nonsuit against a plaintiff, all of the evidence favorable to the plaintiff must be taken as true and interpreted in the light most favorable to him. *Champion v. Waller,* 268 N.C. 426, 150 S.E. 2d 783. Stipulations favorable to plaintiff must also be considered. *Heating, Inc. v. Construction Co.,* 268 N.C. 23, 149 S.E. 2d 625.

[3, 4] "Facts alleged in the complaint and admitted in the answer are conclusively established by the admission, it not being necessary to introduce such allegations in evidence. *Wells v. Clayton,* 236 N.C. 102, 72 S.E. 2d 16; Stansbury, North Carolina Evidence, § 177. The same is true of allegations of new matter in a further answer, which new matter is favorable to the plaintiff. In passing upon a motion for judgment of nonsuit, all such allegations in the answer are taken to be true and are to be considered along with the evidence." *Champion v. Waller, supra.*

Plaintiff alleged, among other things, and defendant Harrell denied, that the death of plaintiff's intestate was proximately caused

by the negligence of the defendant Elbert Lee Harrell in the following respects:

"(c) He brought his automobile to a complete stop on the highway and parked his automobile partly on the highway when it was practicable to park the same on the shoulder thereof, in violation of G.S. 20-161;

(d) He permitted the bright lights of said vehicle to continue burning in the face of oncoming traffic after parking and leaving standing said vehicle at night partly on a highway, in violation of G.S. 20-161.1;

(e) He failed to use due care and caution in the operation and parking of said vehicle and to do that which an ordinary prudent person would have done under the same or similar circumstances."

The pertinent part of G.S. 20-161 reads as follows:

"(a) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway: . . ."

G.S. 20-161.1 reads as follows:

"*Regulation of night parking on highways.* — No person parking or leaving standing a vehicle at night on a highway or on a side road entering into a highway shall permit the bright lights of said vehicle to continue burning when such lights face oncoming traffic."

[9] The evidence, pleadings, and stipulations in this case interpreted according to the foregoing rules would permit but not compel a jury to find the following to be the facts in this case: That the decedent, Blenner Kidd Smothers, Jr., was 20 years old and died on 23 April 1966 as a result of the collision between the automobile operated by defendant Jerry Logan Glass and the automobile of the defendant Elbert Lee Harrell. On the date of his death the decedent was a member of the United States Navy, and his base pay was $222.90 per month. On the night of 23 April 1966 at approximately 10:00 p.m. the plaintiff's intestate was riding as a passenger in the right front seat of a Chevrolet automobile being operated by Jerry Logan Glass and owned by Juanita Kaspouritz Glass. The Glass automobile was traveling eastwardly on the Salterpath Road, a State maintained highway in Carteret County 20 feet in width, at

a speed from 45 to 65 miles per hour. The night was dark, the weather was clear, and the road was dry. As the Glass automobile approached and came around a curve, the driver observed some 350 to 400 feet down the road the high beam, bright light of an automobile, which appeared to be meeting him in its right lane of travel but which in fact was a bright light on the automobile owned by the defendant Elbert Lee Harrell which had been parked or stopped by the defendant Elbert Lee Harrell on his left side of and partially on the road and in the proper lane of travel for the Glass automobile. The Harrell automobile was parked almost in front of the Grady automobile but farther out into the road than the Grady automobile. The right side of the Harrell automobile projected two or more feet out into the road. Two-thirds of the Harrell automobile was out in the highway. The Harrell automobile had been thus parked for ten to fifteen minutes prior to the collision while Mr. Harrell was putting gas in the Grady automobile. The Grady automobile had run out of gas and was off the paved portion of the road, or almost off. There were no lights on the rear of the Grady automobile, and nothing to indicate to an oncoming automobile that the Harrell automobile was on the wrong side of the highway. The driver of the Glass automobile was momentarily blinded by the bright light on the Harrell automobile. The Glass automobile missed hitting the Grady automobile and struck the right front of the Harrell automobile. From the point of impact, the Glass automobile traveled some sixty feet eastwardly, overturned, and resulted in the death of plaintiff's intestate. Plaintiff's intestate in no way interfered with the operation of the Glass automobile by the defendant Jerry Logan Glass. Mr. Glass had been drinking but was not under the influence of intoxicating beverages when the patrolman talked to him. Mr. Glass admitted that he was under the influence of intoxicating liquors to a "certain extent" at the time he was driving. Plaintiff's intestate had been drinking to the extent that he had "passed out" and was sleeping or passed out on the front seat of the Glass automobile while the others were walking on the beach. Glass awakened him, and he was kind of "cranky." He had been aroused, but as they were proceeding toward home in the Glass automobile, the decedent was not sober; he was drunk and passed out.

The case of *Faison v. Trucking Co.*, 266 N.C. 383, 146 S.E. 2d 450, cited by appellee, is distinguishable from the case before us. In the *Faison* case the evidence was that the corporate defendant's trailer had been stopped on the highway at night, without lights. There was also evidence to the effect that there were lights burning on the rear of the trailer. Plaintiff, a guest in a following car, was

injured when the car crashed into the rear of the trailer. The court held that the evidence was sufficient to require the submission of the issue of negligence to the jury, notwithstanding there was a conflict as to whether lights were burning on the trailer. In the case under consideration there is a conflict as to whether there were any lights on the rear of the Grady automobile, as to whether the Harrell automobile had on its parking lights or its bright lights, and as to how much, if any, of the lights from the Harrell automobile were obscured by the Grady automobile.

The defendant contends the *Faison* case is applicable here. In the *Faison* case the Court said that the terms "park" and "leave standing" as used in G.S. 20-161(a) are synonymous; "and that neither term includes a mere temporary or momentary stoppage on the highway for a necessary purpose when there is no intent to break the continuity of the travel." The defendants contended that the tractor-trailer of defendant had stopped temporarily or momentarily to enable northbound traffic to pass before attempting to pull out into the left lane to pass another tractor-trailer stopped in front of it. The Court held that if the jury should find these to be the facts that the defendants' tractor-trailer was not parked or left standing in violation of G.S. 20-161(a).

[5] Appellee contends that G.S. 20-161.1 requires that an automobile has to be parked or left standing entirely on the highway, and that there is no violation of the statute when an automobile is off on the shoulder as far as practicable with its bright lights burning facing oncoming traffic. This contention is without merit. The statute even goes so far as to provide that leaving an automobile standing on a side road entering into a highway with the bright lights burning, when such lights face oncoming traffic, is a violation thereof. The statute is directed against the hazard of bright lights on standing vehicles facing oncoming traffic at night.

[6] The defendant in this case also contends that the factual situation in *Basnight v. Wilson,* 245 N.C. 548, 96 S.E. 2d 699, is virtually identical to the case under consideration. The facts in the *Basnight* case are similar to those in the case under consideration, but there are differences. In the *Basnight* case the plaintiff was a passenger in the automobile that had stopped; he got out and was standing at the rear of the parked automobile having knowledge that he was in a place of danger, when the oncoming automobile collided with the front of the parked automobile. It was held that the plaintiff could have moved to a position of safety, and by failure to do so, the plaintiff was contributorily negligent, and nonsuit was

therefore proper. The distinguishing difference in the case under consideration is that the evidence tends to show that plaintiff's intestate could not move because he became drunk and "passed out" while they were stopped at the beach and before the trip home was commenced.

Defendant appellee also contends that the defendant Glass was under the influence of intoxicating beverages to such an extent that he was incapable of operating an automobile along and over the highways in North Carolina and that the plaintiff's intestate knew, or should have known, of Glass' condition; that the plaintiff's intestate and Glass had been drinking together all day and that plaintiff's intestate was guilty of contributory negligence for that he continued to ride in the automobile knowing that the defendant Glass was under the influence of intoxicating liquor. In the case of *Bank v. Lindsey,* 264 N.C. 585, 142 S.E. 2d 357, cited by defendant, the court held that the evidence disclosed contributory negligence as a matter of law on the part of the intestate, who had been drinking, in voluntarily riding and continuing to ride with an intoxicated driver, and said, among other things, "there is no evidence to the effect that its (plaintiff's) intestate was too drunk to know what was going on."

[7, 8] There is evidence in this case, which if believed, would permit but not compel the jury to find that the plaintiff's intestate became so drunk while at the beach and at the beginning of the trip home that he did not know what was going on. We are of the opinion and so hold that whether plaintiff's intestate, Blenner Kidd Smothers, Jr., was contributorily negligent in riding in the Glass automobile operated by Jerry Logan Glass would depend, among other things, on whether he knew what was going on and if so, consciously committed himself to the assumption of the risk of the trip home from the beach. We are of the opinion that on the evidence here the question of contributory negligence of the decedent is for the jury. *Litaker v. Bost,* 247 N.C. 298, 101 S.E. 2d 31. Nonsuit on the ground of contributory negligence should not be granted unless the evidence, taken in the light most favorable to plaintiff, establishes contributory negligence so clearly that no other reasonable inference can be drawn therefrom. *Tew v. Runnels,* 249 N.C. 1, 105 S.E. 2d 108.

[9] We therefore conclude that appropriate issues, including the issues of negligence of the defendant Harrell and contributory negligence of the decedent, Blenner Kidd Smothers, Jr., should have been submitted to the jury under proper instructions and that the

trial court erred in granting the defendant Harrell's motion for nonsuit, which requires a

New trial.

BROCK and PARKER, JJ., concur.

ELECTRIC MOTOR & REPAIR COMPANY, INC., v. MORRIS & ASSOCIATES, INC.

No. 68SC183

(Filed 14 August 1968)

1. Trial § 56— waiver of jury trial — function of court

The waiver of trial by jury invests the court with the dual capacity of judge and juror, and it is in the judge's province to determine the credibility of the witnesses, the weight to be attached to their testimony, and the inferences legitimately to be drawn therefrom.

2. Trial § 56— trial without a jury — function of court

Where jury trial is waived, the trial judge must consider and weigh all the competent evidence before him, giving it such probative value to which in his sound discretion and opinion it is entitled.

3. Trial § 56— trial without a jury — court's duty to draw inferences from the evidence

Where different inferences can be drawn from the evidence in a trial by a judge without a jury, the determination of which reasonable inferences shall be drawn is for the judge.

4. Sales § 13— counterclaim for goods sold and delivered — trial without a jury — sufficiency of evidence to support findings of fact

In an action for goods sold and delivered, defendant counterclaimed for goods allegedly sold and delivered to plaintiff corporation, alleging that defendant and the president of plaintiff corporation, acting in his individual capacity, entered into a written contract whereby they purchased certain air conditioning equipment as a joint venture, that the air conditioning equipment was delivered, together with certain electrical equipment, to defendant's premises by plaintiff's truck, that the air conditioning equipment was sold, that the amount remitted to plaintiff's president included payment for the remaining electrical equipment, that plaintiff's president agreed that plaintiff corporation would purchase the remaining equipment from defendant for $1800, and that defendant sent an invoice to plaintiff for the equipment, which plaintiff has refused to pay. *Held:* The evidence is sufficient to support the court's findings of fact that (1) the written agreement between defendant and plaintiff's president concerned only the air conditioning equipment and that defendant paid only for such equipment, (2) the equipment defendant alleges it sold to plain-

tiff was not owned by defendant but was owned by plaintiff, (3) plaintiff's president was not authorized to instruct defendant to submit an invoice to plaintiff and plaintiff did not receive any property from defendant to support its invoice, and (4) defendant knew or should have known that plaintiff's president was acting against the interest of plaintiff in the transaction; accordingly, the court's conclusion that plaintiff was not indebted to defendant is supported by the findings of fact based upon competent evidence.

APPEAL by defendant from *Hobgood, J.*, Second January 1968 Regular Civil Session of WAKE Superior Court.

In its complaint, plaintiff alleges that defendant is indebted to it in the sum of $1,866.13 for various articles of equipment, merchandise, and services sold and delivered by plaintiff to the defendant.

In its answer, defendant admits that it is indebted to plaintiff for said merchandise and services in the sum of $1800.00. In a further answer, defense and counterclaim, defendant alleges that it is entitled to a setoff in the amount of $1800.00 due defendant by reason of certain transactions between W. S. Ward (hereinafter called Ward) and defendant, the said Ward being the president of and a major shareholder in plaintiff corporation during 1966 and up until his death in November, 1966.

Specifically, defendant alleges that it and Ward, acting in his individual capacity, entered into a written contract on 6 June 1966 whereby Ward agreed to purchase certain used air-conditioning equipment from a demolishing company in New York and arrange for said equipment to be delivered to defendant's premises in Raleigh, after which it would be resold and any profits divided between Ward and defendant. The contract, written in longhand by Ward, listed with appropriate description two Carrier compressors, three motors, and "one lot valves." Defendant further alleges that Ward arranged for plaintiff's tractor-trailer truck to deliver the air-conditioning equipment, together with certain electrical equipment, from New York to defendant's premises in Raleigh; that, thereafter, Ward and defendant agreed to sell the air-conditioning equipment to Decker & Reynolds in Hickory, N. C., for $12,000.00 and Ward agreed that plaintiff would purchase the remainder of the equipment for $1800.00. The air-conditioning equipment was delivered to Decker & Reynolds; defendant received payment therefor, and on 10 August 1966, made its check to W. S. Ward for $12,000.00. On 3 August 1966, defendant made its invoice to Decker & Reynolds for the two Carrier compressors, three motors, and "one lot valves" in substantially the same words and figures as set forth in the contract

between Ward and defendant. On 3 August 1966, defendant also made out an invoice to plaintiff for "motors, starters, switches, etc." for $1800.00, which plaintiff refused to pay. Defendant alleges that plaintiff is indebted to defendant in said amount.

By agreement of the parties, jury trial was waived and Judge Hobgood heard the evidence, found the facts, and entered judgment, summarized as follows:

FINDINGS OF FACT

1. The written agreement between defendant and Ward concerned air-conditioning equipment, which was all the property covered by their joint venture and that defendant paid Ward only for articles described in Ward's invoice (defendant's Exhibit 5) and nothing else.

2. That the merchandise defendant alleges it sold to plaintiff was not owned by defendant but was owned by plaintiff.

3. Ward was not authorized to instruct defendant to submit an invoice to plaintiff and plaintiff did not receive any property from defendant to support its invoice.

4. Defendant knew or should have known Ward was acting against the interest of plaintiff in the transactions.

CONCLUSIONS OF LAW

1. Ward's actions were not authorized by plaintiff and were not binding on plaintiff.

2. Defendant knew or should have known Ward was acting against the interest of plaintiff.

3. That plaintiff recover $1800.00 plus interest and costs from the defendant.

Defendant made exceptions to the findings of fact and conclusions of law and appealed.

Manning, Fulton & Skinner, Attorneys for plaintiff appellee.

Purrington, Joslin, Culbertson & Sedberry, by Charles H. Sedberry, Attorneys for defendant appellant.

BRITT, J.

[1, 2] The waiver of trial by jury invested Judge Hobgood with the dual capacity of judge and juror. *Reid v. Johnston,* 241 N.C. 201,

85 S.E. 2d 114. Consequently, it was in Judge Hobgood's province to determine the credibility of the witnesses and the weight to be attached to their testimony, and the inferences legitimately to be drawn therefrom, in exactly the same sense that a jury would do in the trial of a case. It was Judge Hobgood's right and duty to consider and weigh all the competent evidence before him, giving to it such probative value as in his sound discretion and opinion it was entitled to be given. *Trust Co. v. Lumber Co.*, 221 N.C. 89, 19 S.E. 2d 138; 89 C.J.S., Trial, § 593; 53 Am. Jur., Trial, § 1123.

[3] When a trial by jury is waived, and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial judge. *Turnage Co. v. Morton,* 240 N.C. 94, 81 S.E. 2d 135.

In *Main Realty Co. v. Blackstone Valley Gas & E. Co.*, 59 R.I. 29, 193 A. 879, 112 A.L.R. 744, the court said: "In reaching his conclusions, the trial justice had the benefit of seeing and hearing the witnesses. He also was entitled to consider all the evidence and to draw therefrom such inferences as were reasonable and proper under the circumstances, even though another different inference, equally reasonable, might also be drawn therefrom."

[4] The first assignments of error brought forward in defendant's brief relate to finding of facts No. 7 and conclusions of law No. 2 which are as follows:

> "7. That W. S. Ward's instruction to the defendant to submit to plaintiff the invoice identified as defendant's Exhibit 3 was not authorized by plaintiff corporation, and that plaintiff corporation did not receive any property or other consideration from the defendant corporation to support said invoice.
>
> * * *
>
> "2. That in the transactions involved, W. S. Ward was acting for his personal interest, and that his actions were not authorized by plaintiff corporation and were not binding on plaintiff corporation."

Defendant contends that his assignments of error relating to the foregoing finding and conclusion pose the question: "Did W. S. Ward have authority to make a contract on behalf of plaintiff corporation for purchase of electrical materials from defendant?" We do not agree that this is the question raised by the assignments of error.

Plaintiff did not contend that in proper instances Ward did not have authority to purchase electrical equipment and transact other

business in the name and on behalf of the plaintiff. But, plaintiff strenuously contended that in the particular transaction set forth in defendant's answer, Ward was acting at all times in his individual capacity, with the full knowledge of defendant, and that under those circumstances plaintiff was not bound by any part of the transaction beneficial to Ward or defendant and detrimental to plaintiff.

Our only responsibility on this appeal is to determine if the conclusions of law made by Judge Hobgood are supported by findings of fact based upon competent evidence.

The burden of proof in the trial of this action was on defendant, and oral and documentary testimony was introduced by defendant and plaintiff. It is elementary that Judge Hobgood could believe all of the testimony, none of the testimony, or such portions as he saw fit.

Finding of fact No. 7 is supported by competent evidence. Edward Pearce, vice-president of plaintiff from 1965 to 1967, testified without objection that Ward told him that the $1800.00 invoice was a "side deal" between him and defendant and there was not any equipment to support the invoice. The written contract between Ward and defendant listed only the equipment which was sold to Decker & Reynolds. All other testimony regarding the purpose of the $1800.00 invoice was oral, and Judge Hobgood was the "trier of the facts." Finding of fact No. 7 was supported by the evidence, and conclusion of law No. 2 was supported by the findings of fact.

[4] Defendant's next assignments of error relate to finding of fact No. 4 which is as follows:

> "4. That the merchandise which the defendant alleges it sold to plaintiff under its invoice identified as defendant's Exhibit 3 was never in fact owned by defendant, but was merchandise off-loaded at defendant's business site from trucks owned by the plaintiff and was in fact property which plaintiff had purchased and paid for from the site of the New York World's Fair."

Defendant contends that there is no competent evidence to support this finding of fact. We disagree. Several witnesses testified that during 1966, Ward, on behalf of plaintiff, purchased large quantities of electrical equipment at the old World's Fair site in New York and removed the same to Raleigh. There was also evidence that the refrigeration equipment embraced in the agreement between Ward and defendant was purchased from a firm demolishing the New Western Hotel in New York City. Thomas A. LaFerire, witness for plaintiff, testified that he was a truck driver for plaintiff in 1966

and was the only driver of the plaintiff's tractor-trailer; that in 1966 he picked up some electrical equipment at the World's Fair site and then picked up a large portion of the refrigeration equipment at the New Western Hotel site; that he delivered all of said equipment picked up at both sites to defendant's premises in Raleigh. He testified that he made a second trip to New York, getting a few items at the World's Fair site and picking up the balance of the refrigeration equipment at the hotel site and that the entire load was delivered to defendant's premises in Raleigh.

In his testimony, Edward Pearce (identified above) testified that the air-conditioning equipment was purchased from the hotel site in New York while the electrical equipment was purchased from the World's Fair and that plaintiff paid for the equipment purchased from the World's Fair. The testimony showed that certain electrical equipment was removed from defendant's premises in Raleigh to plaintiff's premises, but the evidence was very conflicting as to the quantity of said equipment; Pearce testified that the small quantity of electrical equipment which plaintiff received from defendant "looked like" the same equipment which the plaintiff had purchased from the World's Fair. Again, Judge Hobgood was the trier of the facts and there was testimony sufficient to support his findings.

[4] Defendant's next assignment of error relates to finding of fact No. 5 which is as follows:

> "5. That defendant by submitting its invoice identified as defendant's Exhibit 3 to plaintiff was attempting to collect from plaintiff the profit on its joint venture with W. S. Ward personally."

Finding of fact No. 5 was amply supported by the evidence, particularly the testimony of Edward Pearce.

[4] Defendant contends that there is not competent evidence to support the court's findings of fact that the contract between Ward and defendant described all the property covered by the joint venture between defendant and Ward. Again, Judge Hobgood had the authority to believe all, any, or none of the testimony. The record contains ample evidence to support these findings.

[4] Finally, defendant contends that there was competent evidence to support the court's finding of fact that defendant knew or should have known that Ward was acting in his personal interest and against the interest of plaintiff corporation in the transactions described in the pleadings. This contention is completely without merit as the very basis for defendant's counterclaim was a contract allegedly

entered into between Ward, individually, and defendant. From the beginning, defendant knew that it was dealing with Ward as an individual and not with plaintiff corporation. The evidence was more than sufficient to support Judge Hobgood's findings.

We have carefully considered each of defendant's assignments of error and we find no merit in them. They are, therefore, overruled.

The judgment of the Superior Court is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

ONVA CATHERINE TAYLOR v. RUTH HALL CARTER AND CLARENCE McCLALLAN CARTER, JR.

No. 68SC215

(Filed 14 August 1968)

1. Negligence § 34— contributory negligence — sufficiency of evidence to go to jury

If there is evidence from which the inference of contributory negligence may be drawn by men of ordinary reason, the issue is properly submitted to the jury.

2. Negligence § 34— contributory negligence — consideration of evidence

In determining the sufficiency of the evidence to justify submission of an issue of contributory negligence, the evidence must be considered in the light most favorable to the defendant.

3. Automobiles § 88—actions — sufficient evidence of contributory negligence — striking oncoming car

There is sufficient evidence to be submitted to the jury on the issue of plaintiff motorist's contributory negligence in striking the automobile of a person not a party to the action where the evidence tends to show (1) that, as plaintiff approached a parking lot adjacent to the highway on which she was traveling, she could have seen from a distance of 200 feet that defendant's unattended car was rolling backward on the lot toward plaintiff's path of travel at a speed of about five miles per hour, (2) that plaintiff and her passenger were engaged in conversation, (3) that the speed of her automobile as it approached the parking lot was 30 miles per hour, (4) that from the point where plaintiff first saw defendant's car to the point where defendant's car came to rest on the opposite side of the highway in a ditch, plaintiff had at least 125 feet in which to stop her car or bring it under control, but that (5) plaintiff swerved to the left side of the highway and struck the oncoming automobile of a third party.

4. Automobiles § 90— instructions — sudden emergency

The evidence in this automobile accident case *is held* amply sufficient to justify the trial court's instructions with respect to the doctrine of sudden emergency.

5. Appeal and Error § 31— exception to the charge — misstatement of contentions

Where the court was not informed of its error in stating the contentions of the plaintiff, an objection thereto on appeal cannot be sustained.

APPEAL by plaintiff from *Martin, S.J.* (Robert M.), March 1968 Session, BUNCOMBE Superior Court.

Plaintiff seeks to recover damages for personal injuries sustained when the car she was driving was in collision with a car operated by Lloyd Olin Baker, not a party to this action. Plaintiff alleges that defendant Ruth Hall Carter had left the automobile owned by defendant Clarence McClallan Carter, Jr., unattended in a parking lot on a grade running downward and toward U. S. Highway No. 25, having failed to put the car in gear and having failed to engage the emergency brake. She further alleges that the car rolled out of the parking lot into the path of her northbound car; that she swerved to the left to avoid it and collided with a car approaching in the southbound lane of traffic. The answer denies negligence on the part of the defendant and pleads contributory negligence by the plaintiff in that she failed to keep her car under control, was driving at an unreasonable speed under the circumstances, failed to keep a proper lookout, and suddenly turned left onto the wrong side of the road, such movement not being responsive to any act of defendants. The matter was submitted to the jury on issues of defendants' negligence, plaintiff's contributory negligence (over objection of plaintiff), and damages. The jury answered both the issue of negligence and the issue of contributory negligence in the affirmative. From the judgment of the court denying recovery, in accordance with the jury verdict, plaintiff appeals.

Williams, Williams and Morris by James N. Golding for plaintiff appellant.

Van Winkle, Buck, Wall, Starnes and Hyde by Roy W. Davis, Jr., for defendant appellees.

MORRIS, J.

Plaintiff assigns as error the submission to the jury of the issue of contributory negligence, the charge of the court with respect to sudden emergency, and portions of the charge stating plaintiff's con-

tentions. Error is also assigned to the failure of the court to sustain various objections of plaintiff to the evidence.

[1] On the question of contributory negligence, if there is evidence from which the inference of contributory negligence may be drawn by men of ordinary reason, the issue is properly submitted to the jury. *Jones v. Holt,* 268 N.C. 381, 150 S.E. 2d 759.

The plaintiff offered evidence tending to show: The collision occurred approximately a quarter of a mile south of N. C. 280 on U. S. 25. U. S. 25 is the main road between Hendersonville and Asheville, was a two-lane road at that time, and 21 feet wide. The accident occurred almost directly in front of the Skyline Drug Store which is on the right hand side of the road to northbound traffic. There is a paved parking lot between the highway and the drug store extending approximately 25 feet to either side of the building and approximately 50 to 75 feet in front of the building. There are two entrances to the parking lot. After the collision, plaintiff's car was sitting in the southbound lane headed south and Mr. Baker's car was behind it sitting at a right angle to a ditch also headed south. There was a median or divider between the entrances to the parking lot and also between the highway and the parking lot. When the patrolman arrived, there were two solid black lines originating in the northbound lane and proceeding over into the southbound lane approximately 60 feet in length and stopped about 8 feet from the debris (broken glass and dirt) on the highway. Other marks approximately 39 feet long were located in the northbound lane north of the Taylor and Baker cars. The parking lot is fairly level with only a slight incline, if any. There is a drainage ditch approximately two or three feet from the edge of the pavement of the highway, which ditch, a foot or two deep, runs along the eastern side of the highway across the divider. There was a normal width shoulder, then the drop to the ditch itself, then the bank was inclined on up to the parking lot. Mrs. Carter stated to the patrolman that she got out of her car, went into the drug store and that she looked out and her car had rolled in the ditch. Traveling north, the road comes around a curve and leads up on a straight stretch of road. The accident occurred on the straight stretch. There is a railroad trestle or bridge over the road just as you come out of the curve. There was a hog wire fence with vines and whatnot on it slightly to the south of the driveway. The fence is six or eight feet from the edge of the highway and close to 50 feet from the southern edge of the southern entrance to the parking lot (or 60 or 70 feet from parking lot according to Mrs. Rice). From the trestle you can see approximately an eighth of a

mile. The Carter car was in the parking lot when the patrolman arrived. There was a telephone pole in the grassy median in the area of the north entrance to the parking lot and from the trestle to the telephone pole would be at least 200 feet. Plaintiff and Mrs. Rice, a passenger, had started home from their work near Arden when the accident occurred. Plaintiff was driving and Mrs. Rice was seated on the right hand side. There were no cars ahead of her but some behind her. When Mrs. Rice first saw the defendants' car it was between the grassy area and the road moving on an angle south coming toward the road with no one in it. Mrs. Taylor's car was at the fence at that time — the front bumper about even with the fence. She put her hands over her eyes and saw nothing else until after the collision. Mrs. Carter told Mrs. Rice she forgot to put on her emergency brake. Mrs. Rice felt the Taylor car swerve to the left and strike another car. Mrs. Taylor applied brakes just as her car crossed the fence line. Her car traveled 60 feet from the time Mrs. Rice covered her eyes to the collision. If Mrs. Rice had been looking she could have observed the road ahead all the way to the top of the hill from the trestle, but she hadn't been looking at the road because she was talking to plaintiff. The plaintiff was traveling at about 25 to 30 miles per hour as she came around the curve toward the trestle and about 30 as she approached the parking lot. You can't see the parking lot until you get to the fence because it has honeysuckle vines on it. It was too late when she saw the car coming down, she applied her brakes, or locked her tires, and that was all she could do. The car was almost down to the grassy divider between the highway and the parking lot when she first saw it, going about 5 miles per hour coming toward her at an angle. It came on in the ditch and on into the road. Not quite half the car came into her lane of traffic. When she saw the car, she was about 75 feet away. After she turned her steering wheel to the left, she doesn't know what happened. When she cut her steering wheel to the left, the Carter car was about 20 feet ahead in the road. The car she was operating was in good condition — brakes and steering mechanism working satisfactorily. The collision occurred about 60 feet beyond the fence line "I would say it was 75 feet, the distance from when I saw the car and up to the point where I hit the Baker car". She doesn't remember what occurred from a split second shortly before the two cars bumped together. When she hit the Baker car, she was almost stopped. Her car was over the yellow line about a foot in the other lane. The fence blocks your vision. As she and Mrs. Rice came under the trestle, they were talking to one another. The conversation stopped when they got to the fence. Plaintiff looked up and saw the Ford car for the first

time. Mr. Myers was driving behind the plaintiff and first saw the Ford car when he was coming around the curve through the trestle. The car was rolling backward toward the highway. He saw the car roll into the ditch and the rear end jutted into the highway. He did not believe there was room for Mrs. Taylor to get through. Mrs. Taylor applied her brakes and her car swerved — seemed to lurch — into the oncoming lane. The car entered the ditch just south of the utility pole. He was four, five, or six car lengths behind Mrs. Taylor. When he first saw the car it was in the parking lot.

Defendants' evidence tended to show: *Femme* defendant, with her 10 year old daughter, parked the 1960 Ford in front of the drug store, put it in first gear and turned off the motor. She didn't engage the emergency brake. When she had been in the drug store two or three minutes, she heard brakes screeching, ran to the front window and saw her car in the ditch and two other cars on the road. When she got out to the scene, she observed that the rear wheels of her car were in the ditch. It was possible to walk between the pavement and her car. The debris in the road was to the south of her car about 50 feet. The fence post is about ten feet from the south entrance of the parking area and is covered with honeysuckle. It is 110 feet paced off from the trestle to the fence line. From the center of the ditch to the edge of the pavement is six feet. From the center of the rear wheel to the extreme edge of the bumper of the Ford is five feet. Mr. Joe Shepherd came up immediately after the accident driving an F7 oil truck tanker. The cars had not been moved. Neither he nor the cars in front of him had any difficulty passing the Ford car. The two rear wheels of the car were in the ditch suspended in the air. The back bumper was sitting on the shoulder of the road. No part of the framework was on the highway.

[2, 3] In determining the sufficiency of the evidence to justify the submission of an issue of contributory negligence, we must consider the evidence in the light most favorable to the defendants. *Jones v. Holt, supra.* In so doing, the evidence shows that plaintiff could have seen the parking lot and the Ford car of defendants rolling backward toward the highway at a speed of about 5 miles per hour as she passed under the trestle some 200 feet away; that she and her passenger were engaged in conversation which terminated as she was opposite the fence at which time she looked up and saw the car; that even then she was 75 feet from the point of collision which occurred 50 to 60 feet south of the point at which defendants' car stopped in the ditch, which meant that plaintiff had at least 125 feet within which to stop her car or bring it under control.

The evidence would certainly allow, though not compel, a finding of contributory negligence. The issue was properly submitted to the jury. This assignment of error is overruled.

[4, 5] Plaintiff also contends that the court erred in its instructions with respect to the doctrine of sudden emergency. The portion of the charge which plaintiff argues is error is as follows:

> "In *(sic)* instruct you, Members of the Jury, that if you find by the greater weight of the evidence, the burden being upon the defendants to so satisfy you, that the plaintiff Taylor could have seen the defendants' moving car when the plaintiff was coming under the trestle some 200 feet from the point of impact if she had been keeping a proper and reasonable lookout then the plaintiff would not be entitled to the benefits of the sudden emergency doctrine.
>
> (B)ut if you find that the plaintiff, not being negligent herself, was confronted with a sudden emergency by the defendants' car suddenly appearing before her approaching her in her lane of travel and that she was required to act immediately to avoid that car and that the plaintiff acted as a reasonably prudent person under the same or similar circumstances would have acted, it would be your duty to answer the second issue No."

Plaintiff contends this portion of the charge is not in accord with the evidence and incorrectly states plaintiff's contentions. Any error of the court in stating plaintiff's contentions was not called to the court's attention, and objection thereto at this stage cannot be sustained. *Rudd v. Stewart,* 255 N.C. 90, 120 S.E. 2d 601. The evidence amply justifies the charge.

Plaintiff further assigns other portions of the charge as prejudicial error for that the court incorrectly stated plaintiff's contention. For reasons already stated, this assignment of error is overruled.

We find no prejudicial error in the admission of Mr. Carter's testimony as to the condition of the ditch bank the day following the accident.

Other assignments of error not brought forward and argued in plaintiff's brief are deemed abandoned.

In the trial of this case, we find

No error.

CAMPBELL and BRITT, JJ., concur.

RAY WOMBLE, ADMINISTRATOR OF RUBY WILBORN COTTON, DECEASED.
v. JOHN BRUCE MORTON

No. 68SC85

(Filed 14 August 1968)

1. Automobiles §§ 51, 88; Death § 7— wrongful death action —negligence, contributory negligence, damages — sufficiency of evidence

In an action for wrongful death, evidence tending to show that decedent and her husband were looking for decedent's pocketbook along the road in front of their home, that while decedent's husband was on the south side of the road and decedent was in the westbound lane, defendant's truck approached them in the eastbound lane, skidded into the westbound lane and struck decedent, that defendant's truck was going more than 50 miles per hour after it started skidding, that it skidded for 200 feet, 60 of which were sideways, with thick smoke coming from its tires, that the speed limit was 55 miles per hour, that prior to death decedent was 52 or 53 years old, in good health, and worked regularly in a store, *is held* sufficient to require submission to the jury of the issues of negligence, contributory negligence, and damages.

2. Trial § 33— misstatement of evidence in charge — duty to call court's attention thereto

When the court's statement of the evidence does not correctly reflect the testimony of a witness in any particular respect, it is the duty of counsel to call attention thereto and request a correction.

3. Appeal and Error § 31— misstatement of evidence in charge — failure to object — waiver of question on appeal

In an action for wrongful death, failure to call to the court's attention during the trial a misstatement in the court's recapitulation of the evidence as to the speed that a witness had testified defendant's vehicle was traveling is a waiver of the right to have the misstatement considered on appeal.

4. Automobiles § 51— negligence — excessive speed — sufficiency of evidence

In an action for wrongful death, an instruction submitting the issue of defendant's negligence in operating his motor vehicle on the highway at a greater rate of speed than 55 miles per hour *is held* supported by evidence that defendant's vehicle skidded more than 200 feet and that for 60 feet of that distance it skidded sideways, that thick smoke came from its tires, and that it was going 50 miles per hour after it had started skidding.

5. Trial §§ 33, 35— instructions — use of term "evidence tending to show"

The court's use in the charge of the terms "has offered evidence in substance tending to show" and "offered evidence tending further to show" is not an expression of opinion in violation of G.S. 1-180.

6. Automobiles §§ 40, 83, 90— contributory negligence of pedestrian — failure to yield right of way — instructions

In an action for the wrongful death of a pedestrian, an instruction that the failure of plaintiff's intestate to yield the right of way to defendant's

vehicle "should be taken into consideration, together with all of the other facts and circumstances" upon the question of the pedestrian's negligence, while disapproved for failure of the court to instruct that it should be taken into consideration "as evidence," will not be held prejudicial error since a pedestrian's failure to yield the right of way is not contributory negligence *per se*, but is only evidence thereof to be considered with the other evidence.

7. Trial §§ 32, 38— jury informed that instructions given at party's request

Action of the court in informing the jury that particular instructions were given at the request of plaintiff's attorney, although disapproved, will not be held prejudicial error where the court further instructed the jury that they should attach no more importance to such instructions than to any other part of the charge.

APPEAL by defendant from *Bone, E.J.*, 11 December 1967 Civil Session of Superior Court of HARNETT County.

Plaintiff, administrator of the estate of Ruby Wilborn Cotton, instituted this action for the recovery of damages for the wrongful death of plaintiff's intestate allegedly caused by the actionable negligence of the defendant, John Bruce Morton, in the operation of his automobile on 25 October 1965.

The pleadings raise the following issues which the judge submitted and the jury answered as herein indicated:

"FIRST: Was plaintiff's intestate killed by the negligence of the defendant, as alleged in the Complaint?

Answer: YES

SECOND: If so, did plaintiff's intestate by her own negligence contribute to her death?

Answer: No

THIRD: What damages, if any, is plaintiff entitled to recover of defendant?

Answer: $8,000.00"

From the judgment in accordance with the verdict, the defendant appealed.

Morgan & Jones by Robert H. Jones for plaintiff appellee.

Young, Moore & Henderson by J. C. Moore for defendant appellant.

MALLARD, C.J.

In the record on appeal the defendant appellant has fifty exceptions and forty assignments of error he brings forward and states in

his brief that there are only two questions involved which he states in the following manner:

"(1) Did the trial Court err in failing to allow defendant's motion for nonsuit either because:

(a) There was no evidence that defendant was negligent?; or

(b) Plaintiff's intestate was contributorily negligent as a matter of law?

(2) If not, is defendant entitled to a new trial for error in the charge?"

FAILURE TO NONSUIT

The evidence disclosed that on 25 October 1965 plaintiff's intestate, Ruby Wilborn Cotton, was in good health, worked regularly at a store in Lillington, and was 52 or 53 years of age. She and her husband lived on Highway #27 West of Lillington. Their home was located on the north side of the highway which at that point extended generally East and West. A driveway extended from the highway to their home. The highway was straight for three or four-tenths of a mile West of the Cotton home. It was a paved road, twenty feet wide, with shoulders about five feet wide, and with a maximum speed limit of 55 miles per hour posted in that area.

On 25 October 1965 at about 6:45 or 7:00 a.m. John Smith was traveling West on Highway #27 and saw Mr. and Mrs. Cotton on the south shoulder of the road across the highway from their home. Both of them appeared to be looking for something. As John Smith proceeded West on the highway, he met a pickup truck. Smith testified:

"After I passed him, I don't know how long it had been after I passed him, but I looked at my rear view mirror and I saw the smoke started up. In other words, it appeared to be from the tires when he went into a skid. I was about halfway between Charlie's house and Mr. Neese's residence. I would say I looked in my mirror maybe a minute or two minutes after I passed them. As to how far behind me at the time I saw it in the mirror, well, he was away, I would say halfway between where I was at and Mr. Charlie's house. The smoke that I saw coming from the tires was thick. In other words, when the smoke went to coming off the tires, then he went into a skid and that was it; I couldn't see any more because the smoke was so thick. I was not able to judge the speed of the vehicle at the time I saw it."

Charlie Cotton, the husband of plaintiff's intestate, testified in substance, except where quoted, that the night before this occurrence his wife had left her pocketbook on the trunk of the car. He had taken the car to the garage, and the pocketbook fell off when he drove out in the road. The next morning he and his wife went out there to look for the pocketbook. Mr. Cotton was on the south side of the road. He testified:

> "I did not see the truck that was being driven by the defendant coming until I heard the tires start squealing. When I heard the tires start squealing, I turned my head and glanced at my wife and she was about halfway between the yellow line and the shoulder of the road on the left side of the road, that is the north side of the road. That was in the westbound lane.
>
> As to whether I saw the truck when I heard it, I glanced first at my wife when I turned, I looked at her. Then I turned off and saw the truck coming down the road skidding. The truck skidded straight for a good distance, then it commenced varying to the left and skid across the yellow line, the front wheels went over on the shoulder of the road about thirty feet from where it hit her at. Then it slid right sideways and hit the dirt right straight towards her.
>
> The right rear fender of the truck struck my wife. After I heard the skidding, I saw the truck until it struck my wife. I was looking right straight at my wife when she was struck. At the time she was struck, she was about 16 inches from the edge of the hard surface on the north side of the road when facing the house. The front wheels of the truck were up in my driveway and the back wheels of the truck were about 12 inches from the edge of the hard surface."

Mr. Cotton, after stating that he had an opinion satisfactory to himself as to the speed of the truck while it was skidding, replied, "My opinion was, he was going, he was doing better than fifty miles per hour." The skid marks extended approximately two hundred feet. At the beginning there were two skid marks and this "went to sideways, then there was four marks." The four marks extended about sixty feet. When the right rear fender of the truck struck his wife, "it took her off the ground and she went into a spin" for twenty or twenty-five feet, fell to the ground, and slid into the ditch. She didn't move any after that. She was dead.

The defendant offered no evidence.

[1] We conclude that the evidence is sufficient to withstand de-

fendant's motion for nonsuit and to require submission to the jury of the issues of negligence, contributory negligence, and damages.

CHARGE OF THE COURT

Defendant contends that the court committed error in the recapitulation of the evidence in stating that the witness Cotton "testified that in his opinion when he saw the truck of the defendant up the road, skidding, that it was going faster than fifty-five miles per hour," when in fact the witness stated that "he was doing better than fifty miles per hour." The court, in its charge, correctly instructed the jury:

> "I only state the substance of the evidence for the purpose of enabling me to apply and explain the law. You are the judges of what the evidence was and you will go by your recollection of it. If your recollection of the evidence differs from mine or that of counsel for either side, you will disregard our recollection and be guided by your own. The law makes you the judges of what the evidence was and of the weight and credibility of each part of it and you are to determine from the evidence what the facts are and then applying the law as the court explains it to you, render your verdict accordingly."

[2, 3] When the court's statement of the evidence in condensed form does not correctly reflect the testimony of the witnesses 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. It does not appear that this misstatement of the evidence was called to the attention of the court at any time during the trial. The failure to do so in this case is a waiver of any right to have it considered on appeal. *Ward v. R. R.,* 224 N.C. 696, 32 S.E. 2d 221; *State v. Lambe,* 232 N.C. 570, 61 S.E. 2d 608; *State v. Cornelius,* 265 N.C. 452, 144 S.E. 2d 203.

[4] Defendant contends that the court committed error in charging the jury, as follows:

> "In the first place, the law imposed upon the defendant the duty not to operate his motor vehicle upon the highway at a greater rate of speed than fifty-five miles per hour."

This contention is without merit when the following circumstances indicative of speed are considered. The witness Smith testified that the defendant's vehicle was obscured by smoke coming from its tires. The witness Cotton testified that the defendant's vehicle skidded approximately two hundred feet and that for about sixty

feet of that distance it was skidding sideways. The witness Cotton also testified that in his opinion the defendant's vehicle was going at a speed of over fifty miles an hour when he saw it *after* he heard it and *after* it was skidding. We are of the opinion that these circumstances taken in connection with other evidence relating to speed is sufficient for submission to the jury on the question of speed in excess of fifty-five miles per hour.

The defendant contends, but cites no authority except G.S. 1-180 in support thereof, that the court expressed an opinion and committed error in the use of the following language in its charge in connection with the statement of the evidence:

> "In this case, the plaintiff has offered evidence in substance tending to show," and
>
> "The plaintiff offered evidence tending further to show," and
>
> "Plaintiff has offered evidence tending further to show."

[5] Defendant contends that the court failed to explain what was meant by the term "the evidence tended to show" and failed to explain that what the evidence did show was solely the province of the jury. This contention is without merit. The court adequately charged that the jury were the judges of what the evidence was and of its weight and credibility. The use of the terms "has offered evidence in substance tending to show" and "offered evidence tending further to show" is not an expression of opinion in violation of G.S. 1-180. *Thompson v. Davis,* 223 N.C. 792, 28 S.E. 2d 556.

Defendant contends that the court failed to state the evidence necessary to explain the application of the law thereto and also contends in several assignments of error that the court failed to adequately charge the jury with respect to the second issue relating to contributory negligence.

[6] The defendant asserts that the court failed to inform the jury that the failure of plaintiff's intestate to yield the right of way to him in the following portion of the charge would be "evidence" of contributory negligence:

> "(S)o under the uncontradicted evidence in the case, it was the duty of the plaintiff's intestate to yield the right of way to the defendant's approaching vehicle; however, under the law, if she failed to do that, that would not per se or in itself be negligence, *but should be taken into consideration, together with all of the other facts and circumstances appearing in the case, in determining whether she was guilty of negligence or not.*" (Emphasis Added.)

Although the court did not use the words "it should be taken into consideration *as evidence,*" and while we do not approve of the omission thereof, we are of the opinion that the failure to use the words "as evidence" was not prejudicial in this case, as a pedestrian's failure to yield the right of way is not contributory negligence *per se,* but only evidence thereof for consideration with other facts and circumstances. *Moore v. Bezalla,* 241 N.C. 190, 84 S.E. 2d 817.

The charge when read as a whole contains an adequate summary of all the necessary evidence on all the issues. The law with respect to contributory negligence was properly stated and applied to the evidence.

[7] Defendant contends that the court committed error by giving in substance particular instructions requested by the plaintiff's attorney and then informing the jurors that such had been done at his request. However, after giving the requested instructions, the court also instructed the jury with respect thereto, as follows:

> "I charge you, members of the jury, that the circumstances under which the instructions which I have just given you, should not lead you to believe that there should be any more importance attached to that instruction than the others which I have given you. . . .
>
> (B)ut you should not place any emphasis upon it by reason of the circumstances under which it is given; it is simply a part of the charge that the court is giving you, and that is not to be singled out as having any more importance than any other part of the charge and you will, in arriving at your verdict, remember and consider the other parts of the charge relating upon this matter, as well as others."

We do not approve of the trial court informing the jurors that particular instructions are given at the request of a party. However, in view of the charge as a whole and particularly the further instructions given by the court with respect thereto, we are of the opinion that it was not prejudicial error in this case.

There are a number of other assignments of error, some of them to the charge of the court. We have carefully examined each one of them that has been properly brought forward in appellant's brief. None of them point to a cause for disturbing the verdict.

In the trial we find

No error.

BROCK and PARKER, JJ., concur.

THE NORTH CAROLINA STATE BAR, COMPLAINANT, v. ELAM REAMUEL TEMPLE, ATTORNEY AT LAW, JOHNSTON COUNTY, SMITHFIELD, NORTH CAROLINA, RESPONDENT

No. 68SC93

(Filed 14 August 1968)

1. Attorney and Client § 10— disbarment proceedings — council of State Bar — demand for jury trial

G.S. 84-28 authorizes the council of the North Carolina State Bar to hear and determine charges and to invoke the processes of the courts in disciplinary and disbarment proceedings against any member of the North Carolina State Bar, and provides that the person charged may demand a trial by jury.

2. Pleadings § 19— demurrer — construction of pleadings

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. Pleadings §§ 19, 26— demurrer — when sustained

A demurrer will be sustained only when the pleading is wholly insufficient or fatally defective.

4. Pleadings § 19— office of demurrer

The 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.

5. Attorney and Client § 11— disbarment proceedings — grounds for disbarment — statement of cause of action

In a proceeding to disbar an attorney for engaging in conduct involving willful deceit and fraud, engaging in activity showing professional unfitness, and practicing fraud upon the courts of this State, allegations that respondent attempted to engage in illegal traffic of counterfeit money, that respondent fraudulently prepared or caused to be prepared false affidavits relating to the probate of a will and engaged in other specified fraudulent activities in connection with the estate, and that respondent fraudulently altered a note and deed of trust and had them recorded, *are held* to state a cause of action for respondent's disbarment sufficient to survive demurrer.

6. Pleadings § 26— defective statement of cause of action — demurrer — motion to dismiss

A defective statement of a cause of action is a ground for demurrer but not for a motion to dismiss.

7. Pleadings § 42— motion to strike after answer filed

The granting or denial of a motion to strike allegations of the complaint made after answer has been filed rests in the discretion of the court.

8. Attorney and Client § 10— disbarment proceedings — statute of limitations

The plea of the statute of limitations is not available in disbarment proceedings.

9. Evidence § 11— dead man's statute — conversations and transactions by respondent with deceased's third party

In a trial for the disbarment of an attorney, testimony by witnesses as to transactions and conversations between respondent attorney and third parties who were deceased at the time of the trial *is held* not violative of G.S. 8-51 and is properly admitted.

10. Witnesses § 2— subpoenas — U. S. Secret Service Agent — federal regulations

In a trial for the disbarment of an attorney, the trial court properly granted the motion of the U. S. Government to quash subpœnas of respondent directed to U. S. Secret Service Agents where respondent failed to comply with federal rules and regulations for summoning such agents.

11. Attorney and Client § 11— disbarment — sufficiency of evidence

In a trial for the disbarment of an attorney, the evidence *is held* sufficient to be submitted to the jury upon charges that respondent attempted to engage in illegal traffic of counterfeit money, that respondent fraudulently prepared or caused to be prepared false affidavits relating to the probate of a will and engaged in other fraudulent activities in connection with the estate, and that respondent fraudulently altered and recorded a note and deed of trust.

APPEAL by respondent from *Martin, S.J.*, October 1967 Session JOHNSTON Superior Court.

Complainant instituted this action pursuant to Chapter 84 of the General Statutes. The complaint is briefly summarized as follows: (Numbers ours.)

(1) Respondent is and was at all times referred to in the complaint an attorney at law licensed to practice in North Carolina and is and was subject to the rules and regulations of complainant and the laws of North Carolina.

(2) While acting as an attorney and as an individual, respondent did unlawfully and wilfully (a) engage in conduct involving willful deceit and fraud, (b) engage in activity showing professional unfitness, and (c) did practice chicanery and fraud upon the courts of this State.

(3) AS A FIRST CAUSE OF ACTION: On or about 18 July 1963, respondent attempted to engage in illegal traffic of counterfeit money.

(4) AS A SECOND CAUSE OF ACTION: In November, 1964, respondent prepared or caused to be prepared certain affidavits and

engaged in other activities in connection with the estate of one Nancy Williams, all of which were false, erroneous or untrue.

(5) AS A THIRD CAUSE OF ACTION: In the summer of 1964, respondent altered a promissory note and deed of trust which Nancy Williams had executed in his favor in January, 1964, by increasing the amount of said note and deed of trust from Two Hundred Dollars to Twenty-Two Hundred Dollars, without the knowledge and consent of the said Nancy Williams, and caused said altered deed of trust to be recorded in the Johnston County Registry.

Respondent filed answer denying the material allegations of the complaint and requested a trial by jury. Thereafter, on 13 January 1967, he filed a demurrer and motion to dismiss which was heard and denied by Clark, J., on 23 January 1967. On 28 January 1967, respondent filed a motion to strike and a plea in bar and plea of statute of limitations; by order dated 27 February 1967, Mallard, J., denied the motion to strike.

Issues were submitted to and answered by the jury as follows:

"1. Did the respondent, Elam Reamuel Temple, on or about July 18, 1963, attempt to engage in the illegal traffic of counterfeit money, as alleged in the Complaint?

Answer: Yes.

"2. Did the respondent, Elam Reamuel Temple, on or about November 16, 1964, willfully and fraudulently prepare or cause to be prepared false affidavits in connection with the purported or duplicate original Last Will and Testament of Nancy Williams, which the respondent knew to be false and erroneous, as alleged in the Complaint?

Answer: Yes.

"3. Did the respondent, Elam Reamuel Temple, willfully and fraudulently procure or cause to be procured the signature of one Thomas Jones as a witness to a paper writing purporting to be a duplicate original Last Will and Testament of Nancy Williams subsequent to her death, as alleged in the Complaint?

Answer: Yes.

"4. On or about November 16, 1964, did the respondent, Elam Reamuel Temple, willfully and fraudulently offer or cause to be offered false and erroneous affidavits to the Clerk of the Superior Court of Johnston County in connection with the

probate of the purported duplicate original Last Will and Testament of Nancy Williams, as alleged in the Complaint?

Answer: Yes.

"5. Did the respondent, Elam Reamuel Temple, willfully and fraudulently alter a note and deed of trust from one Nancy Williams to Dan Perry, Trustee, for the benefit of Elam Reamuel Temple, by willfully and fraudulently changing the amount from $200.00 to $2200.00 without the knowledge and consent of Nancy Williams, as alleged in the Complaint?

Answer: Yes.

"6. Did the respondent, Elam Reamuel Temple, willfully and fraudulently offer or cause to be offered to the Clerk of the Superior Court of Johnston County a fraudulently altered note and deed of trust for recordation as shown in Book 629, page 19, in the Office of the Register of Deeds of Johnston County, as alleged in the Complaint?

Answer: Yes."

From judgment entered on the verdict disbarring respondent from the practice of law in the State of North Carolina and taxing him with the costs of court, respondent appealed.

Robert B. Morgan and B. E. James, Attorneys for Complainant appellee.

Elam Reamuel Temple, Attorney pro se.

BRITT, J.

[1] G.S. 84-28 deals with discipline and disbarment of attorneys. It authorizes the council of the North Carolina State Bar or any committee of its members appointed for that purpose, or designated by the Supreme Court, to have jurisdiction to hear and determine complaints, charges of malpractice, corrupt or unprofessional conduct, or other allegations made against any member of the North Carolina State Bar. Subsection (3) provides that the processes of the courts may be invoked to carry out the purposes of Chapter 84 but provides that the person charged may demand a trial by jury.

In his appeal to this Court, respondent made numerous assignments of error to the trial proceedings. We will discuss those we deem pertinent to the appeal.

He contends that the trial court committed error in overruling

his demurrer and motion to dismiss, his motion to strike, and his plea of the statute of limitations.

[2-5] It is well established that 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 will not be sustained unless the pleading is wholly insufficient or fatally defective. 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. 6 Strong, N. C. Index 2d, Pleadings, § 19, p. 325, citing numerous authorities. The allegations in the complaint in this action were amply sufficient to survive demurrer.

[6] Respondent's demurrer and motion to dismiss were based on the contention that the facts as alleged do not constitute a cause of action. In *Bowling v. Burton*, 101 N.C. 176, 7 S.E. 701, our Supreme Court held that a defective statement of a cause of action is ground for demurrer but not for a motion to dismiss the action. Respondent was not entitled to have his motion to dismiss granted.

[7] Respondent's motion to strike, denied before the action came on for trial, was made after answer was filed. Granting or denial of the motion then became a matter of discretion for the court, and Judge Mallard properly exercised his discretion in denying the motion. *Brown v. Ball*, 226 N.C. 732, 40 S.E. 2d 412. Furthermore, we find that the motion to strike was without merit, and respondent's assignment of error relating thereto is overruled.

[8] The plea of the statute of limitations is not available to respondent in this action. In 7 Am. Jur. 2d, Attorneys, § 62, p. 86; Annotation, 45 A.L.R. 1110, it is said:

> "Disciplinary proceedings are not barred by the general statute of limitations. Nor is a disciplinary proceeding barred because it is grounded on acts that also constitute a crime that cannot be prosecuted in a criminal action because of limitations."

[9] Respondent contends that the trial court erred in permitting certain witnesses to testify as to transactions and conversations between the respondent and third parties who were deceased at the time of the trial, contending that the evidence was violative of G.S. 8-51. We hold that said testimony was not violative of the statute and that the assignments of error relating thereto are without merit.

[10] Assignments of error were also made to the trial court's granting the motion of the U. S. Government to quash the subpœnas

of respondent directed to U. S. Secret Service Agents Spicer and Tarlton. Certain rules and regulations are prescribed by the Federal Government for the summoning of Secret Service Agents; the record discloses that respondent failed to comply with the regulations, therefore, we hold that his assignments of error relating thereto are without merit.

[11] Respondent assigns as error the failure of the trial court to grant his motion for judgment as of nonsuit made at the close of complainant's evidence and renewed at the conclusion of all the evidence. We hold that the evidence was more than sufficient to support complainant's complaint and to withstand motions for nonsuit.

On its first cause of action, complainant introduced evidence showing that respondent approached one Jesse Noah Williams and tried to get him to work with respondent in purchasing counterfeit money. Pursuant to his conversation with Williams, the evidence disclosed that respondent met with Secret Service Agent Huff, posing as Williams' brother-in-law, and attempted to consummate a transaction involving counterfeit money. The testimony also showed that in June or July of 1963, respondent contacted one Ralph C. Winstead, a convicted counterfeiter, and attempted to purchase counterfeit money from him.

On its second cause of action, complainant introduced several witnesses who gave detailed testimony in support of each allegation of the second cause of action.

As to the third cause of action, complainant presented testimony of one Moses Tart who testified that he saw respondent alter the note and deed of trust executed by Nancy Williams by changing the amount of the indebtedness stated on the note and deed of trust from $200.00 to $2200.00, and that respondent told Tart at the time that no one would know the difference. The deed of trust was thereafter recorded in the Johnston County Registry.

We have stated only a small portion of the voluminous testimony presented by the complainant. The trial court very properly overruled the motions to nonsuit.

Respondent noted 43 exceptions to the trial court's charge; in fact, he excepted to most of the charge and then by exception No. 70, "[d]efendant objects and excepts to the charge of the Court as a whole." Although respondent's numerous exceptions to the charge probably amount to a broadside exception, we have given careful consideration to the charge and each objection made by the respondent. We do not deem it necessary to discuss the numerous ex-

ceptions and assignments of error related to the charge but hold that the charge was without prejudicial error.

We have considered each of respondent's assignments of error, and find them without merit. They are all overruled.

The respondent had a fair trial in his home county where a jury of his peers answered appropriate issues against him. The judgment of the Superior Court predicated thereon is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

GLENN M. PICKARD AND WIFE, MARY ELLEN PICKARD, AND EDGAR M. MURRAY, v. BURLINGTON BELT CORPORATION, A CORPORATION; CLARK BUILDING COMPANY, A CORPORATION; AND T. & J. CONSTRUCTION COMPANY, INC., A CORPORATION

AND

BURLINGTON BELT CORPORATION, NORFOLK & DEDHAM MUTUAL FIRE INSURANCE COMPANY, HARLEYSVILLE MUTUAL INSURANCE COMPANY, NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY, AND PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY v. CLARK BUILDING COMPANY, AND T. & J. CONSTRUCTION COMPANY, INC.

No. 68SC209

(Filed 14 August 1968)

1. Fires § 1— statutory duty of landowner starting fire on own land

The primary purpose of G.S. 14-136 and G.S. 14-140 is to protect property; each statute defines the standard of care imposed upon a person who undertakes to burn brush, grass, etc., and a violation of the provisions of either statute constitutes negligence.

2. Fires § 1; Trial § 33— actions — instructions — failure to apply law to evidence

In an action by adjacent landowners to recover for property damage allegedly caused by the act of defendants in intentionally setting fire to grass and brush on the property of the co-defendant without compliance with the provisions of G.S. 14-136 and G.S. 14-140, an instruction to the jury whereby the trial judge reads the foregoing statutes but fails to charge that a violation of either of the statutes would constitute negligence *is held* erroneous, since the jury is left with no guidance as to the application of the statutes to the evidence. G.S. 1-180.

3. Corporations § 27— tort liability of corporation — nonsuit of individual defendants

In an action to recover for property damage allegedly caused by intentionally setting fire to grass and brush on the property of a corporate co-

defendant without compliance with G.S. 14-136 and G.S. 14-140, there is no error in granting motions of nonsuit as to individual defendants when the record discloses that these individuals were not doing business as individual proprietorships or partnerships, but as the named corporate defendants.

4. Fires § 1; Master and Servant § 21— imposition of liability upon employer of independent contractor — jury question

In an action by adjacent landowners to recover for property damage allegedly caused by the act of a construction company, a co-defendant, in intentionally setting fire to grass and brush on the property of another co-defendant without compliance with the provisions of G.S. 14-136 and G.S. 14-140, it is proper for the trial judge to submit for jury determination the question of whether, under the circumstances of the case, the use of fire by the construction company to clear the land was an inherently hazardous operation and whether the other co-defendants knew or should have known that the construction company intended to use fire for this purpose, since the employment of the construction company by a building company, the third co-defendant, to clear and grade the land preparatory to the construction of an industrial building thereon was not work from which in the natural course of things injurious consequences must be expected to arise so as to impose as a matter of law upon the defendants landowner and building company a non-delegable duty to comply with G.S. 14-136 and G.S. 14-140 and to exercise due care in controlling the fire.

5. Master and Servant § 21— imposition of liability upon employer of independent contractor — rule of non-delegable duty

The principle of law that the liability of the employer of an independent contractor rests upon the ground that mischievous consequences will arise from the work to be done unless precautionary measures are adopted and that the employer cannot escape liability by delegating to the independent contractor the duty to see that precautionary measures are adopted is held applicable to a situation where, in the natural course of things, injurious consequences must be expected to arise from the work to be executed.

6. Appeal and Error § 53— error cured by verdict

The plaintiffs in Case No. 2 of a consolidated action, who were defendants in Case No. 1, could not be prejudiced by the rulings of the trial court in Case No. 1 relating to the admission of certain evidence and exhibits where they were successful in their defense of the action in Case No. 1.

7. Trial § 8— consolidation within discretion of presiding judge

Whether cases should be consolidated for trial is to be determined in the exercise of his sound discretion by the judge who will preside during the trial; a consolidation cannot be imposed upon the judge presiding at the trial by the preliminary order of another trial judge.

APPEAL by plaintiffs in each case from *Bailey, J.*, 8 January 1968 Session, ALAMANCE Superior Court.

The plaintiffs in Case No. 1, Pickard and wife, and Murray, own an industrial building in Alamance County near the town of

Elon College. This building was leased to Burlington Belt Corporation for its manufacturing operations. Burlington Belt Corporation purchased adjoining property, and contracted with Clark Building Company to construct a building thereon for attachment to the Pickard-Murray building. Clark Building Company contracted with T. & J. Construction Company to clear and grade the property in preparation for the new construction.

On 18 March 1966, T. & J. Construction Company intentionally set fire to the grass and brush on the property to be cleared and graded. The grass and brush extended up to the Pickard-Murray building. Burlington Belt Corporation maintained a waste bin outside the Pickard-Murray building where industrial and packaging waste was stored. The fire started by T. & J. Construction Company spread up to the Pickard-Murray building, allegedly igniting the waste bin and subsequently spreading throughout the interior of the building, destroying the building and contents.

The Pickards and Murray brought their action to recover for damage to the building. The several insurance companies named as plaintiffs in Case No. 2, along with Burlington Belt Corporation, bring their action to recover for damages to the contents of the Pickard-Murray building. Burlington Belt Corporation is a defendant in Case No. 1, and is a plaintiff in Case No. 2. The two cases were consolidated for trial, and from adverse verdicts in each case the plaintiffs in each case appealed to the Court of Appeals.

Smith, Moore, Smith, Schell and Hunter, by Norman B. Smith and McNeill Smith, for Glenn M. Pickard, Mary Ellen Pickard, and Edgar M. Murray, plaintiffs-appellants (Case No. 1).

Jordan, Wright, Henson and Nichols, by Luke Wright, for Burlington Belt Corporation, et al, plaintiffs-appellants (Case No. 2).

Sanders and Holt, by W. Clary Holt, and R. Chase Raiford, for Burlington Belt Corporation, defendant-appellee (Case No. 1).

Hoyle, Boone, Dees and Johnson, by E. E. Boone; Kennedy, Covington, Lobdell and Hickman, by Hugh L. Lobdell; and J. Donnell Lassiter for Clark Building Company, defendant-appellee (Cases Nos. 1 and 2).

Haworth, Riggs, Kuhn and Haworth, by John Haworth and Walter W. Baker, Jr., for T. & J. Construction Company, defendant-appellee (Cases Nos. 1 and 2).

BROCK, J.

Case No. 1

Without detailing all of the specifications of negligence, the Pickards and Murray seek to hold T. & J. Construction Company

liable for damages upon the grounds that it violated G.S. 14-136, that it violated G.S. 14-140, that it was negligent in burning the field on a windy day, and that it failed to exercise due care in controlling the fire. They seek to hold Clark Building Company liable for damages upon the grounds that it had notice that T. & J. Construction Company intended to burn the field and that it had the non-delegable duty to comply with G.S. 14-136 and G.S. 14-140, and to exercise due care in controlling the fire. They seek to hold Burlington Belt Corporation liable for damages upon the grounds that it had notice that T. & J. Construction Company intended to burn the field and that it had the non-delegable duty to comply with G.S. 14-136 and G.S. 14-140, and to exercise due care in controlling the fire. They also seek to hold Burlington Belt Corporation liable upon the grounds of negligence in allowing quantities of flammable waste material to accumulate outside and inside the building which caused the fire to spread rapidly through the building.

G.S. 14-136 reads, in pertinent part, as follows:

> "If any person shall intentionally set fire to any grassland, brushland or woodland, except it be his own property, or in that case without first giving notice to all persons owning or in charge of lands adjoining the land intended to be fired, and without also taking care to watch such fire while burning and to extinguish it before it shall reach any lands near to or adjoining the lands so fired, he shall for every offense be guilty of a misdemeanor . . ."

G.S. 14-140 reads, in pertinent part, as follows:

> "All persons, firms or corporations who shall . . . set fire to or burn any brush, grass or other material, whereby any property may be endangered or destroyed, shall keep and maintain a careful and competent watchman in charge of such . . . brush or other material while burning. Any person, firm or corporation violating the provisions of this section shall be punishable. . . . Fire escaping from such . . . brush or other material while burning shall be prima facie evidence of neglect of these provisions."

[1] It is clear that the primary purpose of the above quoted statutes is to protect property. Each of them defines the standard of care imposed upon a person who undertakes to burn brush, grass, etc., and a violation of the provisions of either of the statutes constitutes negligence. *Benton v. Montague,* 253 N.C. 695, 117 S.E. 2d 771.

[2] In his charge to the jury the trial judge read the foregoing statutes, but he failed to instruct the jury that a violation of either, or both, of the statutes would constitute negligence; and the plaintiffs assign this as error. In general terms the trial judge explained the difference between the violation of a statute which constitutes negligence *per se,* and a violation which does not constitute negligence *per se.* Such an explanation was unnecessary in this case, and without a clear instruction that a violation of either of the statutes in issue would constitute negligence, the jury was left with no guidance as to the application of the statutes to the evidence. G.S. 1-180. This assignment of error is sustained.

[3] The plaintiffs, the Pickards and Murray, assign as error the granting of motions of nonsuit as to the individual defendants, S. S. Clark, Jr., Wayne Elkins and Curtis Jenkins. The record discloses that these individuals were not doing business as individual proprietorships or partnerships, but as the named corporate defendants. These assignments of error are overruled.

The plaintiffs, the Pickards and Murray, assign as error the striking from their complaint allegations pertaining to G.S. 14-137 and 14-139, and the failure of the Court to instruct the jury thereon. Upon this Record on Appeal these statutes have no application, and these assignments of error are overruled.

[4, 5] The plaintiffs, the Pickards and Murray, assign as error the failure of the Court to instruct the jury that Burlington Belt Corporation and Clark Building Company had a non-delegable duty to comply with G.S. 14-136 and G.S. 14-140, and to exercise due care in the burning by T. & J. Construction Company. Plaintiffs cite the following principle of law: "The liability of the employer rests upon the ground that mischievous consequences will arise from the work to be done unless precautionary measures are adopted, and the duty to see that these precautionary measures are adopted rests upon the employer, and he cannot escape liability by entrusting this duty to another as an 'independent contractor' to perform." *Evans v. Rockingham Homes, Inc.,* 220 N.C. 253, 17 S.E. 2d 125. The foregoing principle is applicable to a situation where the "work to be executed, from which, in the natural course of things, injurious consequences must be expected to arise unless means are adopted by which such consequences may be prevented." 27 Am. Jur., Independent Contractors, § 38, p. 515. The employment of T. & J. Construction Company to clear and grade the land preparatory to construction was not work from which in the natural course of things injurious consequences must be expected to arise. We hold that it was proper for the trial judge to submit for jury determination the question of

whether under the circumstances of this case the use of fire to clear the land was an inherently hazardous operation, and whether either Burlington Belt Corporation or Clark Building Company, or both, knew or should have known that T. & J. Construction Company intended to use fire for this purpose on the day and under the circumstances prevailing. This assignment of error is overruled.

Case No. 2

Without detailing all of the specifications of negligence, the plaintiffs, Burlington Belt Corporation, *et al,* seek to hold T. & J. Construction Company liable for damages upon the grounds that it violated G.S. 14-136, that it was negligent in burning the field on a windy day, and that it failed to exercise due care in controlling the fire. They seek to hold Clark Building Company liable for damages upon the grounds that it had notice that T. & J. Construction Company intended to burn the field and that it had the non-delegable duty to comply with G.S. 14-136, and to exercise due care in controlling the fire.

Each of the defendants in Case No. 2 allege contributory negligence on the part of Burlington Belt Corporation in allowing an accumulation of flammable waste outside and inside the building.

What has been said in Case No. 1 with respect to the charge of the Court upon the violation of G.S. 14-136 is equally applicable here. The trial judge failed to instruct the jury that a violation of the statute would constitute negligence, and this failure constituted prejudicial error, and entitles plaintiffs in Case No. 2 to a new trial.

The plaintiffs Burlington Belt Corporation, *et al,* assign as error the failure of the Court to instruct the jury upon G.S. 14-137 and G.S. 14-139. As stated in Case No. 1, upon this Record on Appeal these statutes have no application.

[6] The plaintiffs, Burlington Belt Corporation, *et al,* make numerous assignments of error to the ruling of the Court in allowing counsel for plaintiffs in Case No. 1 to propound questions to witnesses and in allowing counsel for plaintiffs in Case No. 1 to introduce certain exhibits. These assignments of error are without merit because Burlington Belt Corporation, *et al,* was successful in its defense of the action in Case No. 1, and the testimony and exhibits could not have been prejudicial.

Case No. 1 and Case No. 2

Since these cases must be retried we refrain from a discussion of the other assignments of error relating to the evidence allowed and rejected; the questions will probably not arise again.

[7] In fairness to the trial judge we note that the Order consolidating these two cases for trial was entered by another Superior Court Judge, and the trial judge may have considered that he was bound to proceed with the consolidated trial. Whether cases should be consolidated for trial is to be determined in the exercise of his sound discretion by the judge who will preside during the trial; a consolidation cannot be imposed upon the judge presiding at the trial by the preliminary Order of another trial judge.

In view of the conflict of interests between the plaintiffs in these two cases, and in view of the confusion as disclosed by the briefs, it appears that the ends of justice will best be served if each case is tried separately. We note that Burlington Belt Corporation, *et al,* plaintiffs in Case No. 2, joined with one of the defendants in the motion for consolidation; and it appears that Burlington Belt Corporation, *et al,* were more confused by the consolidation than any other party.

Upon each appeal we hold that the errors in the charge entitle the plaintiffs in each case to a

New trial.

MALLARD, C.J., and PARKER, J., concur.

CECIL INMAN v. FOSTER JINKS HARPER AND E. C. SANDERS, T/A WACCAWAY FARMS, ORIGINAL DEFENDANTS, AND MARSHALL C. HALL, ADDITIONAL DEFENDANT

No. 68SC180

(Filed 14 August 1968)

1. Appeal and Error § 41— stenographic transcript — failure to provide appendix to brief setting forth pertinent evidence — appeal dismissed

Where appellant files with the clerk a stenographic transcript of the evidence at the trial but fails 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," the appeal will be dismissed by the Court of Appeals. Court of Appeals Rule No. 19(d)(2).

2. Appeal and Error § 45— exceptions not argued in brief — abandoned

Exceptions and assignments of error not brought forward in the brief are deemed abandoned.

3. Evidence § 39— testimony of declarations of bodily feeling

In an action for personal injuries, testimony by lay witnesses of statements made to them by plaintiff as to her physical and mental condition and by plaintiff's physician as to the medical history he took from plaintiff is properly admitted into evidence even though plaintiff did not testify.

4. Damages § 12; Pleadings § 33— amendment of complaint during trial to allege traumatic neurosis

In an action for injuries arising out of an automobile accident, the court properly allowed plaintiff to amend her complaint during the trial to specifically allege a traumatic neurosis and depressive reaction where the original complaint alleged that in addition to her physical injuries plaintiff "has suffered severe mental anguish and depression about her physical condition since the accident and has become highly nervous to the extent she is nearing the point of a nervous break-down," and where the amendment contained no matter not included in depositions of plaintiff's psychiatrist and other physicians, the amendment being for clarification and constituting no surprise to defendants.

5. Damages § 12— pleadings — traumatic neurosis

In an action for injuries arising out of an automobile accident, plaintiff's allegations that in addition to physical injuries she "has suffered severe mental anguish and depression about her physical condition since the accident and has become highly nervous to the extent she is nearing the point of a nervous break-down" is a sufficient predicate for the admission of evidence that plaintiff suffers from a traumatic neurosis and depressive reaction.

6. Witnesses § 5— prior consistent statements — exclusion

In an action for injuries arising out of an automobile accident, the exclusion of testimony by a defense witness of prior consistent statements she had made to plaintiff's attorney while he was representing the witness for injuries arising out of the same accident will not be held prejudicial error where the witness testified that she had not told the attorney anything to which she had not testified at the trial, that she told her own story as she knew it to be, and that the attorney had never told her anything to say.

7. Automobiles §§ 16, 90— duty to give warning before attempting to pass — instructions

In an action against the driver of an automobile in which plaintiff was a passenger and the driver of a truck with which the automobile collided while attempting to pass the truck, failure of the court in instructing upon G.S. 20-149(b) to charge that the warning required of a motorist before attempting to pass a vehicle traveling in the same direction must be timely given will not be held error prejudicial to the driver of the truck where he contended that no warning at all was given, and where the charge as a whole instructed the jury on the duty of defendants to exercise due care.

APPEAL by original defendants from *Clark, J.*, 8 January 1968, Civil Session, COLUMBUS Superior Court.

Plaintiff, a passenger in the automobile driven by the additional defendant (hereinafter referred to as Hall), was injured when the automobile was in collision with a truck driven by original defendant Foster Jinks Harper and owned by original defendant E. C. Sanders, t/a Waccaway Farms. Upon trial of the matter, the jury found original defendants guilty of negligence, that there was no joint and concurrent negligence on the part of Hall, and awarded plaintiff a recovery in the amount of $16,000.00. From judgment thereon, the original defendants appealed.

D. Jack Hooks and Marshall and Williams by Lonnie B. Williams for original defendant appellants.

John W. Jenrette, Jr. and R. C. Soles, Jr. by R. C. Soles, Jr. for plaintiff appellee.

James, James & Crossley by John F. Crossley for additional defendant appellee.

MORRIS, J.

[1] Original defendants note 154 exceptions and 19 assignments of error. They have filed a copy of the transcript of the testimony and state that the evidence is submitted under Rule 19(d)(2). They have failed to comply with that rule, however. The rule provides, as an alternative to the narration of the evidence, the filing of "the complete stenographic transcript of the evidence", "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." This original defendants have failed to do. For failure to comply with the rules of this Court, the appeal is dismissed.

[2] We have, nevertheless, carefully considered the exceptions and assignments of error brought forward and argued in original defendants' brief. Those not brought forward are deemed abandoned. *Capune v. Robbins,* 273 N.C. 581, 160 S.E. 2d 881. We find no reversible error.

[3] Original defendants contend that the court erred in permitting witnesses to testify as to statements made to them by plaintiff with respect to her physical and mental condition and in permitting one of plaintiff's physicians to testify as to the medical history he took from plaintiff. Plaintiff did not testify, and there was evidence that she was not present at the trial.

Where the existence of and extent of pain and suffering are relevant to damages or other issues, lay witnesses may testify with respect to declarations made by another as to the other's then existing pain or other physical discomfort. Stansbury, N. C. Evidence 2d, § 161, and cases there cited.

In *Munden v. Insurance Co.*, 213 N.C. 504, 196 S.E. 872, a case frequently cited in support of the general rule, the Court said:

> "It is very generally held that when the physical condition of a person is the subject of inquiry, his declarations as to his present health, the condition of his body, suffering and pain, etc., are admissible in evidence."

For an exhaustive annotation, see 90 A.L.R. 2d 1072. We find no authority that the general rule is not applicable where the plaintiff does not testify. The reason for the rule would seem to require no distinction.

> "Since pain is a subjective matter which only the suffering person directly experiences, its existence can be proved directly only by the testimony of the sufferer. Since the direct testimony of the person claiming to have suffered pain in the past is sometimes felt to be weak, in that the trier of the fact may suspect him of exaggerating, attempts are often made to prove by others that he manifested his sufferings at other times, when he was not likely to have been motivated by his interest in the litigation." 90 A.L.R. 2d 1073.

[4, 5] Plaintiff's complaint alleged that she "suffered severe and painful wrenching contusion injuries of the neck and dorsal spine, together with multiple contusions and abrasions, about her entire head and body; that she received extensive medical treatment including treatment from an orthopedic surgeon and confinement in the hospital for a long period of time; that she has constant stabbing pains in her eyes going through to the back of her head and has suffered a loss of the sense of smell; that, immediately after the accident, she began having a numbness in both arms and soreness in the area of her hip, back and neck, which still exist at the time of the filing of this complaint; that she also began losing weight and has lost thirty-five pounds; that she has suffered severe mental anguish and depression about her physical condition since said accident and has become highly nervous to the extent that she is nearing the point of a nervous break-down and must take daily medication to relax her nervous condition."

During the course of the trial and on the second day thereof,

the court, in its discretion, allowed plaintiff to amend her complaint as follows:

> "That, as a result of the negligence of the defendant set out above and the collision which resulted therefrom, the plaintiff suffered severe and painful wrenching, contusion injuries of her neck and dorsal spine, together with multiple contusions and abrasions about her entire head and body; that she received extensive medical treatment including treatment from an orthopedic surgeon and confinement in the hospital for a long period of time; that she has constant stabbing pains in her eyes going through to the back of her head and has suffered a loss of the sense of smell; that, immediately after the accident, she began having a numbness in both arms and soreness in the area of her back and neck which still exist at the time of filing this complaint; that she also began losing weight and has lost 35 pounds; that she has been extremely nervous and depressed; that, in addition to her physical injuries and disabilities, she suffered severe mental anguish and depression and these disorders are emotional disorders and disabilities and are in addition to the physical disorders and disabilities which she also suffered;
>
> that her mental anguish, depression and emotional disabilities have increased to the extent that she is nearing the point of a complete nervous breakdown and must take daily medication to relax her nerves, depression and emotional problems; that she has become a victim of traumatic neurosis and depressive reaction."

Original defendants contend this was prejudicial error for that they were entitled to pleading notice that plaintiff sought recovery for a traumatic neurosis, that the complaint as originally filed contained no such notice. The original complaint alleged that plaintiff "has suffered severe mental anguish and depression about her physical condition since said accident and has become highly nervous to the extent she is nearing the point of a nervous break-down and must take daily medication to relax her nervous condition." Additionally defendants had had notice of the taking of the deposition of Dr. Herbert, a psychiatrist, attended the taking of the deposition, and cross examined. The court in allowing the amendment stated that the amendment was a clarifying amendment, contained no matters not contained in the depositions of physicians and, therefore, no surprise to any of the defendants. In allowing the amendment, we find no error. Neither do we find error in the admission of evidence of a depressive reaction in plaintiff. This would be admissible under the

original or amended complaint. We do not consider the original complaint defective under the ruling of *Thacker v. Ward,* 263 N.C. 594, 140 S.E. 2d 23, as original defendants contend. There the allegations held insufficient to allege traumatic neurosis were "his nervous system was severely shocked and damaged and his ability to sleep was and has been permanently impaired", and "that as a direct result of these specific injuries plaintiff has suffered excruciating pain and mental anguish". Defendant requested that the court charge the jury that it could not include damages for psychological injuries in any award to plaintiff, and the court so charged. On appeal the Court held that the allegations of both physical pain and mental suffering as well as severe shock to his nervous system were not a sufficient foundation for recovery of damages for traumatic neurosis.

The refusal of the court to charge the jury, as requested by original defendants, that "you are to allow plaintiff no damages for psychological complaints" was not error.

Original defendants' objection to the court's overruling the objection to the hypothetical question asked Dr. Piggot and the court's denying the motion to strike his answer thereto are without merit. Conceding that the question was not a model hypothetical question, nevertheless, we cannot say that the allowing of question and answer thereto was so prejudicial as to constitute reversible error.

Original defendants also contend that the entire depositions of Drs. Johnson and Herbert should have been stricken. This contention is without merit. Plaintiff's evidence showed a connected medical treatment. Although the doctors first treated plaintiff several months after the accident, the evidence was that she had not been released from medical or psychiatric care since the accident and went to these doctors by referral from another doctor. Both testified to the history given them by plaintiff, and this was properly admissible. *Moore v. Drug Co.,* 206 N.C. 711, 175 S.E. 96; anno. 130 A.L.R. 977.

[6] Defendants' witness, wife of defendant Harper, testified. Defendants sought to offer, by her testimony, prior consistent statements made by her to plaintiff's attorney at the time he was representing her for injuries resulting from the same accident. She testified, both on direct and cross-examination and without objection, that she had not told the attorney anything to which she had not testified at the trial, that she had told her own story as she knew it to be, and the attorney had never told her anything to say. The exclusion of the testimony offered did not constitute prejudicial error.

[7] The remaining assignment of error is to the charge of the court. The original defendants contend that the trial judge committed prejudicial error in failing to give the jury adequate instructions with respect to G.S. 20-149(b), which provides that the driver of an overtaking motor vehicle, not within a business or residential district, shall give an audible warning with his horn or other warning device before passing or attempting to pass a vehicle proceeding in the same direction. Plaintiff's evidence was that the additional defendant sounded his horn as he came up behind the truck and started to pass. Original defendants' evidence was that the horn was not blown at all. Original defendants contend that the court should have specifically instructed the jury that the warning given should have been timely. Original defendants rely on *Cowan v. Transfer Co. and Carr v. Transfer Co.*, 262 N.C. 550, 138 S.E. 2d 228. There the question was whether the court should have instructed the jury that a violation of the statute was not negligence *per se*. The Court approved the instruction given which did include timely warning. However, the Court further instructed that "it boils down to a duty to use reasonable care". Taking the charge in this case as a whole, the jury was fully and clearly instructed that original defendants' duty was to exercise reasonable care under the circumstances. The contention of original defendants is not that the warning signal was not timely, as in *Sheldon v. Childers*, 240 N.C. 449, 82 S.E. 2d 396, but that no warning at all was given. Considering the charge in its entirety, we find it free from prejudicial error.

Appeal dismissed.

CAMPBELL and BRITT, JJ., concur.

STATE v. R. J. FOSTER AND JAMES RONALD BYRD
No. 68SC172

(Filed 14 August 1968)

1. Indictment and Warrant § 11— identification of victim — variance

Where the bills of indictment in a prosecution for felonious breaking and entering and larceny refer to the victim as "G. L. Harris Jewelry Company, a corporation" and the evidence discloses that the correct title of the victim is "G. L. Harris Company, Inc., Siler City" and that there is only one jewelry company by that name located in the county, there is not a sufficient variance to warrant quashal of the indictment.

2. Criminal Law § 102— argument of the solicitor

In a prosecution for felonious breaking and entering and larceny, statements of the solicitor in his argument to the jury that the defendants were professional crooks and that it was his duty as solicitor to protect the people from professional hoods *are held* prejudicial.

APPEAL from *Carr, J.*, Regular November 1967 Session, CHATHAM County Superior Court.

Each defendant was charged in separate bills of indictment containing two counts. The first count charged each defendant on 28 May 1967 with the crime of felonious breaking and entering a certain building occupied by one G. L. Harris Jewelry Company, a corporation, with intent to steal merchandise and valuable securities of the said G. L. Harris Jewelry Company, a corporation. The second count charged each defendant on 28 May 1967 with larceny of goods and chattels of G. L. Harris Jewelry Company, a corporation, with a value of $1,853.85. The items were described by stock number and other description, namely: "a diamond ring, Stock No. 1-771 ANHH, a ruby birthstone ring, Stock No. 11 ELHH, a Keepsake diamond ring, Stock No. 1-764 AGIA, a Keepsake diamond ring, Stock No. A14862/300, and other rings of the value of Eighteen Hundred Fifty-three and 85/100 —— Dollars * * *."

To the charges each defendant entered a plea of not guilty and the jury returned a verdict as to each defendant, "(g)uilty as charged, both counts." The trial court entered judgment that the defendant Foster be confined in the State's prison seven to ten years and the defendant Byrd be confined five to ten years. Each defendant gave notice of appeal, but on failure to perfect the appeal within the time allotted, the solicitor moved to dismiss the appeal and Judge Bailey entered an order 6 May 1968 dismissing the appeal.

This Court allowed petition for writ of certiorari 16 May 1968, and pursuant thereto, the record was filed in this Court 21 May 1968, and arguments were heard the week of 18 June 1968.

The defendants filed a joint brief in this Court and assigned various errors in the trial court.

T. W. Bruton, Attorney General, Harrison Lewis, Deputy Attorney General, and James E. Magner, Staff Attorney for the State.

Dark and Edwards, attorneys for defendant Foster, appellant.

John Randolph Ingram, attorney for defendant Byrd, appellant.

CAMPBELL, J.

[1] The defendants assign as error the denial of their motion to quash the bills of indictment because of variance between the allegation in the indictment and the proof as to the name of the victim. The bills of indictment referred to the victim as "G. L. Harris Jewelry Company, a corporation." The evidence disclosed that the correct title of the victim is "G. L. Harris Company, Inc., Siler City." The evidence further disclosed that there is only one jewelry company by that name located in Chatham County. We hold that there was not a sufficient variance between the name of the victim in the bills of indictment and the correct name as revealed by the evidence. This exception is overruled.

"The fact that the property was stolen from T. A. Turner & Co., Inc. rather than from T. A. Turner Co., a corporation, as charged in the bill of indictment, is not a fatal variance." *State v. Davis,* 253 N.C. 224, 116 S.E. 2d 381. Likewise, in *State v. Wyatt,* 254 N.C. 220, 118 S.E. 2d 420, the indictment for embezzlement alleged ownership in the "Pestroy Exterminating Co." The bill of particulars laid the ownership in "Pestroy Exterminators, Inc." and the witnesses in their testimony referred to both of these names and interchangeably, "Pestroy Exterminating Corporation." The court held that there was no fatal variance and stated: "It is apparent that all the witnesses were talking about the same thing." In the instant case, it is apparent from the record that in respect to the ownership of the stolen jewelry and the building from which the jewelry was taken, all of the witnesses were referring to the same corporation.

The argument of the solicitor on behalf of the State was taken down and transcribed by the court reporter and is in the record before us. The defendants took exception to certain parts of the solicitor's argument.

The following is revealed during the solicitor's argument to the jury:

> "What were these two men doing in Siler City that night? It's always amused me, gentlemen, that there are professional people around here that just love to come to Chatham County, and I can see them right now, in their own minds, saying 'well, there's a poor little one-horse county.'
>
> MR. INGRAM AND MR. EDWARDS OBJECT, 'TO WHAT SOMEBODY ELSE SAYS ABOUT COMING TO CHATHAM COUNTY. WE'RE TRYING THESE TWO DEFENDANTS HERE, NOT SOMEBODY ELSE.' 'HE SHOULD STICK TO THE EVIDENCE IN THIS CASE.'

COURT. I think the Solicitor is entitled to argue any inference. There is not any evidence that anybody was a professional, but the inferences are.

OBJECTION OVERRULED. EXCEPTION No. 16

MR. COOPER (continuing)

I will be happy to stick to the evidence, gentlemen, the evidence of professional crooks. I argue to you that it is a matter of common knowledge that professional crooks use socks and gloves on their hands so they will not leave fingerprints, so they won't leave fingerprints around. I argue to you that this is evidence that these men were professionals. I argue to you that the fact that they make sure that they go by the police station is evidence of a pofessional *(sic)* bent, a crooked mind, because an amateur will stay as far away from the police station as possible.

What do these men do? They go to the police station and establish an alibi, thinking that everybody is going to say 'a guilty man is not going to the cop shop, that's the last place that they will go.' I argue everything about this case is professional. The coming to a small, rural community, Siler City's not a rural community but a small town, not supposed to have much of a police force, probably only two men. * * *

You're entitled, gentlemen, to consider the evidence in this case and all implications that arise from it. You're entitled to ask yourself who's trying to hide what in this case, who doesn't want you to know the truth about this case? You're entitled to ask yourself 'Is Sheriff Simmons trying to hide something?' 'Does he not want to answer any questions from the witness stand, under oath?' You're entitled to ask yourself 'Is anybody else afraid to answer any questions?'

OBJECTION BY THE DEFENDANTS. EXCEPTION No. 17

COURT. Gentlemen, 'as to anyone else wanting to tell the truth about it,' disregard that argument. Dismiss it from your minds and do not let it affect you in any way in making up your decision in this case. Disregard that. There is not *(sic)* obligation on the defendants to explain anything in this case. And the Court will instruct you later as to what the rights of the defendants are with respect to testifying or not testifying.

MR. COOPER. I would like to explain to the - - -

COURT. Let the Jury go to their room at this time. (The Jury at this time leaves the Courtroom)

MR. COOPER. Your Honor, I wanted to explain to the Court and the Jury that what I had reference to was the obvious fact from comments on my speech from the audience that there was somebody in this Courtroom that knew something about this automobile and I was going to suggest that they ask themselves why those people didn't want to answer any questions, and that's exactly what I had in mind, sir, when I made that statement that there are at least some people in here, and they are entitled to ask themselves if there are other people around here who are afraid to answer questions.

COURT. Well, the difficulty about that argument without explanation is that standing alone, it carries the implication that the defendants had something which they wanted to conceal, and that is the reason that they do not testify, did not testify.

MR. COOPER. If your Honor pleases, I didn't get a chance to develop my argument. I was stopped about that time and I argue to you that there is support for this position. In this last case that Solicitor Taylor commended *(sic)* on somebody in the audience had something to say, or something like that. I think I'm entitled to comment on the fact that there are people sitting here in this audience who know something about this case that obviously do not want to answer questions.

MR. INGRAM. Will, *(sic)* I don't think so, Your Honor, because he has the right and the responsibility to put any witness in the Courtroom on that witness stand - - -

COURT. But that would put the burden on the defendants, if you're contending that there are people other than the defendants in the Courtroom that knew something about it. They could have been called.

(There was further discussion at this time that the recording machine did not pick up that was out of the presence of the Jury)

(At this time the defendant moved the Court to declare a mistrial, and motion was denied.)

EXCEPTION No. 18

The jury returned to the Courtroom at this time. The Solicitor continued:

I apologize for taking up so much time. I do think, however, that this is an important case, and, too, it's important from the defendants' standpoint and certainly it is important from

my standpoint, representing the State of North Carolina. It is my duty to prosecute people that are charged with crime and it's my duty to do my best to see that these law abiding citizens have a right to make a living and go about their business every day without being subjected to having their stuff stolen from them, put out of business because some professional crook from Guilford County wants to come down and take away all of his stock so he can't make a living. That's part of my job, to see that people are able to live in peace, just to put it very bluntly. It is my job to protect the people in the four counties of my district from professional hoods.

MR. EDWARDS. OBJECTION, to 'professional hoods or crooks.'

EXCEPTION No. 19

It is my duty to protect the people from the four counties in my district from any kind of stealing, whether it be professional or amateur. That's the reason I'm paid a salary, to prosecute these cases in the Superior Court of Alamance, Orange, Chatham and Person Counties. That's what I'm trying to do in this case. Gentlemen, you have a duty to the people of your county in this case, as in all cases; you have a duty to point out to these people whether or not the law is going to be enforced in this county. You have the duty to see that if people come into this county and attempt to harm one of your citizens, that that man is punished. If you don't do this, you're not going to have any law."

We are unable to distinguish this argument of the solicitor from the argument of the solicitor in the case of *State v. Miller,* 271 N.C. 646, 157 S.E. 2d 335, wherein Chief Justice Parker stated on page 660:

"Considering the argument of the solicitor as a whole, and particularly that part of his argument which in substance states that the appealing defendants are habitual storebreakers, we are of opinion, and so hold, that to sustain the trial below would be a manifest injustice to the defendants' right to a fair and impartial trial."

For the unfair and prejudicial argument of the solicitor for the State, defendants are entitled to a

New trial.

BRITT and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA, PLAINTIFF, v. JOE C. BROOKS, SR. AND WIFE, ANNE BROOKS; THELMA B. McEACHERN, SINGLE; JIM BROOKS AND WIFE, ALENE W. BROOKS; FRANCES B. FURLONG, SINGLE; MARY BROOKS, SINGLE; LULA BROOKS, SINGLE, DEFENDANTS

No. 68SC55

(Filed 14 August 1968)

1. Adverse Possession § 1— definition

Adverse possession consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser; it must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that the possessor is exercising thereon the dominion of owner.

2. Adverse Possession § 25; Water and Watercourses § 7— sufficiency of evidence

In a civil action by the State for trespass, for removal of cloud on title and for removal of objects placed by defendants in the navigable streams of marshlands allegedly owned by the State, the evidence is sufficient to justify the jury in answering the issue of ownership in favor of the defendants on the theory of thirty years adverse possession under known and visible lines and boundaries, where there is evidence that the defendants claimed the tract under definite, known and visible boundaries, that the land was suitable for hogs and cattle, and that the defendants had continuously used the land for more than 30 years as pasturage, for oyster-bedding, and for fishing.

3. Trial § 31— directed verdict

Where all the evidence points in the same direction with but a single inference to be drawn, the court may instruct the jury that if they believe the evidence, they may find a certain verdict.

4. Trial § 31— directed instruction — burden of proof

A directed instruction in favor of the party having the burden of proof is error.

APPEAL by plaintiff from *Hall, J.*, October 1967 Session, BRUNSWICK Superior Court.

This is a civil action for trespass on lands of plaintiff, for removal of cloud on title and removal of objects placed by defendants in the navigable streams of marshlands allegedly owned by plaintiff. By amendment to the complaint, plaintiff alleged that defendants were preventing the general public from using the navigable streams in the marshlands and prayed for issuance of a mandatory injunction requiring defendant Joe C. Brooks, Sr. to remove the obstructions

placed in the navigable streams. Defendants answered, denying plaintiff's title and alleging title to the marshlands in them. The allegations contained in the amendment to the complaint were deemed denied by the court. Upon hearing, the jury returned a verdict for defendants on all issues. From judgment thereon, plaintiff appealed.

T. Wade Bruton, Attorney General, by Millard R. Rich, Jr., Assistant Attorney General, and Rountree and Clark by George Rountree, Jr. and John Richard Newton, for plaintiff appellant.

Herring, Walton, Parker and Powell by Ray H. Walton, and E. J. Prevatte for defendant appellees.

MORRIS, J.

Our study of the record in this case leads us to the conclusion that the judgment below must be upheld.

Plaintiff first contends that the evidence was totally insufficient to support a finding of ownership in the defendants based on adverse possession under color of title. Assuming the correctness of this position, the contention is, nevertheless, without merit. The case was submitted to the jury on the theory of thirty years adverse possession under known and visible lines and boundaries. The trial court gave no instruction with respect to adverse possession under color of title, and none was requested, nor was any issue presented requiring a finding with respect to color of title.

Therefore, as we view the case, the only question with respect to ownership of the marshlands presented by this appeal is the sufficiency of the evidence with respect to thirty years adverse possession. The parties stipulated that Exhibit 1, introduced by plaintiff, "is the map duly recorded in this County of the property claimed by the defendants and the plaintiff". Plaintiff contends that defendants failed to bring forth any evidence that they were ever in open, notorious, hostile and sole possession of the marsh under known and visible boundaries.

[1] In *Mallet v. Huske,* 262 N.C. 177 at 181, 136 S.E. 2d 553, Rodman, J., quoting from *Locklear v. Savage,* 159 N.C. 236, 74 S.E. 347, gave this definition of adverse possession:

> "It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to

show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner."

[2] Testing the competent evidence by that definition, we are constrained to hold that the evidence is sufficient to justify the jury in answering the issue in favor of defendants.

Joe C. Brooks, one of the defendants, testified that he is 60 years of age; had lived withon 100 to 500 feet of the property in question all of his life; that he knows the lines are on the ground as shown by the map agreed to; that the property is bounded on the east by D. S. Frink or the D. S. Frink estate, on the south by Ocean Isle Beach, on the west by M. C. or Manley Gore; that the inland waterway was cut through the northern portion of the property in 1934; that a portion of the property was leased to International Paper Company for the purpose of building a dock extending into the waterway for the unloading of pulpwood from about 1937 to 1956; that from his father's death in 1942 he and his brothers and sisters got oysters and clams out of the area; that his father had run cattle and hogs on it as far back as he could remember until they dug the inland waterway; that he worked with the cattle and hogs since he was 6 or 7 years old; that they would have to take the cattle off the marsh in about May for about 2 months and keep them out until about August; that they worked cattle from the Frink line back to Mad Inlet; that they used the cattle on the beach and in all the marshland in there; that his father gave the Conservation and Development Department, using PWA labor, permission to plant oysters one year, but refused permission the next year and after his refusal they did not attempt to plant oysters; that his grandfather lived in the same area in the old home next to his parents; that he had fished the creeks and had seen others fishing in them until the dredge came in to clean out the waterway and dumped mud in the upper part and had seen people oystering in there in boats; that a Mr. Somerset grazed cattle there with the witness' father; that the Frink's cattle never did stray over on his father's property except once in a while; that he put chicken crates and myrtle bushes in the creeks "up on the sides of the creek" and next to the grass in 1966, and erected signs indicating oyster gardens and shellfish areas; that the signs were put at the four corners of the property; that he didn't mark the objects placed because they were "up in the edge of the grass. The

grass would take care of it"; that he had bought oyster shells but they sank in the mud.

James F. Brooks testified that he was 67 years of age, also a son of George E. Brooks; that the eastern line of the property had been marked with a stake as long as he could remember; that the south end of the property is bounded by marsh, woods and the Atlantic Ocean; that the west line, the Gore line, is marked on the mainland going across to the ocean; that his father and uncle conducted a general mercantile and naval stores business on the property; that their dock extended out from the mainland into Still Creek; that they bought and sold clams and had schooners coming in and loading and unloading at Tubbs Inlet and the mainland; that the dock reached into Still Creek about half way of what is now the inland waterway; that the dock was there when he first remembered it when he was about 15 years of age; that his father had a warehouse there as long as he could remember; that his father used the property as pasture for cattle, horses and marsh ponies; that there was a cattle path entering the marsh right in front of the old home; that he helped with the cattle operations; that they took them out of the marsh in the spring for about 3 months and put them in a lot back of the house; that when he was about 15 or 16 years old his father fenced in the property; that a fence was built on the east line and a fence was built on approximately Mr. Gore's line on the west; that iron stakes were put down on both sides; that he guessed some of the stakes were still there; that he had not seen anyone clamming or shrimping in there because of the mud; that he didn't know how far out in the marsh the fence went; that a stake was put in the southwest corner, in the Gore corner, in the southeast corner; that he did not know who put them in or when, but knew they were put there; that the fence was put up because of the stock law and went around the northern end and to the south out in the sound.

Mr. Robert J. Somerset testified that he is 62 years of age; that George Brooks and J. W. Brooks had a warehouse and dock extending into Still Creek used for cargo boats bringing in fertilizer and taking out rosin and turpentine; that the Brooks family used the marshland for pasture and fishing; that his grandfather had grazed cattle on the property; that at one time it was open range but Mr. Brooks had an area of marsh and hill land fenced when the stock law became effective; that his grandfather took his cattle out because he didn't want to absorb a part of the fencing cost; that the fence went to the point where the marsh was soft enough for cattle to bog down; that the roads into the property had gates across them with the exception of the road that came right to the

Brooks home; that the Brooks family had a fish stand on the eastern channel on the beach side adjoining the marsh and on the other side a fishing stand, and one just below the mouth of Simmons Creek; that these fishing points were operated from the time he was about 12 years old until the inland waterway was cut and the places filled in to the point they were no longer used; that his father operated one of the points and he helped him; that when the fish were divided, one share was laid out for Mr. Brooks; that the fence extended about 2 miles east and west of the Brooks home and down to the boggy area north and south; that in some areas it would go 150 feet — just until it was boggy enough; that the fenced area was known as the Brooks pasture.

The trial court correctly submitted the question of adverse possession to the jury.

The plaintiff further contends that it was entitled to a directed verdict on the Fourth Issue: "Have the defendants obstructed navigable waters of the State of North Carolina as alleged in the complaint?" Plaintiff makes this contention and argument under assignment of error 1, which is based on its exception No. 1 — to the signing of the judgment, and assignment of error No. 2 based on exception No. 2 — the overruling of plaintiff's motion for judgment as of nonsuit on defendants' issue of ownership, the first issue, and exception No. 3 — overruling of plaintiff's motion to set aside the verdict and for a new trial. Regardless of whether the question is properly before the Court, we find the contention to be without merit. The court properly instructed the jury that the burden of proof on the Fourth Issue was on the plaintiff, instructed them with respect to the applicable law, and gave the contentions of the parties. Plaintiff has not excepted to any portion of the charge.

[3, 4] Where all the evidence points in the same direction with but a single inference to be drawn, the court may instruct the jury that if they believe the evidence, they may find a certain verdict. *Morris v. Tate,* 230 N.C. 29, 51 S.E. 2d 892. McIntosh, N. C. Practice and Procedure 2d, § 1516. Here, we cannot say that only a single inference could be drawn from the evidence with respect to the placing of obstructions by defendants. Additionally, "A directed instruction in favor of the party having the burden of proof is error". *Shelby v. Lackey,* 236 N.C. 369, 370, 72 S.E. 2d 757. Here, the burden of proof on the Fourth Issue was on the plaintiff.

Affirmed.

CAMPBELL and BRITT, JJ., concur.

RONALD D. DORSETT AND SHELBY E. DORSETT v. GROUP DEVELOPMENT CORPORATION AND L. A. REYNOLDS COMPANY

No. 68SC142

(Filed 14 August 1968)

1. Pleadings § 19— effect of demurrer

When the legal sufficiency of a pleading is tested by demurrer, the facts alleged and relevant inferences of fact reasonably deducible therefrom are admitted, but not the legal conclusions of the pleader.

2. Deeds § 19— restrictive covenants — construction

Restrictive covenants are not favored and will be strictly construed against limitation on use.

3. Deeds § 20— restrictive covenants — property limited to residential use

Restrictive covenants requiring that all houses in a certain subdivision contain a minimum amount of floor space, that all houses be built so that no concrete blocks are shown, and that there be no outside toilets, do not limit the use of the property to residential purposes, and a complaint seeking to restrain defendants from constructing and operating an asphalt plant on a lot in the subdivision is subject to demurrer for failure to allege a violation of the restrictive covenants.

4. Injunctions § 7; Nuisance § 7— anticipated nuisance — injunctive relief

The courts are reluctant to grant injunctive relief where the purported nuisance is merely anticipated and is not an actual, existing one.

5. Injunctions § 7; Nuisance § 7— proposed use of property — pleadings

In order to state a cause of action for restraining a proposed use of property on the ground that it will result in a nuisance, the complaint must allege facts showing that the contemplated injury is seriously threatened and is not merely apprehended.

6. Injunctions § 7; Nuisance §§ 2, 3, 7— use of proposed building — cause of action

In an action to restrain defendants from constructing and operating an asphalt plant upon a subdivision lot, allegations that the operation of the plant would result in a nuisance by subjecting plaintiffs and other homeowners in the subdivision to continuing odors, smoke and noise *are held* insufficient to state a cause of action for equitable relief in that the complaint fails to allege facts showing substantial grounds for anticipating immediate danger to the health or comfort of plaintiffs.

7. Injunctions § 7; Nuisance § 7— failure to state cause of action — future actions

Where it is determined on appeal that plaintiffs have stated no cause of action for an injunction prohibiting defendants from constructing and operating an asphalt plant, plaintiffs are not prohibited from bringing a

subsequent action if the asphalt plant should be constructed and operated in such a manner as to create a nuisance.

APPEAL by plaintiffs from *Collier, J.*, 25 March 1968, Civil Session, DAVIDSON Superior Court.

Plaintiffs appeal from a judgment of the trial court sustaining defendants' demurrers to their complaint.

The complaint alleged in substance that the defendant Group Development Corporation is the owner of a lot in a subdivision known as the Richfork Acres Development and had leased said lot to defendant Reynolds; that plaintiffs are the owners of a lot within said subdivision; that all lots within the subdivision except one are subject to the following covenants and restrictions:

"a. All houses must contain a minimum of 1,050 square feet of floor space, this not to include porches, breezeways, and garages;

b. All houses must be built so that no concrete or cinder blocks shall be shown;

c. There are to be no outside toilets.";

that the restrictions and covenants "were inserted in said deeds pursuant to the aforesaid grantors' plain and obvious intention and purpose to create a general plan of residential development within said subdivision, to provide for each of the future owners of said property attractive residential property, and for the mutual benefit of all of the lots therein and the owners and purchasers thereof; that a general plan of residential development has actually been established within said subdivision, as evidenced by the construction of approximately twenty-two residences within said subdivision, and by the fact that heretofore improvements within and the use of said subdivision have been exclusively residential." The complaint further alleged that defendant Reynolds is in the process of "leveling, grading and preparing said lot for the construction thereon of facilities for the purpose of mixing asphalt and, unless restrained by this Court, intends to and will complete a facility on said lot for the purpose of fabricating asphalt;" that the "construction and contemplated use are flagrant and unreasonable violations of the covenants, restrictions and provisions placed upon the title acquired by defendant Group Development Corporation" in that the use, if permitted, will make the subdivision and particularly plaintiffs' property unattractive and lower the values of the property of plaintiffs and others in the subdivision; that "a nuisance would necessarily

result from the operation, upon completion, of said asphalt plant in the way and manner following: the plant will give off smoke that will be offensive in odor to the plaintiffs and other home owners within the subdivision and that will pollute the air in the area of the subdivision; moreover, a constant roaring noise will accompany the operation of the machinery and the trucks going into and coming from the plant site, to be located near the home of the plaintiffs"; that as a result the subdivision will suffer diminished property values and be subjected to continuing offensive odors and noises in derogation of their right to the peaceful enjoyment of their property. Plaintiffs seek a temporary injunction pending a hearing on the merits; and, upon a hearing on the merits, a permanent injunction to enjoin the construction of the asphalt plant in violation of the restrictions and in order to abate the threatened nuisance. Upon a hearing on the demurrers filed by both defendants, the trial court entered an order sustaining the demurrers and vacating the temporary restraining order theretofore entered. From this judgment, plaintiffs appealed.

Phillips and Klass by Jack E. Klass and John W. Griffis, Jr. for plaintiff appellants.

Hooper and McGuire by L. D. McGuire for defendant appellee, Group Development Corporation.

Hatfield, Allman and Hall by James E. Humphreys, Jr. and C. Edwin Allman for defendant appellee, L. A. Reynolds Company.

MORRIS, J.

[1] When the legal sufficiency of a pleading is tested by demurrer, the facts alleged and relevant inferences of fact reasonably deducible therefrom are admitted, but not the legal conclusions of the pleader. *Pardue v. Speedway, Inc.*, 273 N.C. 314, 159 S.E. 2d 857.

Plaintiffs contend that the complaint presents a unique factual situation, deemed admitted for purposes of testing its sufficiency by demurrer, and states two causes of action entitling them to the relief sought. We do not agree.

The first cause of action, plaintiffs contend, is sufficient to allege a violation of the restrictive covenants.

[2] While restrictive covenants are not impolitic, they are not favored. They impose servitudes in derogation of the right to free and unfettered use of the land and must, therefore, be strictly con-

strued against any limitation on use. *Hege v. Sellers,* 241 N.C. 240, 84 S.E. 2d 892.

[3] The restrictions here alleged to be violated contain nothing limiting use to residential purposes only. Plaintiffs admit this, but they earnestly contend that a reasonable construction of the covenants prohibits the construction and operation of an asphalt plant within the subdivision. In support of this contention they rely on *Long v. Branham,* 271 N.C. 264, 156 S.E. 2d 235, and *Reed v. Elmore,* 246 N.C. 221, 98 S.E. 2d 360, where our Supreme Court discussed the problem of construing covenants where the meaning is doubtful. In *Long v. Branham, supra,* at 268, Justice Sharp quoted with approval the rules of construction stated in 20 Am. Jur., Covenants, Conditions, and Restrictions, § 187, as follows:

> "Covenants and agreements restricting the free use of property are strictly construed against limitations upon such use. Such restrictions will not be aided or extended by implication or enlarged by construction to affect lands not specifically described, or to grant rights to persons in whose favor it is not clearly shown such restrictions are to apply. Doubt will be resolved in favor of the unrestricted use of property, so that where the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which extends it, should be adopted and that construction should be embraced which least restricts the free use of the land.
>
> Such construction in favor of the unrestricted use, however, must be reasonable. The strict rule of construction as to restrictions should not be applied in such a way as to defeat the plain and obvious purposes of a restriction."

We are not here concerned with an ambiguous restriction or the construction of restrictions of doubtful meaning. The included restrictions are clear and concise, and their meaning is not questioned. They simply do not contain a restriction limiting the use of the lots to residential purposes only, nor do they provide that no building other than a residence may be constructed. Similar restrictions were before the Court in *Scott v. Missions,* 252 N.C. 443, 114 S.E. 2d 74. There the only restrictions were (1) "There shall not be constructed on said lot more than one (1) dwelling house," but allowing servants' quarters in a garage or other outbuilding, and (2) "No building shall be constructed nearer than fifteen (15') feet from the side lines of said lot, nor nearer than twenty-five (25') feet from the line of the river shore." Plaintiffs there sought to enjoin the construction of a church in the subdivision. The trial court had held that the construc-

tion of a church would not be in violation of the restrictions. In affirming, the Supreme Court said:

> "It is clear that the owners of lots in the subdivision under consideration may not build more than one residence on each lot owned, but there is no restriction limiting the use of the property for residential purposes only . . ."

If the owner wanted to restrict his subdivision to residential purposes only, he could easily have said so. "The courts are not inclined to put restrictions in deeds where the parties left them out." *Hege v. Sellers, supra,* at 249.

For the reasons stated, we hold that the complaint does not allege a violation of the restrictive covenants.

[4-6] With respect to the second cause of action, plaintiffs do not contend that an asphalt plant is a *nuisance per se* but do contend that the complaint alleges sufficient facts which, if proved at a hearing on the merits, would show that the construction and operation of the asphalt plant would necessarily result in a *nuisance per accidens.*

As was said in *Louisville Refining Co. v. Mudd,* 339 S.W. 2d 181:

> "In the whole field of law there is nothing more difficult to capture within the confines of a workable definition than the concept of nuisance, nothing more dependent on the peculiar facts of the given case. Like the legendary and elusive gadfly Tyll Eulenspiegel, it scoffs at the conventionalities of the law."

A fortiori, courts have been slow to grant injunctive relief where the purported nuisance is merely anticipated and not an actual, existing one.

> "The mere apprehension of a nuisance is insufficient to warrant equitable relief, and in order to restrain future acts with respect to the use of a proposed building, it is necessary to set forth facts which show with reasonable certainty that such results would likely follow." *Causby v. Oil Co.,* 244 N.C. 235, 240, 93 S.E. 2d 79.

In that case the Court permitted an interlocutory injunction against an anticipated industrial nuisance. The defendant was rebuilding a plant for the refining of used motor oil. Before its destruction by fire, the original plant had been found to be a nuisance and its operation enjoined. The Court found that the evidence was sufficient to show that the new plant would probably be operated in the same manner as the old. Again in *Hooks v. Speedways, Inc.,* 263 N.C. 686,

140 S.E. 2d 387, the Court considered the question which was before it on the demurrer. The complained of anticipated nuisance was an automobile race track and the plaintiff was a church located 2500 feet therefrom which had been a community church for more than 80 years. The complaint alleged that the defendant had advertised publicly that automobile races would be conducted on Sundays and holidays. It further alleged that the facility would accommodate 12,000 or more spectators and that the noise from the racing motors, and the squealing of the tires and the crowds assembled at the track would disrupt and make impossible the conducting of the usual church service on Sunday. The Court, speaking through Justice Moore, held that the allegations met the test that "The injury must be actually threatened, not merely anticipated, it must be practically certain, not merely probable."

While in *Causby, supra,* and *Speedways, supra,* the alleged nuisance met the test of being seriously threatened and not merely apprehended, in *Wilcher v. Sharpe,* 236 N.C. 308, 72 S.E. 2d 662, the Court held that plaintiffs could not enjoin the construction and intended operation of a hammer feed mill which, they had alleged, would produce loud noises and produce dust and dirt, rendering the atmosphere unclean within the radius of plaintiffs' residences.

Here, the plaintiffs have alleged that the plant will give off smoke which will be offensive and that there will be a constant roaring noise. When tested by the standards necessary to be met when the alleged nuisance is not actual and existing, the complaint does not allege facts showing substantial grounds for anticipating immediate danger to the health or comfort of plaintiffs.

[7] The demurrer was properly sustained. This disposition of plaintiffs' appeal, however, would not prevent them from taking further action in the event the asphalt plant, if constructed, should be operated in such a manner as to create a nuisance.

Affirmed.

CAMPBELL and BRITT, JJ., concur.

TOM MORGAN (EMPLOYEE) v. THOMASVILLE FURNITURE INDUSTRIES, INC. (EMPLOYER), AMERICAN MUTUAL LIABILITY INSURANCE COMPANY (CARRIER)

No. 68IC205

(Filed 14 August 1968)

1. Master and Servant § 96— Workmen's Compensation — jurisdiction of Court of Appeals

The Court of Appeals has appellate jurisdiction to review an award of the Industrial Commission for errors of law when a party to the proceeding in which the appeal is made appeals to it. G.S. 97-86.

2. Master and Servant § 85— jurisdiction of Industrial Commission — findings of fact

The finding of facts is one of the primary duties of the Industrial Commission, and the Commission is the sole fact finding agency in cases in which it has jurisdiction.

3. Master and Servant § 93— Industrial Commission — credibility and weight of evidence

The Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony; it may accept or reject all of the testimony of a witness; it may accept a part of the testimony of a witness and reject a part of the testimony of such witness.

4. Master and Servant § 94— Commission's duty to make findings of fact

The Commission is not required to make a finding as to each fact presented by the evidence; however, specific findings with respect to the crucial facts, upon which the question of plaintiff's right to compensation depends, are required.

5. Master and Servant § 69— "disability" defined

"Disability" as used in the Workmen's Compensation Act means impairment of wage earning capacity rather than physical impairment.

6. Master and Servant § 94— Commission's failure to make crucial findings

Where there is evidence tending to show that the plaintiff was totally disabled and incapacitated emotionally and physically to engage in any gainful work as a result of a compensable injury, the finding by the Commission that the plaintiff contends that he is totally and permanently disabled, together with the further finding that he has a 50 per cent permanent partial disability or loss of use of the back, does not answer the question of fact presented by the evidence as to whether plaintiff is totally disabled and incapacitated for work, and the cause is remanded to the Commission for findings of fact determinative of all questions at issue.

PLAINTIFF appealed from the North Carolina Industrial Commission Award of 5 February 1968.

Plaintiff was injured on 28 May 1964 while employed at Thomasville Furniture Industries, Inc. Defendant assumed liability and compensated plaintiff under the provisions of the North Carolina Workmen's Compensation Act for temporary total disability from 29 May 1964 until 9 July 1964. Compensation again was paid plaintiff for temporary total disability from 5 August 1964 until 24 August 1965. No further compensation has been paid to plaintiff. Plaintiff requested a hearing, and after several hearings Commissioner Shuford filed his findings of fact and conclusions of law. He concluded that plaintiff had a 50 percent permanent partial disability of the back and was entitled to compensation for 150 weeks under the provisions of G.S. 97-31. Plaintiff appealed to the full Commission and a hearing was had in Raleigh, North Carolina, before the full Commission on 29 June 1967.

The full Commission ordered that the plaintiff be further examined by a psychiatrist, and plaintiff was examined by Dr. Leslie B. Hohman of Duke Medical Center on 17 August 1967. Deputy Commissioner Robert F. Thomas, acting in behalf of the full Commission, filed its decision on 5 February 1968, affirming the opinion and award of Commissioner Shuford. Plaintiff gave notice of appeal to the Court of Appeals.

Hubert E. Olive, Jr., for plaintiff appellant.

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

MALLARD, C.J.

[1] The Court of Appeals has appellate jurisdiction to review an award of the Industrial Commission for errors of law when a party to the proceeding in which the appeal is made appeals to it. G.S. 97-86.

[2] "The Commission or any of its members shall hear the parties at issue and their representatives and witnesses, and shall determine the dispute in a summary manner." G.S. 97-84. The Commission is the sole fact finding agency in cases in which it has jurisdiction. The finding of facts is one of the primary duties of the Commission. *Brice v. Salvage Co.*, 249 N.C. 74, 105 S.E. 2d 439.

[3, 4] The Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. It may accept all of the testimony of a witness or reject all of the testimony of a witness. It may accept a part of the testimony of a witness and

reject a part of the testimony of such witness. It is not required to accept the uncontradicted testimony of a witness. *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265. The Commission is not required to make a finding as to each fact presented by the evidence. *Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596. However, specific findings by the Commission with respect to the crucial facts, upon which the question of plaintiff's right to compensation depends, are required. *Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706; *Pardue v. Tire Co.*, 260 N.C. 413, 132 S.E. 2d 747.

Plaintiff contends that the Commission erred in failing to find facts relating to whether he was totally disabled and incapacitated for work as a result of a compensable injury.

[5] "Disability" as used in the Workmen's Compensation Act means impairment of wage earning capacity rather than physical impairment. *Anderson v. Motor Co., supra; Burton v. Blum & Son*, 270 N.C. 695, 155 S.E. 2d 71.

The findings of fact in the opinion and award of Commissioner Shuford are as follows:

> "The undersigned finds as facts and concludes as matters of law the following, which were entered by the parties at the first hearing as
>
> STIPULATIONS
>
> 1. At the time of the injury by accident giving rise hereto the parties were subject to and bound by the provisions of the Workmen's Compensation Act.
>
> 2. The employer-employee relationship existed between plaintiff and defendant employer at such time.
>
> 3. American Mutual Liability Insurance Company was the compensation insurance carrier on the risk at such time.
>
> 4. Plaintiff's average weekly wage was $89.00.
>
> 5. On 28 May 1964 plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant employer. Thereafter defendants admitted liability and the parties entered into agreements for the payment of compensation, pursuant to which plaintiff has been paid compensation for temporary total disability from 29 May 1964 to 8 July 1964 and again from 5 August 1964 to 24 August 1965.
>
> * * * * *
>
> Based upon all the competent evidence, the undersigned makes the following additional

FINDINGS OF FACT

1. Plaintiff has not worked or attempted to work since he was last paid compensation in August 1965. Plaintiff feels that he is unable to do any physical work whatsoever. He is nervous and gets upset easily. He feels that he is unable to walk upright and thus walks in a stooped position.

2. Prior to his injury by accident plaintiff had been treated by Dr. Charles F. Gilliam of Thomasville for stomach ulcers and plaintiff suffered with nervousness prior to such accident.

3. Plaintiff is not*(sic)* treated by Dr. E. L. Jones of Thomasville for nervousness, headaches and back pain. Plaintiff draws $270.00 per month from the Federal Government as social security.

4. Dr. Richard H. Ames, neurosurgeon of Greensboro, operated upon plaintiff on 12 August 1964 and removed a disc at L-5. Dr. Ames has examined plaintiff from time to time thereafter, the last examination being on 19 October 1966. Dr. Ames is of the opinion that the combination of plaintiff's physical condition and emotional instability makes plaintiff 100% disabled. The doctor is further of the opinion that plaintiff's physical and mental condition is an outgrowth of plaintiff's injury by accident giving rise hereto and that he is unable to separate the physical and mental disability.

5. Dr. David D. Anderson, orthopedic surgeon of Winston-Salem, first examined plaintiff on 13 August 1965. Dr. Anderson felt that plaintiff should be rehospitalized with the idea of carrying out a lumbosacral fusion. However, plaintiff and his wife felt that if no guarantee could be given that plaintiff's condition would be improved that it would be too much of a risk to undergo further surgery and no operation was thus performed. Dr. Anderson rated plaintiff as having 25 to 30% permanent disability of the back and felt that if a lumbosacral fusion was done at the best he would still rate plaintiff as having approximately 20% permanent disability of the spine. Dr. Anderson last examined plaintiff on 30 January 1967 at which time he found no change in plaintiff's condition and was of the opinion that the previously given rating of 25 to 30% permanent partial disability of the back still prevailed.

6. As a result of the injury by accident giving rise hereto plaintiff has no temporary total or temporary partial disability other than that for which he has already been paid compensation.

7. As a result of the injury by accident giving rise hereto plaintiff has a 50% permanent partial disability or loss of use of the back."

In his appeal and application for review by the full Commission the plaintiff alleged error on the part of the hearing Commissioner for that:

"Portions of the Findings of Fact, Conclusions of Law, and Award are contrary to, and not supported by, the evidence, in that:

Plaintiff should have been found to be totally and permanently disabled rather than having a 50% permanent partial disability or loss of the use of the back, and should be compensated under the provisions of G.S. 97-29."

In the opinion and award by the full Commission no additional findings of fact are made with respect to the condition of the plaintiff. In the opinion and award of the full Commission there appears the following:

"As stated in order filed by the Full Commission on July 6, 1967 counsel for the parties appeared before the Full Commission and ably presented their contentions in the matter, and as noted in said order counsel for the plaintiff contends that plaintiff is totally and permanently disabled and should be compensated under the provisions of G.S. 97-29.

The Full Commission has again carefully reviewed the evidence in this case, including the report of examination by Dr. Hohman, and has fully considered the contentions of counsel for the plaintiff.

The Full Commission is of the opinion that the results reached by Commissioner Shuford are fair and equitable to all parties concerned and that the plaintiff's exceptions and assignments of error are without substantial merit and should be overruled.

Therefore, the Full Commission overrules the plaintiff's exceptions and assignments of error and adopts as its own the opinion and award of Commissioner Shuford, and directs that the result reached by him be, and the same is hereby, in all respects AFFIRMED."

[6] There was evidence tending to show that the plaintiff was totally disabled and incapacitated emotionally and physically to engage in any gainful work as a result of a compensable injury. There was also evidence tending to show that his condition was in

part the result of his failure to submit to further surgery. There was also evidence of a preexisting physical and nervous condition tending to contribute to his condition.

Two medical experts testified in substance that the plaintiff was, as a result of his condition, disabled and incapacitated to engage in any gainful work. One of the medical experts testified in substance that he was of the opinion that further surgery would be of benefit to the plaintiff. There is evidence tending to show that the plaintiff has refused to submit to further surgery. However, the hearing Commissioner and the full Commission have not, pursuant to G.S. 97-25, ordered the plaintiff to accept such surgery.

The plaintiff was ordered by the full Commission to see a psychiatrist. He did. The psychiatrist testified:

> "My opinion about the patient psychiatrically was that he was a somewhat chronic psychoneurotic by history and that his injury had probably precipitated a depressive like hopelessness which made it impossible for him to regain normal psychologic function. From his own history it would seem clear that he has always been something of a complainer. His early quitting of school and his failure to learn to read makes one feel that his intelligence was limited. In my opinion, the patient is severely handicapped emotionally and psychologically and I would agree with one of his former examiners that his incapacity whether emotional, physical, or psychological is severely handicapping."

It is quite clear that the plaintiff in this proceeding raised the question of whether he was totally disabled and incapacitated for gainful work as the result of a compensable injury. It is also clear that this is a determinative question of fact in this case. The finding by the Commission that the plaintiff contends that he is totally and permanently disabled, and the further finding that he *has a 50% permanent partial disability or loss of use of the back* does not answer the factual question presented as to whether he is *totally disabled* and incapacitated for work as a result of a compensable injury. In the case of *Thomason v. Cab Co., supra,* in the opinion by Ervin, J., it is stated:

> "If the findings of fact of the Industrial Commission are supported by competent evidence and are determinative of all the questions at issue in the proceeding, the court must accept such findings as final truth, and merely determine whether or not they justify the legal conclusions and decision of the commission. (Citations omitted.) But if the findings of fact of the Industrial Commission are insufficient to enable the court to

determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the commission for proper findings. (Citations omitted.)

It is impossible to exaggerate how essential the proper exercise of the fact-finding authority of the Industrial Commission is to the due administration of the Workmen's Compensation Act. The findings of fact of the Industrial Commission should tell the full story of the event giving rise to the claim for compensation. They must be sufficiently positive and specific to enable the court on appeal to determine whether they are supported by the evidence and whether the law has been properly applied to them. It is obvious that the court cannot ascertain whether the findings of fact are supported by the evidence unless the Industrial Commission reveals with at least a fair degree of positiveness what facts it finds. It is likewise plain that the court cannot decide whether the conclusions of law and the decision of the Industrial Commission rightly recognize and effectively enforce the rights of the parties upon the matters in controversy if the Industrial Commission fails to make specific findings as to each material fact upon which those rights depend."

For the reasons given the case is remanded and the Industrial Commission is directed to make findings of fact determinative of all questions at issue and proceed as the law requires.

Error and remanded.

BROCK and PARKER, JJ., concur.

WILLIE M. BELL, ADMINISTRATOR OF THE ESTATE OF RICHARD BELL, DECEASED, v. WILLIAM H. PAGE

No. 68SC210

(Filed 14 August 1968)

1. Negligence § 51— condition or use of land — swimming pools — children — instructions

In an action by plaintiff administrator to recover damages for the drowning of his nine-year-old intestate in an unenclosed swimming pool owned by defendant, an instruction that a municipal ordinance requires the owners of commercial swimming pools (1) to have at least one employee on duty 24 hours a day, whose duty it would be, among other

things, to watch the pool and (2) to locate the principal work of this employee where he could see the entire pool, and that the issue of defendant's negligence should be answered in the negative if the defendant made such provision in compliance with the ordinance and if such provision was in effect on the day of the drowning, *is held* without error.

2. Negligence § 5— dangerous instrumentalities — unenclosed pool

It is not an act of negligence for a person to maintain an unenclosed pond or pool on his premises.

3. Statutes § 5— rule of construction — common law

Statute in derogation of the common law must be strictly construed.

4. Municipal Corporations §§ 8, 29— construction of ordinances — common law

Ordinances which are in derogation of the common law, or which are restrictive of rights of owners of private property, are subject to the rule of strict construction.

5. Negligence § 51— unenclosed pool — violation of ordinance — motion to set aside verdict

In an action by plaintiff administrator to recover damages for the drowning of his nine-year-old son in defendant's unenclosed swimming pool, the defendant being liable, if at all, under a municipal ordinance requiring him to have at least one employee on duty 24 hours a day and whose duties must include the watching of the pool, there is no error in the refusal of the trial judge to set aside a verdict in the defendant's favor as being against the greater weight of the evidence, where there is evidence tending to show that (1) the defendant provided at least one employee on duty 24 hours a day whose duties included the watching of the pool, (2) the principal work of the employee enabled him to see clearly the entire pool, (3) there was an employee on duty on the date of the drowning, (4) and that the drowning of plaintiff's intestate occurred during the middle of the day while the employee was away from the premises approximately ten minutes to see about a tire for a lawnmower.

6. Trial § 51— motion to set aside verdict — review of court's discretion

A motion to set aside the verdict as being against the greater weight of the evidence is directed to the sound discretion of the presiding judge, whose ruling, in the absence of abuse of discretion, is not reviewable on appeal.

APPEAL by plaintiff from *Cohoon, J.*, February 1968 Session BEAUFORT Superior Court.

This civil action was instituted by plaintiff, as administrator of his 9-year-old son, to recover damages on account of intestate's death by drowning on 7 July 1965 in a swimming pool owned by defendant.

On said date, and prior thereto, defendant owned and operated a motel business in the city of Washington, North Carolina; he maintained a swimming pool on the motel premises.

In his complaint, plaintiff alleges that intestate's death was proximately caused by the negligence of the defendant and particularly alleges the following acts or omissions of negligence:

(1) That defendant maintained a swimming pool on his premises without any fence, rails, gate, guards, or enclosure of any kind around said pool with the result that said pool was inherently dangerous and particularly attractive to minor children.

(2) That defendant failed to exercise due care in the maintenance of said swimming pool by failing to enclose the same with a fence for the protection of minor children.

(3) That on said date, defendant maintained the swimming pool in violation of Article VIII, Section 3, Subsection (g) of the Ordinances of the City of Washington, N. C.

The city ordinance pled by plaintiff provides as follows:

"(g) All swimming pools to be constructed or which are already constructed shall be enclosed by a fence which shall be at least four (4) feet in height and which shall be of a type not readily climbed by children.

"The gates shall be of a self-closing and latching type with the latch on the inside of the gate, not readily available for children to open. Provided, however, that if the entire premises of the residence is enclosed, then this provision may be waived by the Building Inspector upon inspection and approval of the residence enclosure. Provided that this section shall not apply to Commercial Swimming Pools operated under the following conditions:

"1. That the owner or operator of a commercial swimming pool has at least one employee on duty 24 hours a day, whose duty it will be, among other things, to watch the pool.

"2. That the principal work of this employee be located where he can clearly see the entire pool.

"3. That the pool area be sufficiently lighted to enable the employee on duty to see anyone in the immediate area."

In his answer, defendant denied all of plaintiff's essential allegations and pleaded conditionally the contributory negligence of plaintiff's intestate as a bar to plaintiff's action.

Issues of negligence, contributory negligence, and damages were submitted to the jury who answered the issue of negligence in favor of defendant, and from judgment entered thereon, plaintiff appealed.

Leroy Scott, Attorney for plaintiff appellant.

Rodman & Rodman by Edward N. Rodman, Attorneys for defendant appellee.

BRITT, J.

This action was previously heard at the May 1967 Session of Beaufort Superior Court. From judgment of involuntary nonsuit entered at the close of all the evidence, plaintiff appealed to the Supreme Court of North Carolina. The judgment was reversed and the opinion, by Bobbitt, J., is found in 271 N.C. 396, 156 S.E. 2d 711.

The opinion had the effect of eliminating plaintiff's first and second allegations of negligence above set forth. As to plaintiff's third allegation, we quote from the opinion as follows:

> "Upon the present record, whether the court erred in entering judgment of involuntary nonsuit depends upon whether the evidence, when considered in the light most favorable to plaintiff, was sufficient to permit and support a finding that the violation by defendant of said ordinance proximately caused Richard's death.
>
> "All the evidence tends to show defendant's swimming pool was not enclosed by a fence of any kind. Defendant was maintaining said swimming pool in violation of the ordinance unless it was 'a commercial swimming pool' within the meaning of the ordinance *and* unless defendant (1) had at least one employee on duty twenty-four hours a day, whose duty it was, among other things, to watch the pool, and (2) the principal work of this employee was located where he could clearly see the entire pool. Since it was available for use by all persons who became patrons of the motel, we are in accord with the views expressed by counsel for both plaintiff and defendant that defendant's pool must be considered 'a commercial swimming pool' within the meaning of said ordinance. Hence, *whether the maintenance by defendant of an unenclosed commercial swimming pool constituted a violation of the ordinance depends upon whether defendant complied with the two conditions stated above.*" (Emphasis added).

Elsewhere in the opinion, we find the following statement: "The

gravamen of the complaint and of plaintiff's evidence is that defendant had *no* employee whose duty it was to keep watch at the pool, as distinguished from negligence on the part of such employee."

The complaint was not amended. In the second trial, counsel for plaintiff and defendant seriously disagreed as to the legal theory on which the case should be tried in view of the Supreme Court opinion aforesaid; their disagreement continued in their briefs filed and arguments made in this Court. Basically, their disagreement relates to an interpretation of the city ordinance above quoted. Plaintiff insists on a liberal construction while defendant insists on a strict construction.

Plaintiff's counsel contends that the ordinance is a safety ordinance, and should be construed to mean that defendant was under obligation to provide an employee to watch the pool 24 hours a day and to protect and guard children from the dangers of the pool; in his brief, he states "the plaintiff presented this case on the theory that a failure to guard the pool even for a moment was a violation of the city ordinance which was passed for the safety of children of tender age . . . (and) . . . if the person designated to guard the pool did not actually guard the pool, then the defendant was negligent."

[1] The trial court adopted defendant's theory of the case which is illustrated in the following portion of His Honor's charge to the jury and which was excepted to by the plaintiff:

> "The Washington City Ordinance in this case applying to commercial swimming pools provided and required the owner and operator, that is the defendant Page in this case, to do those things as applicable to this case. First, to have at least one employee on duty 24 hours a day, whose duty it would be, among other things, to watch the pool, and, secondly, that the principal work of this employee be located where he could see the entire pool.
>
> * * *
>
> "Now, if the defendant Page made provision for these services and complied with this duty as to these ordinance requirements and that such were in effect on the day in question, that is July 7, 1965, he would not be negligent nor in violation of the ordinance and the defendant would be entitled to have you answer the first issue No."

Most of plaintiff's assignments of error relate to the admission and exclusion of evidence in accordance with defendant's theory of the trial, and portions of His Honor's charge pursuant to said theory.

We hold that His Honor properly followed the law in this case as declared in the Supreme Court opinion. We hold that his charge to the jury was free from prejudicial error.

[2] As was said by Bobbitt, J., in the former appeal of this action, "A person has the right to maintain an unenclosed pond or pool on his premises. It is not an act of negligence to do so." *Lovin v. Hamlet,* 243 N.C. 399, 90 S.E. 2d 760. This is a part of the common law of North Carolina.

[3, 4] Statutes in derogation of the common law must be strictly construed. *Ellington v. Bradford,* 242 N.C. 159, 86 S.E. 2d 925. *McKinney v. Deneen,* 231 N.C. 540, 58 S.E. 2d 107. Ordinances which are in derogation of the common law, or which are restrictive of rights of owners of private property, have been held to be subject to the rule of strict construction. 37 Am. Jur., Municipal Corporations, § 189, p. 829.

[5] Considerable evidence was introduced in the trial of this action to the effect that defendant provided at least one employee on duty 24 hours a day, whose duty it was, among other things, to watch the pool, and the principal work of such employee was located where he could clearly see the entire pool. Intestate's tragic death occurred around the middle of the day. The evidence disclosed that the witness Johnny Ray Smith was employed by defendant on the day of the tragedy as a maintenance man, charged with the responsibility of maintaining the motel yard and pool and watching the pool; that he had gone across the road to a filling station to see about a tire for a lawnmower when the drowning occurred, and that he was away from the premises approximately ten minutes.

[5, 6] Plaintiff assigns as error the refusal of the trial judge to set aside the verdict as being against the greater weight of the evidence. It is well established that this motion was directed to the sound discretion of the presiding judge, whose ruling, in the absence of abuse of discretion, is not reviewable on appeal. *Frye & Sons, Inc. v. Francis,* 242 N.C. 107, 86 S.E. 2d 790. No abuse of discretion appears in this case.

We have carefully considered each of plaintiff's other assignments of error and find them without merit. Plaintiff's action was properly tried according to applicable principles of law, free from prejudicial error.

The judgment of the Superior Court is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

GOODYEAR MORTGAGE CORPORATION v. MONTCLAIR DEVELOPMENT CORPORATION AND GLENN I. HODGE

No. 68SC197

(Filed 14 August 1968)

1. Pleadings § 2— nature of action — complaint

The nature and purpose of an action is to be determined by the allegations of the complaint.

2. Venue § 5— action affecting title to real estate — removal

An action which may affect the title to real estate is removable to the county where the land is situated by proper motion made in apt time.

3. Venue § 5— action affecting title to real estate — removal

An action brought by corporate plaintiff in the county of its residence for a determination of the rights of the parties to the net profits already realized and to the proceeds from future sales under an agreement whereby plaintiff provided financing for the corporate defendant to purchase real estate for development and resale, the individual defendant was given the right to purchase lots and to erect houses thereon for sale, and the profits were to be shared by plaintiff and the individual defendant, *is held* an action involving only the contractual rights between the parties and not an action affecting the title to real estate; therefore, the action is transitory and is not removable as a matter of right to the county where the land is situated.

APPEAL from *Clarkson, J.*, 7 February 1968, in Chambers, MECKLENBURG County Superior Court.

This civil action was instituted 8 August 1967 in the Superior Court for Mecklenburg County.

On 1 September 1967, each defendant filed a separate motion requesting the removal of this action from Mecklenburg County to Wake County as a matter of right, for that the action was for "the determination of a right or interest in real property."

Pursuant to said motion, Judge Clarkson entered an order 7 February 1968 that "the motions of the defendants should be allowed, as a matter of law."

From this order, the plaintiff appealed.

Fairley, Hamrick, Hamilton & Monteith by Robert C. Hord, Jr., Attorneys for plaintiff appellant.

John V. Hunter, III, Attorney for defendant appellees.

CAMPBELL, J.

G.S. 1-76 provides for trial in the county in which the subject of

the action is located. The only section of the statute pertinent to this appeal is:

"1. Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property."

The question for our determination is whether this action is for the purpose of determining "a right or interest in real property" located in Wake County.

[1] The nature and purpose of plaintiff's action is to be determined by the allegations of its complaint. *Casstevens v. Membership Corp.*, 254 N.C. 746, 120 S.E. 2d 94.

The complaint sets out that the plaintiff is a North Carolina corporation with its principal place of business in Charlotte, Mecklenburg County, North Carolina. The defendant Montclair Development Corporation (hereinafter referred to as "Montclair") is a North Carolina corporation with its principal office and place of business in Raleigh, Wake County, North Carolina. The defendant Hodge lives in Wake County and is the principal stockholder of the defendant Montclair. In May 1964 plaintiff and Montclair entered into an agreement whereby Montclair would purchase and develop certain real property located in Raleigh, Wake County, North Carolina; plaintiff would furnish the funds to finance the development, known as Montclair Subdivision. The defendant Hodge had the right to purchase lots in the subdivision after development and was to erect houses for sale in the subdivision. The proceeds of the sales by Hodge were to be applied toward expenses, and the net profits were ultimately to be divided between the plaintiff and Hodge, with 80% going to the plaintiff and 20% going to the defendant Hodge.

The complaint proceeds:

"13. That approximately 35 lots have been sold in the subdivision and monies are now on hand in the amount of $15,768.52, which money is to be distributed to the plaintiff Goodyear Mortgage Corporation and the defendant Glenn I. Hodge in accordance with the terms of the agreement hereinbefore described.

14. That 13 lots remain to be sold in the subdivision and the profits accruing therefrom will be subject to the terms and conditions of the agreement between the parties in respect to division of profits.

15. That a controversy has arisen between the plaintiff and the defendants wherein the plaintiff claims that it is en-

titled to 80 per cent of the net profits accruing from development of the lots in the subdivision as hereinbefore described and the 20 per cent was to be paid to the defendant Hodge; that the defendant Hodge contends that 80 per cent of the profits from the development of the said lots were to be paid to him and 20 per cent of the same was to be paid to plaintiff.

WHEREFORE, THE PLAINTIFF PRAYS THE COURT:

1. That the Court construe the agreement between the plaintiff and the defendants Montclair Development Corporation and Glenn I. Hodge in respect to the rights and interests of the plaintiff and defendants to any and all monies now on hand and the proceeds to be realized from the future sale of any further lots in the Montclair Subdivision, Raleigh, North Carolina.
2. That the Court decree that, pursuant to the terms of the agreement between the parties hereto, that the plaintiff is entitled to distribution to it of 80% of all monies now on hand and the defendant Glenn I. Hodge is entitled to distribution to him of 20% of all monies now on hand.
3. That the Court decree that the plaintiff is entitled to 80% of all net profits hereafter realized from the sale of any and all lots remaining in the said Montclair Subdivision, Raleigh, North Carolina.
4. That the Court enter such further orders and decrees in respect to the respective rights and interests of the plaintiff and defendants as may in its discretion be just and proper.
5. That the costs of this action be taxed against the defendants by the Clerk."

According to plaintiff's allegations, it seeks the construction of an agreement entered into by it, Montclair, and Hodge and seeks to have this agreement construed to the effect that plaintiff is entitled to 80% of all net profits from the venture and Hodge 20%. This division is to apply to the net profits already realized and to the future profits from any further sales of lots.

[2] When title to real estate may be affected by an action, it is held to be local and removable to the county where the land is situated by proper motion made in apt time.

[3] The defendant appellees assert that the title to real estate may be affected by this action and that, therefore, the case was

properly removed by the order of Judge Clarkson. The defendants say they find no controlling North Carolina decisions and refer to several cases in other jurisdictions as being controlling in this instance.

We have reviewed all of the cases referred to by the defendants and do not find that they support the position of the defendants.

In *Franco Western Oil Co. v. Cameron,* 200 Cal. App. 2d 37, 19 Cal. Rptr. 304 (District Court of Appeal, Third Dist.), the California Court held that the action was primarily to establish that the plaintiff was the owner of an undivided one-half interest in certain oil and gas leases, and the plaintiff was seeking to have the defendant declared a constructive trustee for said interest and to require the defendant to execute a conveyance to the plaintiff covering said one-half interest. The Court went on to hold that the action was not for a declaratory judgment and the request of the plaintiff for an accounting and a determination of the debits and credits between the parties was only for the purpose of showing that the plaintiff desired to do equity in the matter and that this was only incidental to the real cause of action.

In *Continental Oil Co. v. Anderson,* 405 S.W. 2d 622 (Texas Civil Appeals), the plaintiff was seeking to establish title to a one-twelfth interest in certain minerals and the Court held that, "(u)nless he owns it he is not entitled to recover anything", and thereupon the Court concluded that the action involved title to an interest in real estate and was, therefore, a local action and not transitory.

In *Kirchhof v. Sheets,* 118 Colo. 244, 194 P. 2d 320, the Colorado Court stated that the action involved the right to certain royalty payments to be made by a coal company as compensation for the removal of surface support to land from under which it was removing coal. The Court stated: "The owner of the surface has a right to have the superincumbent soil supported from below in its natural state and * * * such right is an incident to the ownership of the surface. * * * It is an interest in land, and the case was properly brought in Weld county where the land is located."

In *Suits v. Mobil Crude Purchasing Co.,* 182 Kan. 310, 321 P. 2d 167, the plaintiff brought an action seeking one-fourth of certain oil royalties. The defendant stated that it was ready, able and willing to pay the oil royalties but did not know to whom they should be paid as other persons were claiming to own the one-fourth royalty interest the plaintiff claimed. The defendant requested that the other claimants be brought in and made parties to the action. The plain-

tiff then amended the complaint asserting title to the one-fourth interest, and the new defendants sought to have the action dismissed because it was not brought in the county where the real estate was located. The Court held that the action was one to recover an estate or an interest in real estate since it involved the claim to a one-fourth mineral right and that, therefore, the action should be in the county where the real estate was located.

In *Ross v. District Court of Oklahoma County,* 199 Okla. 573, 188 P. 2d 861, the action was one brought to determine an interest in land in the way of an oil and gas royalty. The Court stated: "Royalty is an interest in real property." Since this involved an action to determine an interest in a royalty right, it was an interest in real property and had to be brought in the county where the land was located.

All of these cases referred to by the defendants were cases where title to real estate would be affected by the action.

In the instant case, the plaintiff is not seeking to recover any real estate. The title to the real estate involved in the development will not be affected.

The plaintiff does not seek to impress a trust in favor of the plaintiff on lands located in Wake County as in *Williams v. McRackan,* 186 N.C. 381, 119 S.E. 746.

This case falls in that class of cases where the title to the real estate is not involved, and the action as set forth in the complaint involves contractual rights between the parties. The contract may have stemmed originally from dealings in real estate, but the cause of action no longer affects a right or interest in real estate. Compare *Lamb v. Staples,* 234 N.C. 166, 66 S.E. 2d 660; *Lumber Corp. v. Estate Corp.,* 215 N.C. 649, 2 S.E. 2d 869; *Blevens v. Lumber Co.,* 207 N.C. 144, 176 S.E. 262; *White v. Rankin,* 206 N.C. 104, 173 S.E. 282.

This case is similar to *Rose's Stores v. Tarrytown Center,* 270 N.C. 201, 154 S.E. 2d 320, where it is stated:

> "The judgment plaintiff seeks by its complaint would not alter the terms of the lease, nor would it require notice to third parties. The only result, should plaintiff prevail, would be the personal enforcement of rights granted under a contract of lease. This is a personal right and does not run with the land. Whatever the outcome of this action, the title to the land would not be affected. The defendants would still be owners, with their title unimpaired by this suit. The complaint sounds of breach

of contract and not for 'recovery of real property, or of an estate or interest therein, or for the determination of any form of such right or interest, and for injuries to real property.' G.S. 1-76.

This is a transitory action and is not removable as a matter of right to the county in which the land is situate."

Here, likewise, "whatever the outcome of this action, the title to the land would not be affected. The defendants would still be owners, with their title unimpaired by this suit."

Reversed.

BRITT and MORRIS, JJ., concur.

WILLIAM C. MATTHEWS, PETITIONER, v. EDITH SUMMERS MATTHEWS, RESPONDENT

No. 68SC214

(Filed 14 August 1968)

1. Pleadings § 19— effect of demurrer

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, but a demurrer does not admit inferences or conclusions of law.

2. Contracts §§ 4, 25— consideration — pleadings

A valuable consideration is necessary to the validity of a contract not under seal, and the pleader must allege facts to show that there was a valuable consideration.

3. Husband and Wife § 4; Contracts § 6— contract to perform marital obligations

A contract between a husband and wife whereby one spouse agrees to perform specified obligations imposed by law as part of the marital duties of the spouses to each other is without consideration and is void as against public policy.

4. Husband and Wife § 1— marital obligations

A husband has a legal right to the services of his wife as a wife, and this includes his right to her society and the performance of her household and domestic duties.

5. Husband and Wife §§ 1, 4— contract not to separate from spouse — consideration

A promise by the wife that if she would not separate herself from her

husband and would continue to live together with the husband as his wife does not constitute a valuable consideration for a promise by the husband that if he left the wife everything he owned would be hers to have and hold for herself and the children of the marriage.

6. Husband and Wife § 4; Contracts § 3— promise of spouse — uncertainty

A promise by a husband that if he ever left his wife "everything I have or will have will be hers to have and hold for the benefit of our children and herself" is too vague and uncertain to be enforceable.

7. Contracts § 3— definiteness and certainty of agreement

Where an agreement is so vague and uncertain that no definite meaning can be ascertained, there is no valid contract.

8. Husband and Wife § 10— deeds of separation — future separation

Articles or deeds of separation are permissible where the separation has already occurred or immediately follows, but agreements looking to a future separation of the husband and wife will not be sustained.

9. Husband and Wife § 10; Contracts § 6— deeds of separation — future separation — public policy

A promise by the husband that if the wife would not separate herself from the husband and would continue to live with the husband as his wife, everything the husband owned would be hers to have and hold for herself and their children in the event the husband left the wife is in the nature of a property settlement or separation agreement looking to a future separation and is void as against public policy.

APPEAL by *respondent* from *Clarkson, J.*, 12 February 1968, Schedule C Session, MECKLENBURG Superior Court.

This is a Special Proceeding instituted before the Clerk of Superior Court of Mecklenburg County on 18 September 1967 for a sale for partition of lands in Mecklenburg County, held by the parties as tenants in common.

The petitioner and respondent were married to each other on 12 June 1940, and lived together thereafter as man and wife. Four children were born of the marriage. On 29 May 1967 a decree of absolute divorce was entered in the Superior Court of Mecklenburg County in an action brought by William C. Matthews.

During the period of their marriage the lands described in the Petition had been conveyed to the parties as tenants by the entirety, and title had been converted into a tenancy in common by the divorce.

By her answer respondent admits the material allegations of the complaint with respect to the record title to the lands, and with re-

spect to the necessity for sale in order to make an equal division. By her further answer respondent alleges:

> "3. That on or about August 16, 1952, the Petitioner, for valuable consideration, entered into a Contract with the Respondent under the terms of which the Petitioner promised the Respondent that if she would not separate herself from the Petitioner and would continue to live together with the Petitioner as his wife then in the event Petitioner ever left the Respondent everything he owned would be hers to have and hold for the benefit of herself and the children of their marriage."

The Respondent attaches as an exhibit to her answer and further answer the alleged contract as follows:

> "To whom it may concern —
>
> I, Wm C Matthews do declare that if I ever leave Edith Summers Matthews, everything I have or will have will be hers to have and hold for the benefit of our children and herself — I make no claim on anything we own jointly, and separately —
>
> /s/ Wm C Matthews
>
> 16 Aug 1952"

The petitioner demurred to the further answer of respondent upon the grounds that it did not allege facts sufficient to support a judgment for affirmative relief.

By consent of the parties the Clerk ordered a sale of the property described in the petition, appointed a commissioner to conduct the sales and transferred to the civil issue docket all questions of fact and law raised by respondent's further answer.

Petitioner's demurrer was heard by Judge Clarkson, and was sustained. The respondent appealed to the Court of Appeals, assigning as error the sustaining of the demurrer.

Jones, Hewson and Woolard, by Hunter M. Jones, for petitioner appellee.

Herbert, James, Williams and Cooper, by Henry James, Jr., for respondent appellant.

BROCK, J.

[1, 2] It is elementary that 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. But a demurrer does not admit inferences or conclu-

sions of law. *Corprew v. Chemical Corp.*, 271 N.C. 485, 157 S.E. 2d 98. A valuable consideration is necessary to the validity of a contract not under seal, and it is necessary for the pleader to allege such facts as will enable the Court to see that there was a valuable consideration. McIntosh, N. C. Practice 2d, Sec. 1067.

Therefore, if respondent has alleged facts showing a valuable consideration, it will have to be found in the words "if she would not separate herself from the Petitioner and would continue to live together with the Petitioner as his wife."

[3-5] It is well settled that a contract between husband and wife whereby one spouse agrees to perform specified obligations imposed by law as a part of the marital duties of the spouses to each other is without consideration, and is void as against public policy. 26 Am. Jur., Husband and Wife, Sec. 326, p. 923; *Sprinkle v. Ponder*, 233 N.C. 312, 64 S.E. 2d 171. Under the law, a husband has the right to the services of his wife as a wife, and this includes his right to her society and her performance of her household and domestic duties. 26 Am. Jur., Husband and Wife, Sec. 9, p. 637.

In *Sprinkle v. Ponder, supra,* in ruling to be without consideration an alleged promise by the husband to convey to the wife a one-half interest in his new home if she would live there with him, the Court said: "As long as the husband exercises his choice in a reasonable manner, consistent with the comfort, welfare and safety of his wife, it would seem to be the wife's marital duty to go with the husband to the home of his choice, and this being so, the law will not permit, as a matter of sound public policy, any such marital duty to be made the subject of 'barter and sale,' and a contract based thereon is a nullity, without consideration."

There is no allegation in respondent's further answer of conduct on the part of the husband which would give rise in 1952 to a right on the part of the respondent to breach her marital obligations. The law relied upon by respondent and argued in her brief amply supports the proposition that forbearance by a wife to bring a well-founded suit for divorce may be a sufficient consideration for a promise. But this principle of law has no application to the allegations of respondent's further answer.

[6] The alleged promise set up in respondent's further answer does not specifically promise respondent anything; at most it constitutes a declaration "to whom it may concern" of an intent. If the alleged promise is construed as being made to respondent, it is vague and indefinite with respect to what is meant by "if I ever leave." Would this term apply to his death? Would this term apply

if respondent drove him away from home? Would it apply in case of a mutual separation? What kind of trust, if any, is created by the words "will be hers to have and to hold for the benefit of our children and herself?" Do those words give her a fee title to the whole, or just a part; or do they entitle her to a life estate? Also the alleged promise is vague and indefinite as to the term "everything I have or will have." Does this mean up until the time of a separation? Or does it mean everything he will have even after separation?

[7] Where an agreement is so vague and uncertain that no definite meaning can be ascertained, there is no valid contract. 2 Strong, N. C. Index 2d, Contracts, § 3, p. 295.

[5, 6] Quite apart from our conclusion that no consideration for the promise has been alleged by respondent's further answer, and apart from our conclusion that the promise as alleged is too vague and uncertain, there is a more compelling reason for petitioner's demurrer to be sustained.

[8, 9] If the alleged promise met the tests of consideration and clarity, it would be clearly a promise looking to a future separation, and would be in the nature of a property settlement or separation agreement. Articles or deeds of separation are permissible where the separation has already taken place or immediately follows; but agreements looking to a future separation of husband and wife will not be sustained. *Archbell v. Archbell*, 158 N.C. 409, 74 S.E. 327. If such an agreement as the one alleged by respondent were enforceable, it would induce the wife to goad the husband into separating from her in order that the agreement could be put into effect and she could strip him of all of his property. Our society has been built around the home, and its perpetuation is essential to the welfare of the community. And the law looks with disfavor upon an agreement which will encourage or bring about a destruction of the home.

We hold that the promise alleged by respondent is unenforceable because it is void on grounds of public policy.

The judgment sustaining petitioner's demurrer to respondent's further answer is

Affirmed.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA v. CLIFFORD LEE MARTIN AND McKINLEY GIBBS WALKER

No. 68SC232

(Filed 14 August 1968)

1. **Appeal and Error §§ 24, 30— admission of evidence — consideration on appeal — objection and motion to strike**

No question as to the admission of evidence is presented on appeal where no objection or motion to strike was made at the trial.

2. **Burglary and Unlawful Breakings § 7; Criminal Law § 115— breaking and entering without felonious intent — necessity for instruction**

In a prosecution for breaking and entering with intent to commit a felony, the court did not err in failing to submit the question of defendants' guilt of the misdemeanor of wrongfully breaking and entering without felonious intent where the evidence was that defendants were surprised in a home which they had broken and entered, that money and other chattels were kept in the home, and that furnishings and other property in the home were in disarray, the evidence pointing unerringly to an intent to commit a felony.

APPEAL by defendants from *Bryson, J.*, November 1967 Criminal Term, RUTHERFORD Superior Court.

Defendants were tried, on valid bills of indictment, for breaking and entering with intent to commit a felony or other infamous crime.

Mr. Ben Davis testified that he and his wife had been away from home on Sunday, 28 May 1967, since about 9 o'clock a.m.; that they returned between 3 and 4 o'clock in the afternoon; that there was a 1963 4-door Ford in the yard; that he told his wife they had company; that he pulled his car in behind it and got out of his car; that he saw Jeff Wilson at the back door and saw Gibbs Walker and Martin come out behind him; that he had known Walker all of Walker's life and had known Martin about 4 years; that they ran out of the house and hid behind some bushes; that he removed the key from the Ford, went in the house, latched the screen door, and got a shot gun; that the lock on the back door had been kicked out and the glass "busted" out; that he went to the front door and unlocked it, and Jeffrey Wilson came on the porch demanding the car keys; that Wilson contended he had nothing to do with it but had just picked up the other two boys; that he told Wilson to get off the porch and sit down; that the three boys ran to the creek, down the creek into the woods; that officers came and called for bloodhounds; that when he and his wife went in the house, it was in disarray; that they had left two big barrels of quilts, sheets, etc. in the closet and the contents of these barrels "strung out on the floor";

that he had over $200.00 worth of old coins he usually kept in that closet, but his wife had moved them to another bedroom and put them in a wardrobe under some dresses; that the utility room door was not locked; that an electric fan had been "bent all to pieces"; that there was some money in a trunk in the closet "where they was pulling all that stuff out"; that the trunk wasn't damaged and the money was not taken. Mr. Davis also testified that two doors of the car were open when he drove up.

Officer Lorrance testified that he went to the Davis home as the result of a call; that a white '63 Ford was parked in the yard to which Mr. Davis had the keys; that Mr. Davis told him three men had run out of his house; that the dogs were called for; that Officer Byers, who had arrived, started patrolling the road; that he went into the house with Mr. Davis; that when the dogs arrived he went to the woods with the man and the dogs where he stayed until he learned by radio message that two subjects had been identified; that the house of Mr. Davis was in disarray; that the door had been forced and the glass broken; that the furnishings in the house were worth between $1600.00 and $2000.00; that Mr. Davis told him he knew who the boys were and gave him their names, but he couldn't remember whether this was before or after he ran the dogs; that he did not put the names on the radio. Mr. Davis identified Walker and Martin in the courtroom as two of the people who ran out of his house.

Neither defendant testified. Officer Byers was called and examined by defendants. He testified that when he first went to the house Mr. Davis told him he had come home and surprised three boys in his house and named Jeffrey Wilson but did not at that time name the other two; that he went out on the road to see if he could see the boys when they came out of the woods; that he saw the defendants walking on the road and did not stop them but then went back and picked them up; that this was some three or four miles from the Davis home and some 30 minutes had elapsed from the time he got the message to go to Mr. Davis' house and the time he picked up defendants to take them back to Mr. Davis' house to see if he could identify them; that by crossing the creek and going through the woods it was about a mile from where he saw defendants to the Davis house; that when he took the boys back to the Davis house, Mr. Davis identified them as two of the boys who came out of his house.

Gwendolyn Pritchard, sister of McKinley Walker, testified that Martin and Walker came to her house walking on that Sunday about

12:30 or 1:00; that she lived about five miles from the Davis house; that they stayed until 3:30 or 4:00 and left her house walking; that she is the aunt of Jeffrey Wilson.

The jury returned a verdict of "guilty as charged" as to both defendants. From judgments thereon, defendants appealed.

Carroll W. Walden, Jr. for defendant appellants.

T. W. Bruton, Attorney General, by James F. Bullock, Deputy Attorney General, for the State, appellee.

MORRIS, J.

Defendants have set out no exceptions in their assignments of error. Four of their assignments of error are addressed to alleged errors in the court's charge. The charge is not, however, set out in the record. While these are plain and obvious failures to comply with sections (a) and (c) of Rule 19, Rules of Practice in the Court of Appeals of North Carolina, we have considered each assignment of error and find each to be without merit.

[1] Defendants' contention that the allowance in evidence of Mr. Davis' testimony that "my wife, she was hollerin' to the top of her voice, 'we have been robbed, we have been robbed' " constituted prejudicial error cannot be sustained. Defendant Martin did not object thereto. No objection was interposed by defendant Walker nor any motion to strike made by him when the same statement was made by Mr. Davis on cross-examination by counsel for defendant Martin. The objection cannot now be raised. *State v. Howell,* 239 N.C. 78, 79 S.E. 2d 235.

[2] Assignments of error Nos. 4 and 5 are addressed to the court's charge. Defendants earnestly contend that the court should have read G.S. 14-54 in its entirety. G.S. 14-54 provides:

> "§ 14-54. *Breaking into or entering houses otherwise than burglariously.* — If any person with intent to commit a felony or other infamous crime therein, shall break or enter either the dwelling house of another otherwise than by a burglarious breaking; or any storehouse, shop, warehouse, bankinghouse, countinghouse or other building where any merchandise, chattel, money, valuable security or other personal property shall be; or any uninhabited house, he shall be guilty of a felony, and shall be imprisoned in the State's prison or county jail not less than four months nor more than ten years. Where such breaking or entering shall be wrongfully done without intent to commit

a felony or other infamous crime, he shall be guilty of a misdemeanor."

Defendants say the court committed reversible error in failing to instruct the jury that they could consider the lesser degree and find defendants guilty of the misdemeanor of wrongfully breaking and entering without intent to commit a felony. They insist that the evidence merely casts a suspicion of their intent to commit a felony and rely on *State v. Jones*, 264 N.C. 134, 141 S.E. 2d 27, and *State v. Worthey*, 270 N.C. 444, 154 S.E. 2d 515. In *State v. Jones, supra*, the evidence was that the defendants entered the boiler room of a cleaning plant, then broke an inside window between the boiler room and the main building. An employee in the main building heard the noise, accosted them, and they fled. There was no evidence any personal property was disturbed nor no positive testimony as to whether merchandise, chattels, money, valuable securities were in the boiler room or the main building. In *State v. Worthey, supra*, the evidence was that at a time when only the watchman and manager were on the premises of Swift & Company plant, an employee noticed that the screens were torn off two windows of one of the buildings. The building was used as a washroom and locker room for employees when the plant was in operation. It housed a table, lockers, showers, sink and toilet facilities. The employee went to a window, heard someone inside and called the police. Upon the demand of the police, defendant came out. He insisted he had gone in to meet an employee named "Robert" who was to give him a ride and had used the toilet facilities while in the building. There was evidence that no Swift employee was named "Robert". In both cases, the Court held that the trial judge should have charged on the lesser degree because "The evidence as to defendant's intent was circumstantial and did not point unerringly to an intent to commit a felony; the jury might have found defendant guilty of a misdemeanor upon the evidence." *State v. Worthey, supra*, at 446.

> "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." *State v. Jones, supra*, at 136, 137.

We think here the evidence points unerringly to an intent to commit a felony and differentiates this case from *State v. Jones, supra*, and *State v. Worthey, supra*. The evidence leaves no doubt but that defendants were interrupted in their mission, and the fact

that they were unsuccessful does not entitle them to a charge on the lesser degree of the crime charged.

We have carefully considered the entire charge of the court. There is no merit in defendants' contention that the court placed most of the emphasis on the contentions, evidence, and law arising thereon in favor of the State and thereby expressed an opinion in violation of G.S. 1-180. Defendants put on very little evidence. Naturally the recapitulation of the evidence by the court would require more time as to the State's evidence than the defendants'. Although defendants complain of no particular portion of the charge, we find that the court fairly and accurately stated the contentions and evidence of both parties.

The remainder of defendants' assignments of error are not brought forward in their brief, and are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

In the defendants' trial we find

No error.

CAMPBELL and BRITT, JJ., concur.

STATE v. ERVIN MERCER

No. 68SC228

(Filed 14 August 1968)

1. Criminal Law § 162— motion to strike — unresponsive and hearsay testimony

In a prosecution for first-degree murder, the trial court properly allowed the State's motion to strike the answer of a State's witness elicited on cross-examination, which answer was not responsive to the question and was hearsay.

2. Homicide § 15— exclusion of irrelevant evidence

In a prosecution for first-degree murder, the trial court properly excluded as irrelevant (1) testimony of a State's witness with respect to the manner in which defendant had wished to be buried, (2) testimony of defendant as to the localities of his overseas service for 15 years, and (3) testimony of defendant with respect to his previous marriage and the circumstances of its dissolution.

3. Criminal Law § 50; Arrest and Bail § 3— testimony invading province of jury — competency

In a prosecution for first-degree murder, testimony of the arresting

officer is not incompetent as an invasion of the province of the jury when he testifies that at the time he responded to a call to arrest the defendant he was aware that a felony had been committed, that the defendant's wife had been murdered, and that he had reasonable grounds to believe who had committed the felony, since the officer was merely explaining the basis for his arrest of defendant.

4. Criminal Law § 43— competency of photographs

In a prosecution for first-degree murder, the court does not commit error in admitting photographs for the purpose of illustrating the testimony of a State's witness as to the location of the bodies in the house where the homicide took place, the location of the gunshot wounds, and the condition of the front door to the house.

5. Criminal Law § 43— gruesome photographs — competency

If a photograph is relevant and material, the fact that it is gory or gruesome will not alone render it inadmissible.

6. Criminal Law § 42— bullets connected with crime — competency as exhibits

In a prosecution for first-degree murder, bullets connected with the commission of the crime are properly admissible as exhibits.

7. Criminal Law § 63— evidence as to defendant's sanity

In a prosecution for first-degree murder, the trial court properly excludes testimony of the defendant that, in his opinion, he did not know right from wrong during the time the killings occurred.

8. Criminal Law § 164— renewal of motion for nonsuit

Where defendant introduces evidence, the motion for nonsuit at the close of the State's evidence is waived, and the assignment of error should be based on exception to the failure of the court to grant motion for nonsuit at the close of all the evidence.

9. Criminal Law § 176— renewal of motion for nonsuit — review

Where motion to nonsuit is renewed at the close of defendant's evidence, the only question presented for review is whether there was error in the denial of the motion made at the conclusion of all the evidence.

10. Homicide § 21— first-degree murder — sufficiency of evidence

In this prosecution charging the defendant with the first-degree murder of his wife, the evidence is sufficient to be submitted to the jury on the question of defendant's guilt.

11. Criminal Law § 170— argument of solicitor

Where the court directs the jury to use their own recollection of the evidence in the case and not the recollection of the solicitor, the court, or defense counsel, any impropriety in the solicitor's argument implying collusion between the defendant and his witness in testifying contrary to the import of other evidence is rendered harmless.

12. Criminal Law § 170— argument of solicitor — inflammatory language

Under the circumstances of this prosecution for first-degree murder, de-

fendant was not prejudiced by solicitor's argument referring to the "slaughter" which took place in the house of the homicide.

APPEAL by defendant from *Parker, J.,* February 1968 Criminal Session, WILSON Superior Court.

Defendant was tried on three valid indictments charging first-degree murder. The cases were consolidated for trial. Defendant entered a plea of not guilty to each charge. The jury returned a verdict of guilty of murder in the second degree in each case. From judgments rendered on the verdicts, defendant appealed.

Farris and Thomas by Robert A. Farris for defendant appellant.

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

MORRIS, J.

Defendant has submitted this appeal under Rule 19(d)(2) but has failed to comply therewith in that he has not attached any appendix to his brief as required. Nevertheless, we have engaged in a voyage of discovery and find no prejudicial error.

Assignments of error Nos. 1, 2, 3, 4, 6, 7, 8, 9 and 10 are all addressed to the admission or exclusion of evidence.

[1] The court properly allowed a motion to strike the answer of Mrs. Owens, "Well I don't think she had ever done him right." The witness had been asked on cross-examination by counsel for defendant if she knew why defendant did not stay with his wife. She answered that his wife didn't want him to. The quoted answer was given in response to a question asking how long that situation had existed. The answer was obviously not responsive; it was a matter of opinion for which no foundation had been laid, and was hearsay.

[2] The testimony of the witness Mrs. Owens with respect to the manner in which defendant had stated he wished to be buried, the testimony of defendant as to the localities of his overseas service for 15 years, the testimony of defendant with respect to his previous marriage and the circumstances of its dissolution was all irrelevant and properly excluded.

[3] The admission of the evidence of Officer Hayes, the arresting officer, to the effect that at the time he went to defendant's brother's house in response to a call to go there and pick up Ervin Mercer he was aware that a felony had been committed, that Myrtle Mercer

had been murdered, and that he had reasonable grounds to believe who had committed the felony was not prejudicial error as an invasion of the province of the jury. The witness was the arresting officer who was explaining the basis for his arrest of defendant. Immediately following the above testimony was testimony that there was at that time a warrant on file in the police department for the arrest of Ervin Mercer.

[4-6] The court admitted, for the purpose of illustrating the testimony of Detective Smith, certain photographs and bullets. Defendant contends this was prejudicial error. He contends the photographs and bullets were inflammatory. He does not contend these exhibits were not accurate. The photographs were used to illustrate the testimony of Detective Smith as to the location of the bodies in the house, the location of the wounds, the condition of the front door to the house, etc. The court properly instructed the jury as to the exhibits. Their admission was not prejudicial error. *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10. In that case the Court quoted, with approval, Stansbury, N. C. Evidence 2d, § 34, as follows: "If a photograph is relevant and material, the fact that it is gory or gruesome . . . will not alone render it inadmissible."

[7] The defendant earnestly contends that he should have been permitted to testify as to whether in his own opinion he himself knew right from wrong while he was in the house where the killings were done and whether he had sufficient mind to know what he did and the consequences of his act. In support of his contention, defendant relies on *State v. Nall,* 211 N.C. 61, 188 S.E. 637. There, the Court held admissible defendant's testimony that eight years prior to the time of his testimony he had been hit on the head with a baseball bat and twelve years prior he had been hit on the head with an axe and that he had had measles settle in his head and that these had had a bad effect on his mind; that he sometimes lost his "sense of recollection" and could not remember what he had done when his mind was gone away from him. The testimony sought to be admitted here is quite different. Here, the defendant had already testified that he remembered going in the house and remembered standing on the porch hearing the gun clicking at his head, but remembered nothing in between. It was during this time the killings occurred and it was this period of time as to which defendant wished to testify that in his opinion he did not know right from wrong. We think the evidence was properly excluded.

We have carefully examined the remaining assignments of error addressed to rulings of the court as to admission or exclusion of testimony, and we find them to be without merit.

[8-10] Defendant's assignments of error Nos. 5 and 11 are to the failure of the court to grant motion for nonsuit at the close of the State's evidence and at the close of all the evidence. The defendant offered evidence. The motion for nonsuit at the close of the State's evidence is, therefore, waived, and the assignment of error should be based on the second exception. 2 Strong, N. C. Index 2d, Criminal Law, § 105. The only question is whether there was error in the denial of the motion made at the conclusion of all the evidence. *State v. Leggett,* 255 N.C. 358, 121 S.E. 2d 533; *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916. Defendant in his brief cites no authorities, and makes no argument in support of his assignment of error. In this situation, under Rule 28, the exception is deemed abandoned. We have, however, carefully examined the evidence. Without reciting all the details of the evidence, it tends to show that defendant and his wife had been having trouble for some time; that she had refused to talk with him on several occasions; that they had had arguments and then reconciliations; that she had written him a "Dear John" letter; that he had gotten a 10-day leave to come home and try to get his marital problems straightened out; that he had, about a month prior to the killings, written to his wife that he would rather be dead and have her with him than to see her with another man, and "Don't make me do something that will put both of us in the grave"; that when he came to Wilson to see her she refused to see him so he went to Tarboro to stay with a cousin; that the cousin brought him to Wilson the night of the killings to try to see her again; that he got out of the car, first picking up a pistol and bullets in a paper bag which was under the seat of the car and which she had returned to him earlier in the day; that he went on the porch, laid the bag containing the pistol in a chair, and knocked on the door; that she called out to him that if he didn't leave she would call the police; defendant testified he remembered going in the house but his memory stopped at that point until he found himself back on the porch. Mrs. Owens, the cousin, testified that he kicked at the door and shots rang out at the same time; that she heard a voice say "Ervin, don't do that", and she left at that point and went to his brother's house. The testimony of other witnesses was to the effect that defendant came out of the house after the shots were heard and walked down the walk. He testified he remembered standing on the porch with the gun clicking at his head; that he went into a neighbor's yard, was sitting behind some bushes and saw the police cars come up and knew he had done something; that he laid the pistol on the ground and buried the bullets left in the ground so he would not do anything else and walked to his

brother's house where he was later apprehended. Clearly the evidence is sufficient to withstand a motion of nonsuit. *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769; *State v. Porth, supra.*

[11, 12] Two assignments of error involve statements made by the solicitor in his argument to the jury. The solicitor argued to the jury that collusion could be inferred between defendant and his witness, his brother, for that both testified that defendant had had two drinks, although the evidence was that defendant had not had anything to drink with his brother. Defendant contends that his brother testified that he, the defendant, had had a "couple" of drinks which was merely a figure of speech. The court directed the jury to use their own recollection of the evidence and not the solicitor's, his, or that of counsel for defendant. The court overruled defendant's objection to a portion of the solicitor's argument wherein he referred to the "slaughter which took place in that house on September 14th". Defendant's objection is that the word "slaughter" is inflammatory. We cannot say that under the facts of this case the word is inaccurate, nor did the court's overruling defendant's objection constitute reversible error.

Defendant's remaining eight assignments of error are addressed to the charge of the court and the refusal of the court to charge as requested by defendant. We have painstakingly examined the charge of the court. We find it contains the exact language contended for by defendant in his brief with respect to assignment of error No. 20. We find that the charge, when considered in its entirety, covers fairly, impartially, accurately, and clearly all the essential elements of the case and is free from error.

Defendant had a fair trial and was ably represented by counsel both at trial and on appeal.

In the verdict and judgment, we find

No error.

CAMPBELL and BRITT, JJ., concur.

SYLVESTER G. BROOKS v. UNIVERSITY OF NORTH CAROLINA
No. 68IC120

(Filed 14 August 1968)

1. State § 7— Tort Claims Act — duty of Industrial Commission

The Industrial Commission is to determine whether a claim brought under the Tort Claims Act arose as the result of a negligent act of an

employee of the State under such circumstances that if the defendant were a private person there would be liability.

2. State § 8— Tort Claims Act — negligent acts of State employees

The Tort Claims Act permits recovery only for the negligent acts of State employees, but does not permit recovery for their negligent failure to act.

3. State § 7— tort claim against State — requisites of affidavit

An affidavit setting forth the names of the alleged negligent State employees but which does not allege the specified act or acts of negligence relied upon is insufficient to support a claim under the Tort Claims Act.

4. State § 8— tort claim against State — negligent act — sufficiency of evidence

In an action under the Tort Claims Act for injuries received as a result of eating collard greens containing pieces of wire at a state university cafeteria, evidence of how vegetables are generally prepared and inspected for foreign material at the cafeteria is insufficient to support an award to claimant, there being no evidence of any negligent act on the part of a named cafeteria employee in the preparation of the collard greens.

APPEAL by defendant from an opinion and award, 3 January 1968, of the North Carolina Industrial Commission.

This is a proceeding under the Tort Claims Act. Plaintiff filed an affidavit in which he alleged that his claim was "against The University of North Carolina at Chapel Hill, N. C. for damages resulting from the negligence of the cooking & serving department of Chase Cafeteria of the University of North Carolina at Chapel Hill, N. C." He further alleged that the date of the alleged occurrence was 8 November 1965. He further alleged "That the injury or property damage occurred in the following manner: While eating collard greens at Chase Cafeteria at lunch, claimant swallowed some pieces of wire in the collards, and immediately went to the Cafeteria Manager, who sent claimant to Memorial Hospital Infirmary at Chapel Hill where x-rays were taken." There followed allegations with respect to his subsequent hospitalization, surgery, loss of weight, medical expense, loss of time from work, etc. Defendant demurred and plaintiff filed an amended affidavit in which the only change was that he alleged his claim was "against the University of North Carolina at Chapel Hill, N. C. for damages resulting from the negligence of Arnold Pender, Manager and the following who were cooks: Liddie Thompson, Fannie Edwards, Roberta Adams, Melba Brandon and Curtis Farrow." Defendant filed a pleading denominated "Answer, Demurrer or Other Pleading of Defendant to Plaintiff's Affidavit" which sets out the following: "The defendant, answering the plaintiff, alleges and says: 1. That it affirms its answer and demurrer

filed to plaintiff's original affidavit in all respects, which answer and demurrer was filed on the 16th day of June, 1966, with the Industrial Commission." The matter was heard before Commissioner Marshall. Order was entered 15 September 1967 awarding plaintiff $2,750.00. Defendant appealed to the Full Commission. The Full Commission adopted the findings of fact and conclusions of law of Commissioner Marshall and affirmed the award.

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

Everett & Creech by William A. Creech for plaintiff appellee.

MORRIS, J.

Plaintiff, in his brief again asks the Court to consider motion to dismiss previously considered by the Court *en banc* and denied. We see no reason to consider the motion again, and plaintiff has given no reason which compels reconsideration. In any event, had such compelling reasons been advanced, the Court would consider the appeal as a petition for *certiorari* and proceed to consider the matter on its merits.

The affidavit filed by plaintiff refers to Liddie Thompson, the commissioner's order refers to Linda J. Thompson, the transcript of evidence gives the witness' name as Lydia J. Thompson. We assume that all these refer to the same person.

The findings of fact having to do with the actions of defendant are numbers 6 and 7. Number 6, to which defendant does not except, is as follows:

> "6. The collard greens were purchased by the University in one-gallon sealed cans. These cans were opened in the cafeteria kitchen and removed from the cans into university-owned cooking utensils. They were then inspected and cooked and then delivered to the cafeteria serving line where plaintiff made his purchase as hereinabove described."

Defendant excepts to finding of fact No. 7 as follows:

> "As set forth above, the defendant through the acts of the cook in the cafeteria, Linda J. Thompson, were negligent in permitting the greens to be sold to a cafeteria customer with such foreign matter located in them",

for that the finding is not supported by competent evidence; and to the commissioner's conclusion of law No. 1 based thereon as follows:

"The defendant through employee, Linda J. Thompson, was negligent in the preparation of the foodstuff sold by the cafeteria by permitting said foreign matter to be left in the food when it was sold to the customers."

We think defendant's exception is well taken. The only cafeteria employee to testify was Lydia J. Thompson, called by the plaintiff as an adverse witness. She testified in substance that she had worked at Chase Cafeteria since 1 October 1965; that she had worked in the kitchen since that time, first as a cook's helper and then as a cook; that she was familiar with the vegetables and how they were cooked "since I have been in that department"; that she was familiar with how she prepared vegetables; that the procedure she was taught to use had not changed; that the vegetables come either in number 10 cans or frozen; that the cans are cleaned before they are opened with an electric can opener which is cleaned before and after use; that the liquid is drained off into a stainless steel colander and the vegetables removed to a pot in which they are cooked; that for a normal luncheon meal sometimes two and sometimes three cases of mustard greens would be used; that approximately 240 servings would be expected; that the greens are dumped on a stainless steel table and inspected for foreign matter; that after they are cooked they are placed in serving pans and taken to the cafeteria; that with the large quantity of vegetables that go through the kitchen "it is not impossible to inspect it because we are supposed to inspect them and that is what I do"; that three of the cooking staff are still at the cafeteria who were there on 8 November 1965 when Mr. Brooks ate his luncheon meal there; that after the food is cooked, it is taken from the pot with a food ladle "and if there is anything in there we should see it"; "I inspect the food thoroughly before I put it into the pot and when I go to take it out of the pot I look"; to inspect the frozen food you bump it against the table and it falls on the table; for frozen mustard greens the cook takes the frozen food out ahead of time, they are put in cold water and they "fall a loose"; as to whether frozen vegetables were used in November 1965, "At that time I was not cooking vegetables and I can not say what was used at that time"; that the procedure described by her is the procedure used since she has been in the kitchen. She further testified that approximately 1200 servings of food are inspected daily for the luncheon meal; that she starts cooking at 8:30 and they start taking it to the cafeteria at 11:00.

[1-4] Plaintiff brings this action under the provisions of the Tort Claims Act. Under that Act, the Industrial Commission is to determine whether a claim brought thereunder arose as the result of

a negligent act of an employee of the State under such circumstances that if the defendant were a private person there would be liability. The Act permits recovery only for the negligent *acts* of employees of the State — not for their negligent failure to act. G.S. 143-291; *Wrape v. Highway Commission,* 263 N.C. 499, 139 S.E. 2d 570.

> "It is necessary to recovery that the affidavit filed in support of the claim and the evidence offered before the Commission identify the employee alleged to have been negligent and set forth the specific act or acts of negligence relied upon." *Ayscue v. Highway Commission,* 270 N.C. 100, 103, 153 S.E. 2d 823.

The affidavit filed in this case does not meet the tests. It contains the names of employees but there is no allegation of any act or acts done by any of them. Neither is there any evidence of any negligent act on the part of any of them. The only evidence as to preparation of food was evidence of how foods are generally prepared. There is no evidence of how foods were prepared on 8 November 1965. Indeed there is no evidence in the record at all as to how collard greens were prepared at any time or that collard greens were ever prepared. Plaintiff alleged he was damaged as the result of eating collard greens in which there was wire. The only witness to testify testified in detail as to the preparation of mustard greens.

There is no evidence in the record before us which would support a finding of a negligent act on the part of the employee Lydia Thompson. The mere showing that a large quantity of food was prepared at the cafeteria in a relatively short period of time is not evidence of negligence.

The questions whose negligent act and what it was which caused the wire to be in the collard greens, as plaintiff alleged, are unanswered in the record in this case.

The judgment and award of the Full Commission is

Reversed.

CAMPBELL and BRITT, JJ., concur.

PAUL J. MASSEY, ADMINISTRATOR OF THE ESTATE OF PAUL W. MASSEY, DECEASED, v. ONIE ADAM CATES

No. 68SC148

(Filed 14 August 1968)

1. Execution § 16— proceedings supplemental to execution

Article 31, Chapter 1, of the General Statutes provides for supplemental proceedings, equitable in nature, which may be used after execution has been returned unsatisfied to aid creditors to reach property of every kind subject to the payment of debts which cannot be reached by the ordinary process of execution.

2. Execution § 16— proceedings supplemental to execution — appointment of receiver — sufficiency of motion

A motion for the appointment of a receiver under G.S. 1-363 is sufficient to withstand demurrer if it sufficiently alleges that defendant probably has property which cannot be reached by execution or that defendant probably has transferred property to defraud plaintiff judgment creditors.

3. Execution § 16— proceedings supplemental to execution — appointment of receiver — sufficiency of motion

A motion by a judgment creditor for the appointment of a receiver under G.S. 1-363 is sufficient to withstand demurrer upon allegations that an examination of defendant debtor pursuant to G.S. 1-352 revealed that defendant had transferred corporate stock formerly registered in his name to his wife, that he had disposed of automobiles formerly registered in his name or had allowed them to be repossessed so that they could be registered in his wife's name, that all funds on deposit to his name had been withdrawn and all bank accounts placed in his wife's name, that he is accumulating corporate stock and life insurance cash value through payroll deductions, and that defendant does not intend to pay the balance due on the judgment.

APPEAL by plaintiff from *Shaw, J.*, in chambers, 27 November 1967 Civil Session ROCKINGHAM Superior Court.

Plaintiff brought suit against defendant to recover for the wrongful death of his intestate allegedly resulting from the negligence of defendant. Defendant answered and pled the contributory negligence of plaintiff's intestate as a bar to any recovery. The jury answered the issues in favor of plaintiff and awarded plaintiff $10,000.00. Judgment thereon was entered 24 February 1966. Defendant noted an appeal but failed to perfect it, and the appeal was dismissed by order entered 23 May 1966. Defendant's insurance carrier paid $5,000.00 on the judgment. Defendant failed to pay the balance, and on 22 August 1966 plaintiff caused execution to issue, which was returned unsatisfied on 26 October 1966. On 31 July 1967, plaintiff filed a motion in the cause for the examination of defendant, his

wife, and the appropriate personnel officer of Duke Power Company, defendant's employer. On 13 October 1967, plaintiff filed a motion in the cause alleging that an inquisition of defendant was held under authority of G.S. 1-352 from which it was determined that defendant is regularly employed by Duke Power Company and earning a gross monthly income of $885.00; that his children were all married and away from home; that he had disposed of the two automobiles formerly registered in his name or permitted them to be repossessed in order that all family automobiles could be transferred or registered in his wife's name; that defendant provided the funds with which his wife was buying said automobiles; that defendant had discontinued all bank accounts in his name and was delivering his paycheck to his wife to be cashed or deposited to her name; that defendant had transferred to his wife an undetermined number of shares of Duke Power Company stock formerly registered in his name; that defendant had intentionally removed, transferred or disposed of his property with intent to defraud his creditors and did not intend to make any arrangements to pay the balance on said judgment; that defendant had authorized the deduction of $56.95 monthly from his salary for purchase of life insurance and Duke Power Company stock and substantial cash values are accumulating under these programs which assets are beyond the reach of execution under the ordinary processes of the court; that defendant has a substantial monthly income in excess of his legitimate expenses which should and could be applied to payment of principal and interest on the judgment.

Plaintiff asked for the appointment of a receiver to (1) take possession of and hold subject to orders of the court all lands, goods, property, stocks, insurance policy cash surrender values, insurance policy proceeds, Duke Power Company stock and current earnings of the defendant, and (2) take such action as may be necessary to recover from defendant's wife automobiles acquired by her with funds of defendant and any and all property transferred to her by defendant for purposes of defrauding plaintiff. Defendant demurred to the motion for that plaintiff had not shown he had exhausted his remedies as provided by law; that plaintiff had not shown that defendant had assets in excess of his exemptions; that plaintiff had not shown that defendant had fraudulently transferred any property held by him at the time of the accident or from the time of the accident to the entry of the judgment; that plaintiff has a remedy at law as to any assets transferred in defraud of his creditors. On 18 March 1968, an order was entered sustaining the demurrer and plaintiff appealed.

Gwyn & Gwyn by Melzer A. Morgan, Jr., for plaintiff appellant.

W. T. Combs, Jr. for defendant appellee.

MORRIS, J.

Plaintiff is proceeding under G.S. 1-363 which provides:

"The court or judge having jurisdiction over the appointment of receivers may also by order in like manner, and with like authority, appoint a receiver in proceedings under this article of the property of the judgment debtor, whether subject or not to be sold under execution, except the homestead and personal property exemptions. But before the appointment of the receiver, the court or judge shall ascertain if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if so, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to the receivership. No more than one receiver of the property of a judgment debtor shall be appointed. The title of the receiver relates back to the service of the restraining order, herein provided for."

[1] This statute is included in Article 31 of Chapter 1 of the General Statutes entitled "Supplemental Proceedings". Article 31 provides for supplemental proceedings, equitable in nature, after execution against a judgment debtor is returned unsatisfied to aid creditors to reach property of every kind subject to the payment of debts which cannot be reached by the ordinary process of execution. These proceedings are available only after execution is attempted.

Here, plaintiff had execution issued. It was returned unsatisfied. Plaintiff then proceeded under G.S. 1-352 and obtained an order to examine the defendant with respect to his property. Based on information obtained from this examination of defendant under oath, plaintiff moved for the appointment of a receiver as provided by statute.

The only question presented here is whether plaintiff's motion is sufficient to withstand a demurrer.

The statute with which we are now concerned was before the Court in *Coates v. Wilkes,* 92 N.C. 377. There has been no amendment or change in phraseology since that time. There the plaintiff had caused execution to issue, it was returned unsatisfied, and plaintiff obtained an order to examine defendant. Thereafter plaintiff moved for the appointment of a receiver, the motion was denied,

and plaintiff appealed. In discussing the evidence sufficient to warrant the appointment of a receiver, the Court said:

> "Indeed, a receiver is appointed almost as of course, where it appears that the judgment debtor has, or probably has, property that ought to be so subjected to the satisfaction of the judgment, after the return of the execution unsatisfied. The receivership operates and reaches out in every direction as an equitable execution, and it is the business of the receiver, under the superintendence of the court, to make it effectual by all proper means."

In discussing plaintiff's allegation of defendant's disposition of property to prevent its application to the payment of the judgment, the Court noted:

> "If there was evidence tending strongly to show such a disposition of it, or that he was refusing, covertly or otherwise, to apply his property to the judgment, this was sufficient to warrant the appointment of a receiver, to the end that he might take such steps and, if need be, bring such actions as would enable him to secure and recover any property of the defendant so conveyed or withheld by him, to be applied to the judgment of the plaintiff. To warrant the appointment of a receiver, it need not appear, certainly or conclusively, that the defendant has property that he ought to apply to the judgment — if there is evidence tending in a reasonable degree to show that he probably has such property, this is sufficient; or if it appears probable that he has made a fraudulent conveyance of his property as to his creditors, this is sufficient."

[2, 3] Plaintiff has alleged that defendant had testified under oath that he had transferred Duke Power Company stock formerly registered in his name to his wife, had allowed automobiles owned by him to be repossessed so that any automobiles could be registered in his wife's name; that all funds on deposit to his name had been withdrawn and all bank accounts placed in his wife's name; that he was through payroll deductions accumulating Duke Power Company stock and cash value of life insurance; that he did not intend to pay the balance due on the judgment. The motion sufficiently alleges that defendant probably has property which cannot be reached by execution and that he has probably transferred property to defraud this judgment creditor. The demurrer should not have been sustained.

Plaintiff has chosen to proceed under G.S. 1-363 in preference to G.S. 1-353. This is his right. We find no authority to support defendant's contention that plaintiff must proceed under G.S. 1-353

before he can apply for a receiver under G.S. 1-363 nor has defendant cited any authority for this position. It may be that defendant has no property over and above his exemptions allowed by law which can be applied to the satisfaction of the judgment. If he does have such property, it should be applied to the payment of the judgment. If he does not, this fact ought to be made to appear, with reasonable certainty, to the satisfaction of the holder of the judgment. This the receiver, if appointed, will proceed to determine. "The purpose of the law in such proceedings is to afford the largest and most thorough means of scrutiny, legal and equitable in their character, in reaching such property as the debtor has, that ought justly to go to the discharge of the debt his creditor has against him." *Coates v. Wilkes, supra,* at 381.

For the reasons herein stated, the ruling of the trial court sustaining the demurrer is

Reversed.

CAMPBELL and BRITT, JJ., concur.

ELSIE ELIZABETH TRAMMELL v. ROBERT LEWIS TRAMMELL

No. 68SC187

(Filed 14 August 1968)

1. **Husband and Wife § 4— wife's separate property — transactions with husband — common law rule**

All transactions of the wife with her husband in regard to her separate property were held void at common law.

2. **Husband and Wife § 10— separation agreements — requisites and validity**

A separation agreement between husband and wife, which is executed without certification by the examining probate officer that the wife was privately examined, is void *ab initio,* and is not admissible in evidence to prove the terms of the agreement. G.S. 52-6, G.S. 47-39.

APPEAL by defendant from *Froneberger, J.,* 8 February 1968 Session of GASTON Superior Court.

The allegations of the complaint in this civil action are summarized as follows: Plaintiff and defendant were married in 1959; on 8 July 1965, they entered into a deed of separation, copy of same

being attached to and made a part of the complaint; under section "Second" of the agreement, defendant agreed to convey to plaintiff a certain automobile and to pay to Wachovia Bank $3,612.96 balance owing on said automobile, secured by a chattel mortgage; defendant paid only $1,000.00 of said indebtedness, the bank foreclosed its mortgage and repossessed the automobile; defendant is indebted to plaintiff in the sum of $2,612.96 plus interest.

In his answer, defendant alleged that the purported separation agreement is void for the reason that the probate certificate of the officer before whom plaintiff acknowledged execution of the instrument does not comply with the statutes.

At the trial, two issues were submitted to and answered by the jury as follows:

"1. Did the plaintiff and defendant enter into a valid separation agreement, as alleged in the Complaint?

"ANSWER: Yes.

"2. What amount, if any, is the plaintiff entitled to recover of the defendant?

"ANSWER: $2612.96."

From judgment entered on the verdict, defendant appealed.

Frank Patton Cooke, Attorney for plaintiff appellee.

Childers & Fowler by H. L. Fowler, Jr., Attorneys for defendant appellant.

BRITT, J.

Defendant's principal assignments of error raise the following questions: (1) Did the trial court commit error in allowing plaintiff to introduce the purported deed of separation as evidence? (2) Did the trial court commit error in overruling defendant's motion for judgment as of nonsuit at the conclusion of plaintiff's evidence?

The certificate attached to the purported deed of separation is as follows:

"NORTH CAROLINA

LINCOLN COUNTY

"I, Nellie L. Bess, Asst. Clerk of the Superior Court for Lincoln County, North Carolina, do hereby certify that ROBERT LEWIS TRAMMELL and his wife, ELSIE ELIZABETH MCALISTER TRAM-

MELL, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

"And I do further certify that it has been made to appear to my satisfaction, and I do find as a fact, that the same is not unreasonable or injurious to her.

"Witness my hand and official seal, this 8th day of July, 1965.

"s/ Nellie L. Bess, Asst. Clerk of the Superior Court"

G.S. 52-6 provides in part: ". . . nor shall any separation agreement between husband and wife be valid for any purpose, unless such contract or separation agreement is in writing, and is acknowledged before a certifying officer who shall make a private examination of the wife according to the requirements formerly prevailing for conveyance of land."

G.S. 47-39 sets forth the form of acknowledgment of conveyances and contracts between husband and wife. It provides, in part, that when an instrument or contract purports to be signed by a married woman and such instrument or contract comes within the provisions of G.S. 52-6 of the General Statutes, the form of certificate of her acknowledgment before any officer authorized to take the same shall be in substance as follows:

". . . and the said (here give married woman's name), being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, does state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she does still voluntarily assent thereto.

"And I do further certify that it has been made to appear to my satisfaction, and I do find as a fact, that the same is not unreasonable or injurious to her."

Defendant insists that the purported deed of separation is void for the reason that the certifying officer did not provide in her certificate that the plaintiff was privately examined; and being void, the trial court erred in permitting it to be introduced in evidence.

[1] All transactions of the wife with her husband in regard to her separate property were held void at common law. *Sims v. Ray,* 96 N.C. 87, 2 S.E. 443.

In *Caldwell v. Blount,* 193 N.C. 560, 137 S.E. 578, Connor, J., speaking for the court, it is said:

"C.S., 2515, (now G.S. 52-6) is an enabling statute; but for the statute the deed of a wife conveying land to her husband would

be void. Such deed is valid only when the statute has been strictly complied with. The law is stated in 30 C.J., at page 757, sec. 379, as follows:

" 'Since a married woman's power to convey is wholly statutory, all the requirements of enabling statutes must be strictly complied with to render her deed valid, and her deed will be held invalid where there is a failure to comply with statutory requirements as to execution or acknowledgment. Where, however, there has been a substantial compliance with statutory requirements, her deed may be enforced, but there must be a substantial compliance with every requisite of the statute.' "

In *Fisher v. Fisher,* 217 N.C. 70, 6 S.E. 2d 812, our Supreme Court said:

"This Court has uniformly held that the deed of a wife, conveying land to her husband, is void unless the probating officer in his certificate of probate certify that, at the time of its execution and her privy examination, the deed is not 'unreasonable or injurious' to her." (Citing numerous authorities).

In *Bolin v. Bolin,* 246 N.C. 666, 99 S.E. 2d 920, Denny, J., (later C.J.) speaking for the court said: "We have universally required separation agreements to be executed in conformity with statutory requirements governing contracts between husband and wife. . . . Furthermore, this Court has uniformly held that a contract between husband and wife, which must be executed in the manner and form required by G.S. 52-12 (now 52-6) is void *ab initio* if the statutory requirements are not observed." (Citing numerous authorities).

[2] Applying these well-established legal principles to the case at bar, we are compelled to hold that the questions above stated must be answered in favor of the defendant. The purported deed of separation, without a certificate meeting the requirements of G.S. 52-6 and G.S. 47-39, is void and, over defendant's objection, should not have been allowed in evidence. Eliminating the purported deed of separation from the evidence, plaintiff failed to make out her case.

We are not called upon to say if it is now too late for plaintiff to obtain a proper certificate of acknowledgment to the purported deed of separation.

We deem it unnecessary to consider defendant's other assignments of error.

The judgment of the Superior Court is

Reversed.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. MICHAEL WAYNE GREEN
No. 68SC156

(Filed 14 August 1968)

1. Robbery § 2; Indictment and Warrant § 7— robbery with firearms — indictment — allegation of location

It is not essential to an indictment charging robbery with firearms that there be an allegation as to the exact location where the offense occurred, it being sufficient that the county of the offense be named in order to establish the jurisdiction of the court.

2. Indictment and Warrant §§ 9, 13— failure to allege exact location of offense — bill of particulars

Where an indictment for armed robbery does not allege the exact location within the county where the offense occurred, defendant may obtain further information in respect thereto by a motion for a bill of particulars.

3. Robbery § 4— robbery with firearms — sufficiency of evidence

In a prosecution for robbery with firearms, evidence that when the prosecuting witness first saw defendant he was standing at a store counter with a gun in his hand, and that defendant placed the gun on the counter and demanded that the prosecuting witness give him money, which she did, *is held* sufficient to show "the use or threatened use" of a firearm whereby the life of the prosecuting witness was endangered and threatened.

4. Robbery § 3; Criminal Law § 36.1— evidence of alibi

In a prosecution for robbery with firearms, the exclusion of documents offered by defendant on the question of alibi which show defendant's conviction four years previously and his commitment to prison for a minimum of eight years is not prejudicial error, particularly where the State offered evidence that at the time of the robbery defendant was a prison escapee, defendant's previous judgment and conviction being too remote to have any probative value on the defense of alibi.

5. Criminal Law § 161— abandonment of exceptions

Exceptions not properly set out in the record will be deemed abandoned and will not be considered on appeal. Court of Appeals Rules Nos. 19(c) and 21.

6. Robbery § 5— instructions — submission of lesser degrees of the crime

Where the evidence in an armed robbery prosecution shows that money was taken from the prosecuting witness by the use of a gun, the court is not required to submit the question of defendant's guilt of the lesser offense of common law robbery.

APPEAL by defendant from *Ervin, J.*, 29 January 1968 Schedule "A" Criminal Session of MECKLENBURG Superior Court.

Defendant was indicted for armed robbery in a bill of indictment

which charged him with having taken $177.00 from the person and place of business of one Mollie Brown and Li'l General Stores Incorporated in Mecklenburg County, N. C. In apt time, before entering plea, defendant's counsel moved to quash the bill of indictment, but declined to give any reason or argument in support of his motion. The motion was overruled, whereupon defendant entered a plea of not guilty.

The State offered the evidence of Mrs. Mollie Brown, an employee of Li'l General Stores, who testified that on 4 June 1967 she was employed as assistant manager at the store located at 4100 The Plaza, Charlotte, North Carolina. She came to work on that date at 3:00 p.m. and first saw defendant at the store about 9:45 p.m. He was at the counter and had a gun in his hand. He placed a few items from the drug department on the counter and put the gun down beside them. He said, "I want the money, all of it." At the time there was a small boy and a lady customer in the back of the store. Mollie Brown got the money out of the cash drawer, except for some change, and put it in a paper bag. At this time the little boy had left, but the lady customer started toward the front of the store. Defendant told Mollie Brown to wait on her. When the customer got up to the counter, Mollie Brown waited on her and the customer went out. Defendant then told Mollie Brown to get the rest of the money, pointing toward the safe, and she got it and put it in the paper bag. Defendant then said: "Don't call anybody for at least five minutes. I don't want to come back and hurt anybody." As defendant left he said, "I'll see you." When Mollie Brown waited upon the lady customer, who was Mrs. Bernice Freeman, Mrs. Freeman gave her $3.00 and she gave Mrs. Freeman some change. The money Mrs. Freeman gave Mollie Brown was put in the cash drawer but the defendant said he wanted that also, so Mollie Brown placed it in the bag. Mollie Brown also testified: "I gave him the money because he had a gun, and I thought I had to." The defendant was in the store for a total of about ten minutes. On cross-examination Mollie Brown testified that she could not be mistaken and that it was the defendant, Green, who perpetrated the robbery.

Mrs. Bernice Freeman, the customer in the store who came up to the counter and saw the defendant, Green, testified that she had some conversation with the defendant at the time and she identified him in the courtroom as being the person who was present and with whom she had the conversation. A Charlotte Police Officer also testified in corroboration of Mollie Brown and Mrs. Freeman.

The jury returned a verdict of guilty of armed robbery as charged, and from a sentence pronounced thereon the defendant appeals.

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

T. O. Stennett for defendant appellant.

PARKER, J.

[1] Defendant contends the indictment was defective because it does not allege the exact location where the robbery took place, other than as being in Mecklenburg County. The bill of indictment in the present case is almost identical in form with the bill of indictment which was set forth in full in the opinion and was approved by the North Carolina Supreme Court in the recent case of *State v. Rogers,* 273 N.C. 208, 159 S.E. 2d 525. What was said by the Court in that case is pertinent here:

> "The time or place was not essential element of the offense in instant case. The jurisdiction of the court was established by the allegation that the crime occurred in Mecklenburg County, and after jurisdiction was established, the place of the crime became immaterial. The indictment charged the offense in a plain, intelligible and explicit manner, and contained averments sufficient to enable the court to proceed to judgment and thus bar a subsequent prosecution for the same offense."

[2] Defendant contends *State v. Rogers, supra,* is not controlling here since in *Rogers* the victim of the robbery operated only one place of business, whereas in the instant case the Li'l General Stores operated some 32 separate places of business in Charlotte. Defendant further points out that at the time of trial he was under indictment on three other bills of indictment, each of which charged him with having committed the offense of armed robbery of other named individuals and Li'l General Stores, Inc. But if the defendant, because of the multiplicity of Li'l General Stores in the Charlotte area and of his alleged proclivity for committing armed robberies therein, needed more specific information as to exactly which store he was being charged with having robbed in this particular case, his remedy was by a motion for a bill of particulars. G.S. 15-143. Not only did defendant fail to resort to this readily available remedy, but he even refused at the time of making his motion to quash the indictment to disclose to the court his reasons therefor. There was no error in overruling the motion to quash the indictment.

[3] Defendant's next assignments of error, directed to the overruling of his motion for nonsuit made at the close of the State's evidence and overruling his motion in arrest of judgment made following entry of the judgment against him, raise the same questions of

law. Defendant contends that under the State's evidence there was in this case no use or threatened use of any firearm, and that the victim was never put in fear. There is no merit in this contention. When the State's witness, Mollie Brown, first saw defendant he was standing at the counter with a gun in his hand. He placed the gun on the counter in front of him and demanded that she give him money. This was clearly "the use or threatened use" of a firearm whereby the life of Mollie Brown was endangered or threatened, the offense charged in the indictment and a violation of G.S. 14-87. Exhibition of a pistol while demanding money conveys the message loud and clear that the victim's life is being threatened. There was no variance between the allegations in the bill of indictment and the State's evidence and no error in overruling defendant's motions of nonsuit and in arrest of judgment.

[4] Defendant did not take the witness stand himself, but did attempt to introduce into evidence the record of a judgment dated February 1964, sentencing him to prison for a minimum of eight years upon his plea of guilty to armed robbery. Defendant also offered in evidence the commitment dated February 1964, committing him to prison on this judgment. Defendant contends that the trial court's exclusion of these proffered exhibits was error, in that these documents had some probative value as tending to prove an alibi. The judgment and conviction of 1964, however, were too remote to have any real probative value on the defense of an alibi, and there was no prejudicial error in the trial court's refusal to allow them in evidence. In addition, the record discloses that at the time the court excluded these documents from evidence the State offered the testimony of a detective of the Charlotte Police Department who testified, for the record, that as of 4 June 1967, the date on which the robbery occurred, defendant was an escapee from the North Caroline Department of Correction. If the court had allowed defendant's proffered documents into evidence, this evidence of the State would have become relevant and competent. The burden was on the State to prove the defendant was present and committed the crime with which he was charged. The State carried this burden by the testimony of two eyewitnesses who positively identified the defendant as the person in the store who committed the crime on the date in question.

[5, 6] Defendant's final assignment of error is directed to the court's failure to charge the jury as to the included lesser offense of common law robbery. There is no exception in the record upon which to base this assignment of error. Exceptions not properly set out in the record will be deemed to be abandoned and will not be con-

sidered by this Court on appeal. Rules 19(c) and 21 of *Rules of Practice in the Court of Appeals*. In any event, in the present case there was no evidence of the commission of any lesser offense, and the trial court properly limited the jury to two possible verdicts: Guilty of armed robbery as charged, or not guilty. The jury found defendant guilty as charged, and there was ample evidence to support the verdict.

In the entire trial there was

No error.

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

MARGARET J. BRADY v. CAROLINA COACH COMPANY, A CORPORATION, AND DONNIE GAY

No. 68SC178

(Filed 14 August 1968)

1. Negligence § 53— duties to invitees

A proprietor has the duty to exercise ordinary care to keep his premises in a reasonably safe condition so as not to expose invitees unnecessarily to danger and to give warning of hidden conditions and dangers of which he has express or implied knowledge.

2. Negligence § 53— duties to invitees — obvious conditions

A proprietor is under no duty to warn an invitee of an obvious condition or of a condition of which the invitee has equal or superior knowledge.

3. Negligence §§ 53, 56— duties to invitees — fall upon the floor — negligence

The operator of a restaurant does not insure his patrons against slipping and falling upon the floor, nor does the mere fact that one slips and falls upon the floor constitute evidence of negligence.

4. Negligence § 54— duties of invitee

An invitee has the duty to see that which can be seen in the exercise of ordinary prudence and to use reasonable safeguards to protect himself.

5. Negligence § 57— action by invitee — slippery floors — sufficiency of evidence

In an action for injuries sustained when plaintiff invitee slipped and fell on the floor of a restaurant, evidence that while seated at the lunch counter plaintiff observed another customer spill coffee on the counter and observed a waitress wipe the coffee from the counter, that while leaving the counter ten minutes later plaintiff's foot slipped on the floor,

causing her to fall, that a spot of coffee with a mark through it was then observed on the floor, and that coffee had run to the floor from a raised platform to which counter stools were attached, *is held* insufficient to be submitted to the jury on the issue of negligence on the part of the restaurant proprietor.

6. Landlord and Tenant § 8— liability of landlord to invitees of tenant

When property is demised in a good condition and state of repair, suitable for the reasonable, ordinary and contemplated use of the premises by the lessee and the contemplated use is not one which, in itself, must prove to be offensive, obnoxious or dangerous to third persons, the tenant, and not the owner or landlord, is liable for injuries to a third person caused by the negligently created condition or use of the premises.

7. Landlord and Tenant § 8; Negligence § 57; Carriers § 19— liability of landlord to invitees of tenant — sufficiency of evidence

In an action for injuries sustained when plaintiff bus passenger slipped and fell on the floor of a restaurant operated by a lessee of a bus company, nonsuit is properly allowed in the action against the bus company where there is no allegation or evidence that the bus company was negligent in leasing the premises to the restaurant operator.

APPEAL by plaintiff from *May, J.*, 26 February 1968 Session, WILSON Superior Court.

On 25 July 1963, the plaintiff purchased a ticket at Smithfield, North Carolina, to travel by Carolina Coach Company from Smithfield to Portsmouth, Virginia. The plaintiff and her mother boarded the Carolina Coach Company passenger bus at Smithfield and rode thereon to the bus terminal at Wilson, where the bus made a stop.

In the bus terminal building at Wilson was a restaurant, or refreshment counter, operated by the defendant Donnie Gay under a lease from the defendant Carolina Coach Company. The seating arrangement for customers of the restaurant was composed of a row of revolving, round, flat-top stools mounted on pedestals secured at their bottoms to a raised platform immediately in front of the counter. The platform to which the pedestals of the stools were attached was 23 inches in width and raised five and one-half inches from the floor. This raised platform was painted with yellow stripes and overhead was a sign bearing the words "watch your step." The main floor covering was a predominantly brown colored tile and the interior of the building was well-lighted from overhead fixtures.

Plaintiff and her mother entered the bus terminal for the purpose of getting refreshments. There were several people and three Carolina Coach Company drivers ordering food and drink at the restaurant counter. One or more waitresses were behind the counter serving customers. Plaintiff and her mother took seats at the lunch

counter, and while so seated, a bus driver, seated or standing, to plaintiff's mother's right, spilled coffee on the counter. Some of this coffee splashed on plaintiff's mother, but none came down as far as plaintiff's position and none splashed on the floor. The plaintiff, seated to the left of her mother, observed this mishap and observed the waitress wipe the coffee from the counter.

After about ten minutes, plaintiff turned to leave, and in getting up from the stool, she placed her right foot directly upon the main floor level behind where she had been sitting. Her right foot "slid" from under her and she fell backwards against the stool. Plaintiff looked before she stepped, but saw nothing on the floor and she was aware of the raised platform upon which the stools were secured. She was wearing a "medium heel pump type shoe."

After plaintiff fell, several men and women helped her up and seated her upon one of the seats in the "waiting room" section of the terminal. Plaintiff's mother then observed a spot of coffee about four to five inches in diameter located about eight and one-half inches from the raised platform, with a mark "maybe a couple of inches" wide through it. Plaintiff's mother also testified that she saw where the coffee had run down from the raised platform to the floor in these words: "Well I could see where it kindly come down, just a damp spot there, more or less. It wasn't puddled up right there where it kind of come down from that platform where it went over."

In her fall, plaintiff suffered injury to her shoulder and brings this action for damages alleging negligence of both defendants in allowing the floor to become wet and slippery. At the close of plaintiff's evidence, judgment of involuntary nonsuit was entered as to each defendant. Plaintiff appealed.

Gardner, Connor and Lee, by J. M. Reece, for plaintiff appellant.

Thorp and Etheridge, by William D. Etheridge, for Carolina Coach Company, defendant appellee.

Dupree, Weaver, Horton, Cockman and Alvis, by Jerry S. Alvis, for Donnie Gay, defendant appellee.

BROCK, J.

[5] By her evidence and argument, plaintiff bottoms her whole case upon the theory that the coffee spilled by the bus driver ran down the counter, across the raised platform and onto the floor, and that plaintiff slipped and fell because of this coffee on the floor. However, taking the evidence in the light most favorable to the

plaintiff, there is no testimony, or other explanation, to connect a spot of coffee on the floor immediately behind the plaintiff with coffee that was spilled some distance away to her mother's right. Although plaintiff's mother described a "damp" spot running out onto the floor from beside her right foot, plaintiff was seated to her left; this is in no way connected with a location behind where plaintiff was seated. Also, plaintiff's testimony that she looked before she stepped onto the floor and that she saw no wet spot is considerable evidence that there was no wet spot on the floor at the point she put her foot down.

Clearly there were numerous other people being served at the counter and walking back and forth behind plaintiff, anyone of whom might have spilled a little coffee or some other liquid on the floor, either before plaintiff slipped, or while they were trying to assist her after she slipped. The plaintiff's evidence affirmatively shows there was no wet spot on the floor when she took her seat, and, having remained only about ten minutes, the spilling of a little coffee by another customer within that interval of time would hardly give defendants reasonable time to acquire notice under the circumstances disclosed by the evidence in this case.

[1-5] Nevertheless, proceeding upon plaintiff's theory, there is plenary evidence that plaintiff had full knowledge that a cup of coffee had been spilled on the counter to her mother's right, and she had as much opportunity as anyone to anticipate that some of the coffee might run down the counter and onto the floor. If there was danger of this occurring, it was as obvious to the plaintiff as to the defendants. Plaintiff was an invitee and it was the duty of defendant Donnie Gay to exercise ordinary care to keep the premises which plaintiff was to use in a reasonably safe condition, so as not to expose her unnecessarily to danger, and to give warning of hidden conditions and dangers of which he had knowledge, express or implied. However, defendant Donnie Gay was under no duty to warn plaintiff, as an invitee, of an obvious condition or of a condition of which plaintiff had equal or superior knowledge. *Wrenn v. Convalescent Home,* 270 N.C. 447, 154 S.E. 2d 483. The operator of a restaurant does not insure his patrons against slipping or falling upon the floor. Nor does the mere fact that one slips and falls on a floor constitute evidence of negligence. The invitee has the duty to see that which can be seen in the exercise of ordinary prudence, and to use reasonable safeguards to protect herself. *Hinson v. Cato's, Inc.,* 271 N.C. 738, 157 S.E. 2d 537.

[5] Plaintiff's evidence fails to show a breach of duty on the part of Donnie Gay.

[6, 7] Plaintiff argues that defendant, Carolina Coach Company, owed to the plaintiff the highest degree of care for her safety so far as is consistent with the practical operation and conduct of its business. In support of this plaintiff cites *Harris v. Greyhound Corporation,* 243 N.C. 346, 90 S.E. 2d 710. In the *Harris* case the question was one of structure of the building, and is not applicable to the case *sub judice.* When property is demised in a good condition and state of repair, suitable for the reasonable, ordinary and contemplated use of the premises by the lessee and the contemplated use is not one which, in itself, must prove to be offensive, obnoxious, or dangerous to third persons, the tenant, and not the owner or landlord, is liable for injuries to a third person caused by the negligently created condition or use of the demised premises. 32 Am. Jur., Landlord and Tenant, Sec. 817, p. 695. There is no allegation or evidence that Carolina Coach Company was negligent in leasing the premises to Donnie Gay; all of the evidence tends to show that Donnie Gay and his employees were reputable and experienced in the operation of a restaurant. The high degree of care urged by the plaintiff would require Carolina Coach Company to constantly oversee the operation of the restaurant; and, under the circumstances of this case, we hold that such a burden would not be consistent with the practical operation and conduct of its business as a common carrier.

As to both defendants the entry of judgment of nonsuit is

Affirmed.

MALLARD, C.J., and PARKER, J., concur.

Z. D. OWENS, M.D., FLOID E. OWENS AND WIFE, ARNETTE B. OWENS, v. WALLACE TAYLOR, C. R. TAYLOR AND ROBERT O. KLEIN

No. 68DC194

(Filed 14 August 1968)

1. Dedication § 1— what constitutes dedication of streets — recordation of plats

As a general rule, where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into subdivisions of streets and lots, such streets become dedicated to public use, and the purchaser of the lot or lots acquires the right to have all and each of the streets kept open.

2. Dedication § 1— dedication of road — sufficiency of evidence

In an action by plaintiffs to recover damages for trespass to a parcel of land and to have plaintiffs declared the owners thereof, the evidence was to the effect that the disputed land was a road which was bounded on either side by the lots of the plaintiffs, that the owners of the subdivision in which the plaintiffs purchased their lots recorded three plats showing the lots of the subdivision together with the road, that the plaintiffs purchased the lots with reference to the recorded plats, that the road provides the only access to a river by other owners of lots in the subdivision, and that the State Highway Commission included the road in its map of the highway system, undertook the maintenance of the road, and had erected at the request of one plaintiff a stop sign and barricade at the end of the road. *Held:* There was no error in the granting of defendants' motion for judgment as of nonsuit on the ground that the plaintiffs have failed to establish any rights in the property, there being plenary evidence to show acceptance of the offered dedication of the road by the State Highway Commission and there being no evidence that the Commission has formally abandoned the road pursuant to G.S. 153-9(17).

3. Dedication § 2— acceptance of dedication — sufficiency of evidence

There is plenary evidence to show acceptance by the State Highway Commission of the offered dedication of a road where (1) a highway commissioner testified that during his tenure the road was on the map of the highway system, (2) a highway engineer testified that the road was being worked by State forces when he came into the highway district, and (3) a barricade and stop sign had been erected by the Commission at the end of the road at the request of an adjacent landowner.

APPEAL from *Privott, J.*, 26 February 1968 Session District Court.

Plaintiffs and defendants all reside at Taylor's Beach in Camden County. Plaintiff, Dr. Owens, owns Lot #10 and plaintiffs, Floid Owens and wife, own Lot #21 of what is known as Taylor's Beach. Both lots are described with reference to plats of Taylor's Beach of record in the Camden County Registry. Both are described with reference to a lane or 20-foot road.

In the deed to Dr. Owens and wife (now deceased), the property conveyed is described as follows:

> "Known and designated as Lots Nos. Nine (9) and Ten (10) on the plat of lots surveyed by David Cox, Sr., registered engineer, for Carey Taylor, August 5, 1942, which said plat is duly recorded in the Office of the Register of Deeds for Camden County, North Carolina, in Deed Book 25, page 118, to which said map reference is hereby had for a more particular description of said lots. Said lots front 100 feet on the Pasquotank River and extend back between parallel lines 150 feet to Riverview Avenue, and bounded on the North by Riverview Avenue;

on the East by a twenty-foot road, a prolongation of the lane leading from Shiloh Highway to the Taylor home; on the South by the Pasquotank River; and on the West by Lot No. 8, on said plat."

In the deed to Floid E. Owens and wife, Arnette B. Owens, the property conveyed is described as follows:

"Situated on the West side of Riverview Avenue at what is known as Taylor's Beach in Camden County, and being lot #21 on plat #3 of said Taylor's Beach of record in the office of Register of Deeds of Camden County, and more particularly described as follows:

"Beginning on the lane leading to the highway to Shiloh, at the river, and running thence an Eastwardly course along said lane 155 feet to Riverview Avenue, thence Southwardly along Riverview Avenue 100 ft. thence Westwardly 150 ft. to Pasquotank River, thence Northwardly along said river 175 ft. to said lane, the place of beginning,".

The 20-foot lane or road is the property in dispute. In their complaint, plaintiffs describe the lane or road as a parcel of land 20 by 150 feet, allege they are the owners thereof, that defendants have trespassed thereon by placing posts on the land and by breaking or causing to be broken portions of a seawall or bulkhead placed there by plaintiffs and by causing a ramp to be built extending from the lot in question out in the water. Plaintiffs asked for a restraining order and damages in the amount of $4,000.00.

Defendants answered, admitting the ownership by Dr. Owens of Lot #10 and the ownership of Floid Owens and wife of Lot #21, but denying their ownership of the lane or road between them; defendants averred that the land in question fronting on the Pasquotank River and extending back to Riverview Avenue was left open for the use of persons owning lots within the development for access to the river, particularly those owning lots not fronting on the river. Defendants further answering, alleged that plaintiffs had no right or claim to the land except the same right to use it as all other persons owning property in Taylor's Beach; that by instituting this action and restraining the defendants from use of the land and preventing their development of it for their use plaintiffs have damaged defendants in the sum of $4,000.00. Defendants asked for a restraining order.

The court, on the hearing, entered an order modifying the restraining order obtained by plaintiffs to the extent that "neither plaintiffs nor defendants . . . shall commit any acts of ownership

on the 20 by 150 feet parcel of land described in the complaint, except plaintiffs may continue to mow grass and that both plaintiffs and defendants may pass over the said 20 by 150 feet parcel of land until the final determination of this case."

When the matter came on for trial, defendants moved for judgment as of nonsuit at the close of plaintiffs' evidence. The motion was granted, and plaintiffs appealed.

John T. Chaffin for plaintiff appellants.

J. W. Jennette for defendant appellees.

MORRIS, J.

Plaintiffs contend that their deeds convey to them the fee in the lane or road, and they, therefore, have standing to seek to restrain defendants from trespassing. Upon this premise, they argue that the evidence was sufficient to allow the case to go to the jury for assessment of damages.

[1, 2] We cannot agree with plaintiffs' contention with respect to their rights in and to the property in question.

Plaintiffs introduced deeds carrying their title back to a common source beyond defendant Carey Taylor who at one time owned the lots as part of land which he developed as Taylor's Beach. Plaintiffs also introduced three maps. One map was made in 1942, is recorded in Deed Book 25 at pages 118 and 119, Camden County Registry. This map shows Lots 1-10 each fronting 50 feet on the Pasquotank River and running back a depth of 150 feet between parallel lines to a 20-foot road. Lot #10 is bounded on the southeast by a 20-foot road. The map is entitled "Cary S. Taylor lots". The map dated December 16, 1943, entitled "lots of Carey Taylor", recorded in Deed Book 25 at page 438, Camden County Registry, shows Lots 11-20. These lots front on Riverview Avenue and run back a depth of 165 feet between parallel lines. Lot #20 is bounded by a lane on the south, but no width thereof is shown. This lane is the same lane as is shown in the 1942 map as having a width of 20 feet. Riverview Avenue is the 20-foot road shown on the 1942 map running along the easterly side of Lots 1-10. The 1945 map entitled "Plat #3 showing Taylor's Beach", and recorded in Plat Book #2 at page 16, Camden County Registry, shows numbered Lots 21-43 fronting on the Pasquotank River and having various depths and widths. All of them run back from the river to Riverview Avenue. Lot #21, the northernmost lot, is bounded by a 20-foot lane. This is the same lane shown on the 1942 and 1943 maps. Riverview Avenue

is the same street shown on the 1942 and 1943 maps. It appears that the only access to the Pasquotank River by owners of lots fronting on Riverview Avenue would be the 20-foot lane shown on all three maps.

> "As a general proposition, where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into subdivisions of streets and lots, such streets become dedicated to public use, and the purchaser of the lot or lots acquires the right to have all and each of the streets kept open." *Wofford v. Highway Commission,* 263 N.C. 677, 683, 140 S.E. 2d 376.

[3] J. Emmett Winslow, called by plaintiffs, testified that the 20 by 150 foot parcel in dispute was on the map of the highway system during his tenure as Highway Commissioner from 1953 to July 1957. George K. Mack, a retired District Engineer for the North Carolina State Highway Commission, testified that when he came into the district in about 1948 the road was being worked by the State forces. There was also evidence that a barricade and stop sign had been erected by the Highway Commission at the end of the road at the river at the request of Dr. Owens as the result of cars going into the river.

The evidence is plenary to show acceptance of the offered dedication by the North Carolina State Highway Commission. *Wofford v. Highway Commission, supra.*

There is no evidence of a revocation or withdrawal of dedication either before or after acceptance of the offered dedication. G.S. 136-96.

Plaintiffs rely on *Patrick v. Jefferson Standard Life Ins. Co.,* 176 N.C. 660, 97 S.E. 657, as controlling here. We do not think it has any application to the facts in this case. Denny, J., later C.J., in *Russell v. Coggins,* 232 N.C. 674, 62 S.E. 2d 70, summarized the *Patrick* case as follows:

> "There an alleyway had been reserved in a deed as appurtenant to the use of the land and the grantee thereafter acquired the fee simple title to the dominant and servient estates. The Court held that when these estates were merged, the easement in the alleyway being no longer necessary was extinguished, and the alleyway became a part of the merged estate."

Plaintiffs urge that under *Patrick,* the deed conveying their respective lots to them describing the lots as bounded by the lane or road conveyed the fee to the center.

"The only instance in which the adjacent owners of lots in a subdivision, like the one under consideration, may be deemed to own any right, title or interest in a dedicated street, except an easement therein, is where the street was dedicated by a corporation which has become nonexistent. *Sheets v. Walsh,* 217 N.C. 32, 6 S.E. 2d 817; G.S. 136-96." *Russell v. Coggin, supra,* at 677.

A witness for the plaintiffs testified that he was working for the North Carolina Highway Commission in 1965 when the Highway Commission was planning to pave Riverview Avenue. At that time, at the request of Mr. Wallace Taylor, one of the defendants, he made inquiry as to whether the land in dispute was still on the highway system. He testified that, after investigation, he told Mr. Taylor that the Highway Commission "did not claim this parcel of land." G.S. 153-9(17) provides a procedure for the closing of roads abandoned by the Highway Commission and the vesting of title in and to the roadbed.

For the reasons stated herein, the judgment of the trial court is

Affirmed.

CAMPBELL and BRITT, JJ., concur.

GRETCHEN F. PELKEY v. JAMES A. BYNUM

No. 68SC131

(Filed 14 August 1968)

1. Automobiles § 57— collision at intersection controlled by signal — sufficiency of evidence

In an action arising out of an intersection collision, plaintiff's evidence tending to show that when she approached and entered the intersection she had the green traffic control signal facing her, and that defendant's automobile entered the intersection after plaintiff's automobile was already in it and collided with plaintiff's vehicle, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence.

2. Negligence § 28; Trial § 18— duty of jury where evidence is contradictory

Discrepancies and contradictions in the evidence are matters for the jury and not the judge.

3. Automobiles § 90— operating vehicle at speed greater than reasonable — instructions not supported by allegations

In an action arising out of a collision at an intersection controlled by traffic signals, it is error for the court to instruct the jury on the ques-

tion of defendant's violation of the statute, relating to the operation of an automobile at a speed greater than is reasonable and prudent under the circumstances, where the complaint does not allege that defendant was operating her vehicle at a speed greater than was reasonable and prudent. G.S. 20-141(a).

4. Automobiles § 90— decreasing speed at intersection — instructions not supported by evidence

In an action arising out of a collision at an intersection controlled by traffic signals, it is error for the court to instruct the jury on the question of defendant's violation of the statute, relating to the failure to decrease speed when necessary in approaching and crossing an intersection, where there is no evidence as to whether defendant did or did not decrease her speed on entering the intersection. G.S. 20-141(c).

5. Trial § 33— instructions not supported by allegation or evidence

It is error for the court to charge upon an abstract principle of law which is not presented by the allegations and is not supported by any view of the evidence.

APPEAL by defendant from *Brewer, J.*, 22 January 1968 Civil Session of the Superior Court of CUMBERLAND County.

The record reveals that the defendant, James A. Bynum, is a woman. This action for personal injuries and property damage alleged by the plaintiff in her complaint, and by the defendant in her counterclaim, arises out of a collision on 2 November 1966 of the two automobiles owned by the parties.

At the close of all the evidence, the court submitted and the jury answered the following issues:

"1. Was the plaintiff damaged and injured by the negligence of the defendant as alleged in the complaint?

ANSWER: Yes.

2. Did the plaintiff by her negligence contribute to her own damage and injury as alleged in the answer?

ANSWER: No.

3. What amount, if any, is the plaintiff entitled to recover of the defendant for her personal injuries?

ANSWER: $2,500.00.

4. What amount, if any, is plaintiff entitled to recover of the defendant for damages to her automobile?

ANSWER: $500.00.

5. Was the defendant damaged by the negligence of the plaintiff as alleged in the counterclaim?

ANSWER: No.

6. What amount, if any, is the defendant entitled to recover of the plaintiff for personal injuries?

ANSWER: No.

7. What amount, if any, is the defendant entitled to recover of the plaintiff for damage to her automobile?

ANSWER: No."

From the entry of the judgment on 25 January 1968, that the plaintiff have and recover of the defendant the sum of $2,500 for personal injuries and $500 for damages to her automobile, the defendant excepted and appealed.

MacRae, Cobb, MacRae & Henley by James C. MacRae for plaintiff appellee.

Rose & Thorp, and Quillin, Russ, Worth & McLeod by Joe McLeod for defendant appellant.

MALLARD, C.J.

[1] Defendant assigns as error the denial of her motion for judgment of nonsuit of plaintiff's cause of action renewed at the close of all the evidence.

The collision occurred on 2 November 1966 at about 3:30 p.m. at the intersection of Raeford Road (U. S. Highway #401) and Robeson Street in Fayetteville. Raeford Road extends generally in a northeast-southwest direction, and Robeson Street extends generally in a northwest-southeast direction. The traffic at this intersection was controlled by electric traffic control signals. It was raining and the pavement was wet.

Plaintiff offered evidence tending to show that she was operating her 1966 Ambassador automobile in a careful and prudent manner on the Raeford Road going in a northeastern direction at the time and place of the collision. That as she approached and entered the intersection, she had the green traffic control signal facing her. After plaintiff was approximately three-fourths of the way through the intersection, the defendant, having entered the intersection after plaintiff's vehicle was already in it, collided with plaintiff's vehicle. As a result of the collision, the plaintiff was injured and her automobile damaged.

Defendant offered evidence tending to show that on this occasion she was operating her 1964 Buick automobile and stopped at this intersection for the red signal. She waited until the light turned

green, and after looking both ways and seeing nothing, she entered the intersection. While defendant was already in the intersection, plaintiff's automobile entered and collided with her vehicle. As a result of the collision, defendant was injured and her automobile damaged.

[2] The evidence was contradictory; however, it was sufficient to withstand the defendant's motion for judgment of nonsuit. The question was one for the jury. Discrepancies and contradictions in the evidence are matters for the jury and not the judge. *Greene v. Meredith,* 264 N.C. 178, 141 S.E. 2d 287; *Jones v. Schaffer,* 252 N.C. 368, 114 S.E. 2d 105.

The court instructed the jury as follows with respect to G.S. 20-141(a) and (c):

> "No person shall operate a motor vehicle at any time at a speed greater than is reasonable and prudent under the circumstances then and there existing. The statute goes on to provide that even if the speed of the vehicle is lower than the posted or legal speed limit fixed by law, a driver approaching and entering an intersection has the duty to reduce speed as may be necessary to avoid colliding with other persons and vehicles, in compliance with the legal requirement to use due care. . . .
>
> I instruct you, members of the jury, that a violation of these provisions that I have just mentioned, that is, the provision requiring vehicles to be operated at a speed no greater than is reasonable and prudent under the circumstances then and there being, and to reduce the speed when approaching an intersection or where some special hazard exists, in a manner commensurate with this due care duty; the violation of either one of these statutes is negligence per se as a matter of law and you will keep that in mind as you measure the conduct of these two drivers on the occasion in question. . . .
>
> Now, members of the jury, we come back to the first issue, keeping in mind that the plaintiff on this issue has the burden of proof from the greater weight of the evidence of satisfying you that on the occasion in question, Miss Bynum in operating her car was guilty of negligence in that she operated it at a speed greater than that reasonable and prudent under the circumstances then and there existing, or . . ."

[3] Defendant contends that the court committed error in its charge by instructing the jury on the question of a violation of G.S. 20-141(a), relating to the operation of an automobile at a speed

that is greater than is reasonable and prudent under the conditions then existing. There was no allegation in the complaint or amended complaint that the defendant was operating her vehicle at a speed greater than reasonable and prudent. It is error for the judge to charge the jury as to matter not presented by allegation and supported by the evidence. *Worley v. Motor Co.*, 246 N.C. 677, 100 S.E. 2d 70; *Jackson v. McBride*, 270 N.C. 367, 154 S.E. 2d 468.

[4, 5] Defendant contends that the court committed error in instructing the jury on the question of the defendant's violation of G.S. 20-141(c). This statute relates to the failure, when necessary, to decrease speed of a vehicle in approaching and crossing an intersection.

In this case the violation of the statute was alleged by the plaintiff, but there was no evidence as to whether the defendant did or did not decrease her speed on entering the intersection. There must be evidence, either circumstantial or direct, to support the allegation; if not, the court should not charge with respect to such allegation. It is error for the court to charge upon an abstract principle of law which is not presented by the allegations and is not supported by any view of the evidence. *Motor Freight v. DuBose*, 260 N.C. 497, 133 S.E. 2d 129; *Worley v. Motor Co., supra; Jackson v. McBride, supra.*

We deem it unnecessary to consider and pass upon the other assignments of error, some of which appear to be not without merit.

In our opinion, the defendant is entitled to a new trial, and it is so ordered.

New trial.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. DENNIS GIBSON
No. 68SC217

(Filed 14 August 1968)

1. Criminal Law § 75— confessions — voluntariness — promise by officer inducing a confession

The confession of a fifteen year old defendant is rendered involuntary where the officer to whom defendant confessed promised defendant prior

to the confession that "if he knew anything about this, if he would tell me, I would in any way assist him or help him as a youngster."

2. Criminal Law § 76— involuntary confession — subsequent confession presumed involuntary

Where an accused has made an involuntary confession, any subsequent confession is presumed to proceed from the same vitiating influence, and the burden is on the State to establish the voluntary character of the subsequent statement before it can be received in evidence.

APPEAL by defendant from *Snepp, J.*, 25 March 1968 Regular Criminal Session, GASTON Superior Court.

Defendant was charged with first-degree burglary and the larceny of an automobile of the value of more than $200.00. He was found guilty of breaking and entering with intent to commit a felony and of larceny of an automobile of the value of less than $200.00. At the time of his arrest, defendant was 15 years old. At the time of his trial, he was 16 years old. The record reveals that he had been declared an incorrigible by the juvenile court. The record also reveals that he had run away from training school three times. At the request of his attorney, the court ordered his commitment to Dorothea Dix Hospital for the purpose of "testing and evaluation to determine the defendant's mental ability to properly stand trial, plead to the indictments and defend himself." The report was that defendant "is able to plead to the Bill of Indictment and he is able to understand the charges against him." After his return to the Gaston County jail, he was involved in a disturbance creating a near riot, and on petition of the sheriff, was transferred to Central Prison. At his trial he entered a plea of not guilty. From the judgment of the court on the verdict, he appeals.

Joseph B. Roberts, III for defendant appellant.

T. Wade Bruton, Attorney General, by George A. Goodwyn, Assistant Attorney General, for the State.

MORRIS, J.

Appellant assigns as error the ruling of the court that his confession to Officer Setzer was freely and voluntarily made.

Officer Setzer testified on *voir dire* as follows: That he came on duty at 6 o'clock a.m. on 11 October 1967; that two other officers brought defendant into the police station at approximately 7 o'clock a.m.; that defendant was in custody at that time; that he talked to defendant and advised him that he had the right to remain silent,

that he had the right to have counsel, that "he had a right to the advice" and could call some of his relatives, and anything asked him could be used against him and he (defendant) didn't have to tell him anything if he didn't want to; that he didn't have to say anything without having an attorney present and if he needed an attorney, one would be obtained for him if he couldn't afford it; that defendant advised that he didn't know anything at that time about what he was talking about.

"Q. And then what happened?

"A. I further questioned Dennis . . . if I'm permitted to say this, I have known Dennis for several years and I have had occasions to talk to Dennis in the police station, and I advised Dennis if he knew anything about this, if he would tell me, I would in any way assist him or help him as a youngster."

Defendant then related to Officer Setzer the events in connection with the charges against him. Officer Setzer further testified that defendant had been at the police station about 30 minutes when he made the statements involving himself in the crime; that defendant told him that he was 14 years of age; that he had known defendant and that defendant had frequently dropped by the station to talk with the officers, as other youngsters did; that at the time he was not aware that defendant had been in Jackson Training School; that by his statement that he would assist defendant or help him in any way he could he meant "By knowing Dennis, whatever I could do to help him — any advice or anything he wanted me to assist him with."

We are not able to distinguish this case from *State v. Woodruff*, 259 N.C. 333, 130 S.E. 2d 641, where the sheriff told the defendant that "if he would help me out on this thing I would certainly appreciate it" and "if he would help us on this thing, we would certainly try to help him", and *State v. Fuqua*, 269 N.C. 223, 152 S.E. 2d 68, where the officer testified on *voir dire* as to his conversation with defendant, "Yes, sir, I told him if he wanted to talk to me then I would be able to testify that he talked to me and was cooperative." In both these cases, our Supreme Court held that these statements constituted a type of promise which aroused in the defendant some hope and were sufficient to render the confession involuntary.

In this case, we are cognizant of the fact that this defendant was not unfamiliar with police routine, that he had been in training school, had run away three times, and had been declared an incorrigible. Nevertheless, he is entitled to the same protection of careful procedures to assure the voluntariness of his confession as our Court has assured to other defendants.

In *State v. Roberts,* 12 N.C. 259, 261-262, a landmark decision in the area of free and voluntary confessions, the Court said:

> "Confessions are either voluntary or involuntary. They are called voluntary when made neither under the influence of hope or fear, but are attributable to that love of truth which predominates in the breast of every man, not operated upon by other motives more powerful with him, and which, it is said, in the perfectly good man cannot be countervailed. These confessions are the highest evidences of truth, even in cases affecting life. But it is said, and said with truth, that confessions induced by hope or extorted by fear are, of all kinds of evidence, the least to be relied on, and are therefore entirely to be rejected."

The fact that this defendant was a juvenile delinquent does not dispel the compelling conclusion that the statement of Officer Setzer aroused in defendant some hope and that this emotion of hope induced the confession. We do not think the confession can be considered as freely and voluntarily given within the meaning of our decisions. It was, therefore, inadmissible.

Statements made to Charles Huggins and to Officer Hand are likewise inadmissible. They were made within a short time after the statement to Officer Setzer.

> "Where a confession has been obtained under circumstances rendering it involuntary, any subsequent confession is presumed to proceed from the same vitiating influence, and the burden is on the State to establish the voluntary character of the subsequent confession before it can be received in evidence." *State v. Hamer,* 240 N.C. 85, 88, 81 S.E. 2d 193.

The State did not carry this burden.

Other assignments of error addressed to the failure of the court to grant defendant's motion for nonsuit and to portions of the judge's charge are not considered, because there must be a

New trial.

CAMPBELL and BRITT, JJ., concur.

SHARON E. ANDERSON BY HER NEXT FRIEND, EMERY ANDERSON, v. RAWLEIGH W. ROBINSON, D/B/A, ROBINSON BROTHERS MOTOR COMPANY AND JAMES A. JENKINS

No. 68SC167

(Filed 14 August 1968)

Negligence § 25; Torts § 3; Pleadings § 14— action in tort — rights inter se of defendants — cross-action for indemnity

Where plaintiff, seeking recovery for negligent injury from two defendants, alleges that each defendant committed an active tort and that their liability is joint and concurring, neither defendant is entitled to maintain a cross-action against the other for indemnity arising out of the breach of an express or implied warranty.

APPEAL from *McLean, J.*, 4 March 1968, Civil Non-Jury Session, Superior Court of BUNCOMBE County.

This is an appeal by the defendant Jenkins from an order entered 7 March 1968 by Judge McLean sustaining the motion of the defendant Robinson to strike the second further answer and defense and cross-action of the defendant Jenkins.

Van Winkle, Buck, Wall, Starnes and Hyde by O. E. Starnes, Jr., Attorneys for defendant Rawleigh D. Robinson, D/B/A Robinson Brothers Motor Company, appellee.

Williams, Williams & Morris by James F. Blue, III, Attorneys for defendant James A. Jenkins, appellant.

CAMPBELL, J.

The plaintiff in her complaint alleges that she is an eighteen year old girl and was riding as a guest passenger in a 1962 model Chevrolet automobile operated by the defendant Jenkins about 3:00 p.m., 19 July 1966, in a southerly direction on Dockery Road in Buncombe County. Dockery Road terminates at its intersection with Rural Paved Road No. 1003 which runs in an easterly and westerly direction. She alleges that Jenkins intended to turn left and proceed in an easterly direction on Rural Paved Road No. 1003, but due to the speed at which he was operating the Chevrolet, he was unable to make the turn and lost control of the Chevrolet, causing it to go off the highway and overturn in a field, thereby causing injuries to the plaintiff. The plaintiff alleges negligence on the part of the defendant Robinson in that, among other things, he sold said Chevrolet to Jenkins on 19 July 1966 shortly before the upset, when he knew or by the exercise of reasonable care should have known that the brakes on said Chevrolet were inadequate and defective. The plain-

tiff alleges that the defendant Jenkins was negligent in that he had failed to inspect the mechanical condition of said Chevrolet automobile and particularly the brakes thereof when he knew that same had not been inspected prior to his purchase of the vehicle and he drove same upon the highway with inadequate brakes; that he drove said automobile at a speed that was greater than was reasonable and prudent under the conditions then existing and failed to decrease the speed when approaching and attempting to negotiate a turn at an intersection; that he did not maintain a reasonable and adequate lookout and did not exercise due care to maintain reasonable and adequate control of said vehicle. The plaintiff seeks damages for personal injuries received by her as a result of the joint and concurring negligence of both defendants.

The defendant Robinson denies negligence and sets up a further defense that, if there was a brake failure, it was a sudden and unexpected mechanical failure and not due to any negligent acts or omissions by him.

The defendant Jenkins denied negligence and in a first further answer and defense pleads an unavoidable accident and an unavoidable and unexpected brake failure.

The defendant Jenkins in a second further answer and defense and by way of a cross-action against the co-defendant Robinson sets out that he had purchased the vehicle on the same day from the defendant Robinson and at the time of purchase the defendant Robinson "represented and warranted said motor vehicle, both expressly and impliedly to be free of mechanical defects and in good mechanical condition and it was upon said express and implied representations and warranties that this defendant purchased said automobile." He further sets forth that the warranties and representations made by the defendant Robinson were false and fraudulent and that the defendant knew or should have known of the defective condition of the automobile and that the accident resulted solely and exclusively from the acts and conduct of the defendant Robinson. The defendant Jenkins seeks "complete and full indemnification therefor by reason of the representations and warranties hereinabove set forth and by reason of the primary negligence" of the defendant Robinson.

The defendant Robinson on 21 September 1967 filed a motion to strike all of the second further answer and defense and cross-action of the defendant Jenkins. This motion was sustained by Judge McLean and by order of 7 March 1968 the second further answer and cross-action of the defendant Jenkins was ordered stricken.

The defendant Jenkins asserts that he has the right to maintain

a cross-action against the defendant Robinson to establish primary liability as between them.

In support of this position, the defendant Jenkins relies upon the following cases: *Guthrie v. Durham,* 168 N.C. 573, 84 S.E. 859; *Gregg v. Wilmington,* 155 N.C. 18, 70 S.E. 1070; *Davis v. Radford,* 233 N.C. 283, 63 S.E. 2d 822; *Ingram v. Insurance Co.,* 258 N.C. 632, 129 S.E. 2d 222, and the same case on its second hearing in 266 N.C. 404, 146 S.E. 2d 509.

These cases do not support the position of the defendant Jenkins.

The *Guthrie* and *Gregg* cases, both decided by a divided court and both decided before the enactment of the joint tort-feasor statute in North Carolina, fall within a well recognized exception where both parties have been at fault, but not in the same fault, towards the party injured, and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury. In both of those cases, as pointed out, the individual defendant was a positive tort-feasor and the efficient cause of the injury complained of; whereas, the other party, a municipal corporation, was liable for a negative tort of neglect after notice. This line of cases is completely distinct and separate from the type of case involved here.

The instant case does not fall within one of the exceptions to the rule; the plaintiff has alleged that each defendant here is a tort-feasor whose negligence was a positive tort.

The *Davis v. Radford* case, *supra,* was a case involving implied warranty and not tort. In the opinion, it is stated:

> "Both the plaintiff's complaint and defendant Radford's cross-complaint are bottomed upon allegations of implied warranty. It is not contended that defendants were joint tort-feasors, or that there was a joint obligation on part of defendants."

It is, thus, very clear that this case will not support the position of the defendant Jenkins.

Ingram v. Insurance Company, supra, falls within the second of the exceptions referred to in *Guthrie v. Durham, supra,* and is in that line of cases "(w)here the party claiming indemnity has not been guilty of any fault, except technically or constructively, as where an innocent master is held to respond for the tort of his servant acting within the scope of his employment * * *." This line of cases is within the line of cases where recovery from the master or principal depends on *respondeat superior* and not on active tort by the principal.

In the instant case, as pointed out above, the plaintiff is seeking recovery from both defendants as joint tort-feasors, each having committed an active tort and each being responsible equally therefor. In such case where both tort-feasors have been sued, they cannot file cross-actions against each other.

This case is clearly within the doctrine and holding of *Greene v. Laboratories, Inc.*, 254 N.C. 680, 120 S.E. 2d 82, where all of the various views are clearly set forth in a decision by a divided court with Justice Moore writing the majority opinion concurred in by Chief Justice Winborne, Justices Denny (later Chief Justice) and Higgins. The dissenting opinion was written by Justice Bobbitt and concurred in by Justices Parker (now Chief Justice), and Rodman. We can add nothing to what has been said in *Greene v. Laboratories* where the subject is covered in complete detail.

Affirmed.

BRITT and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. DONALD RAY WILLIAMS

No. 68SC77

(Filed 14 August 1968)

1. Burglary and Unlawful Breakings § 5— felonious breaking — sufficiency of evidence

There is sufficient evidence to be submitted to the jury on the issue of defendant's guilt of felonious breaking and entering with intent to commit a felony, where police officers testified that as they approached a supermarket at night they observed the defendant knocking out a large plate glass window by means of a buckled belt wrapped around his hands, that the defendant then reached inside the window where gloves were on display therein, and that a pair of gloves was subsequently found on the sidewalk outside the store.

2. Burglary and Unlawful Breakings § 7— felonious breaking — instruction on less degree of crime

In a prosecution for felonious breaking and entering, failure of the court to submit the issue of defendant's guilt of non-felonious breaking and entering is not error where the State's evidence is to the effect that defendant broke a store window and removed a pair of gloves on display and the defendant's evidence is to the effect that defendant accidentally broke the window, since, if defendant's evidence be accepted as true, he would not be guilty of any crime.

STATE *v.* WILLIAMS

APPEAL by defendant from *Armstrong, J.*, at the 13 November 1967 Criminal Term of FORSYTH Superior Court.

Defendant was tried on a bill of indictment, proper in form, charging him with the crime of feloniously breaking and entering a certain storehouse occupied by one Roy H. Minor t/a Minor's Market in Winston-Salem, N. C., "with intent to steal, take and carry away the merchandise" of the said Roy H. Minor t/a Minor's Market. He pleaded not guilty. The State offered the evidence of a police officer of the Winston-Salem Police Department, who testified that at approximately 8:15 p.m. on Friday night 3 November 1967 he, together with two other police officers, was driving in a police car on 8th Avenue approaching the intersection of Cameron Avenue, where Minor's Market is located. At the front of Minor's Market there were two large plate glass windows with a door between them. As the officers drove up, they observed the defendant and two other persons at the front of the market. The defendant had a large black leather belt wrapped around his hand, with a large buckle from the belt extending outward. He was swinging at the plate glass window with the belt and buckle, and knocked out one of the large plate glass windows. The officers observed him standing facing the store window and reaching in. Gloves were on display on a rack inside the window. The officers found a pair of gloves lying on the cement sidewalk outside of the window. The officers observed two other persons approximately eight or ten feet away from defendant, who ran when the officers approached. The officers jumped from the police car and arrested defendant. The other window at the front of Minor's Market was also broken.

The State also offered the evidence of Roy H. Minor, who testified: He was the operator of Minor's Market; he had closed the business at about 6:00 p.m. on 3 November 1967; when he returned the following morning both front windows, which were approximately six by eight feet in size, had been broken out; he kept merchandise in the store; he had gloves on display in the window and the gloves could be reached by a person standing outside the building and reaching through the broken glass. He further testified that he did not know the defendant and had never given him permission to go into the building at any time. At the close of the State's evidence the defendant moved for judgment of nonsuit, which was denied.

The defendant then took the stand and testified: On the night in question he had been to visit a friend and was walking along Cameron Avenue; when he got to the store building he observed two

boys come around the side of the building, one of whom had a large rock in his hand which he threw through the window; the other boy kicked the window; the two boys then grabbed him from behind and took $42.00 out of his pocket; the only thing defendant had to defend himself with was the big buckled belt and he was trying to defend himself against the two boys when the officers drove up. Defendant also testified that: The first time he saw the officers was when they jumped out of the car; he was swinging at the two boys when he hit the glass window with his belt buckle; and the glass did not shatter when he hit it, but was already broken. At the conclusion of all of the evidence defendant again moved for nonsuit, which motion was also denied.

The jury found the defendant guilty as charged. From judgment imposed thereon sentencing defendant to prison, defendant appeals.

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

Clyde C. Randolph for defendant appellant.

PARKER, J.

[1] The State's evidence was amply sufficient to submit to the jury the issue of defendant's guilt of the crime with which he was charged. There was direct eyewitness testimony from which the jury could find defendant guilty of all elements of the crime of breaking and entering with intent to commit a felony. There was, therefore, no error in overruling defendant's motions for nonsuit.

[2] Defendant further assigns as error that the trial court instructed the jury that they might return either of two verdicts, namely: Guilty as charged in the bill of indictment, or not guilty; and that the court failed to instruct the jury that it might return a verdict of guilty of the misdemeanor of non-felonious breaking and entering.

G.S. 15-170 provides:

> "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime."

In *State v. Jones,* 264 N.C. 134, 141 S.E. 2d 27, Justice Bobbitt, writing for the Court, stated:

> "G.S. 14-54, as amended, defines a felony and defines a misdemeanor. The unlawful breaking or entering of a building de-

scribed in this statute is an essential element of both offenses. The distinction rests solely on whether the unlawful breaking or entering is done 'with intent to commit a felony or other infamous crime therein.' Hence, the misdemeanor must be considered 'a less degree of the same crime,' an included offense, within the meaning of G.S. 15-170.

" '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.' *S. v. Hicks*, 241 N.C. 156, 159, 84 S.E. 2d 545. *Cf. S. v. Summers*, 263 N.C. 517, 139 S.E. 2d 627."

In the present case there was no evidence from which the jury could find defendant guilty of the lesser crime of non-felonious breaking and entering. He admitted striking the window glass with his belt buckle but his own testimony, if accepted as true, would not support a finding that his act in striking the window had been "wrongfully done without intent to commit a felony or other infamous crime," which would have made him guilty of a misdemeanor under G.S. 14-54 as amended. On the contrary, he testified that he struck the window glass only accidentally and while engaged in defending himself. If this testimony should be accepted as true, defendant would not have been guilty of any crime. The court properly submitted to the jury the issue of defendant's guilt or innocence of the crime with which he was charged, and there was no error in failing to submit as a possible verdict his guilt of a lesser degree of that crime.

We have carefully examined defendant's remaining assignments of error and find them to be without merit. In the entire trial we find

No error.

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

MARYLAND CASUALTY COMPANY, A CORPORATION, v. CECIL ASTON HALL

No. 68SC229

(Filed 14 August 1968)

1. Parties § 1— duty of court to bring in necessary parties

When a complete determination of a controversy cannot be made without the presence of other parties, the court must cause them to be brought in. G.S. 1-73.

2. Parties § 8— joinder of additional parties — joint tort-feasor

The right to bring in joint tort-feasors for contribution under G.S. 1-240 is the only instance where a party has a right to bring in other parties who are not necessary parties to the action.

3. Parties § 8; Insurance § 75— joinder of additional parties defendant — necessary parties

In an action by an insurance company to collect an amount paid to defendant under a policy of automobile collision insurance, which amount defendant had allegedly collected from third parties involved in the collision, the court properly denied defendant's motion to join as additional defendants the third parties who allegedly had "bound themselves to stand between this defendant and any subrogation claim made against him by plaintiff" since they were not necessary parties for a complete adjudication of the plaintiff's cause of action against the original defendant.

APPEAL from *McLean, J.*, 13 March 1968 Session, BUNCOMBE County Superior Court.

Plaintiff instituted this action 19 July 1967 setting forth that as an insurance company it had issued a policy with automobile collision coverage to the defendant; that defendant made a claim under said policy for a collision between the defendant's automobile insured by the plaintiff and a vehicle owned by Thomas E. Pulliam and Leroy Pulliam; that in said collision the defendant had sustained a claimed loss of $808.88; that pursuant to its policy, the plaintiff paid to the defendant the sum of $708.88 (being the amount of the loss less $100 deductible as provided in the policy); that at the time of making the payment to the defendant, the defendant agreed that the plaintiff would have all rights the defendant might have against any person or corporation liable for the loss sustained by the defendant, and the defendant further authorized the plaintiff "to sue, compromise or settle" in the name of the defendant; that subsequent to payment made by the plaintiff to the defendant, the defendant collected damages from Thomas E. Pulliam and Leroy Pulliam for the loss sustained by the defendant and that as a result thereof the defendant has incurred liability to the plaintiff for the $708.88 paid to the defendant by the plaintiff.

The defendant filed an answer admitting the issuance of the policy to him by the plaintiff; the filing of a proof of loss under said policy and the receipt of payment pursuant to said proof of loss. The defendant further admitted that he had collected from Leroy Pulliam and Thomas E. Pulliam, but the sum collected was to cover his claims for personal injuries, pain and suffering, loss of time, medical expenses and property damages, and that there was no apportionment between the various items and the defendant denies liability to the plaintiff. The defendant set up a further answer and a cross-action against Leroy Pulliam and Thomas E. Pulliam and asserts that at the time of the settlement of his claim with them that they "bound themselves to stand between this defendant and any subrogation claim made against him by the plaintiff herein"; that if there is any liability in favor of the plaintiff, such liability is that of Leroy Pulliam and Thomas E. Pulliam and that they are necessary and proper parties to this action, and he requested an order making them parties.

The defendant's answer was filed 20 September 1967 and at the same time the defendant made a motion to make Leroy Pulliam and Thomas E. Pulliam additional parties. The defendant caused a notice to be issued to Leroy Pulliam and Thomas E. Pulliam, together with a copy of the motion and had same served through the Department of Motor Vehicles pursuant to the provisions of the statute for service of process on nonresident motorists. The Commissioner of Motor Vehicles sent a copy of the motion and notice by registered mail to Leroy Pulliam and Thomas E. Pulliam.

The record does not show that the plaintiff was given any notice of the motion to make additional parties.

Under date of 13 March 1968, Judge McLean entered an order denying the defendant's motion to make Leroy Pulliam and Thomas E. Pulliam parties defendant.

The defendant appeals from the order of Judge McLean denying the motion to make additional parties.

Lee & Allen by H. Kenneth Lee, Attorneys for defendant appellant.

No Counsel, Contra.

CAMPBELL, J.

[1] Our statute, G.S. 1-73, makes it mandatory "when a complete determination of the controversy cannot be made without the presence of other parties, the court must cause them to be brought in."

They are necessary parties. *Garrett v. Rose,* 236 N.C. 299, 72 S.E. 2d 843.

[2] In a single instance, our statute gives a party the right to bring in others, not necessary parties, *i.e.,* the right to bring in joint tort-feasors for contribution. G.S. 1-240.

[3] The question, therefore, presented is whether the Pulliams are necessary parties. If they are necessary parties, then it was error to deny the motion making them parties. On the other hand, if they are not necessary parties and only proper parties, it would not be error to deny the motion.

As stated in *Overton v. Tarkington,* 249 N.C. 340, 106 S.E. 2d 717, "(w)hen not regulated by statute the procedural processes which will best promote the administration of justice are left to the judicial discretion of the trial judge. He has plenary power with respect to those who ought to be made parties to facilitate the administration of justice."

As stated in *Manning v. Hart,* 255 N.C. 368, 121 S.E. 2d 721,

> "A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party. * * *
>
> Certainly no additional parties are necessary for a complete adjudication and determination of the plaintiff's cause of action alleged against the defendant Hart.
>
> Several parties may have a cause of action which arises out of the same motor vehicle collision, but that does not mean necessarily that all of them are required to litigate their respective rights or causes of action in one and the same action."

[3] In the instant case, the Pulliams are not necessary parties for a complete adjudication and determination of the plaintiff's cause of action alleged against the defendant Hall. Since the making of additional parties, when they are not "necessary parties", is a discretionary matter with the trial court and no abuse of discretion has been alleged or shown, we find no error in the order of Judge McLean.

No error.

BRITT and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIAM THEODORE WITHERS
No. 68SC147

(Filed 14 August 1968)

1. **Criminal Law § 91— continuance — review of court's discretion**

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 had been deprived of a fair trial.

2. **Criminal Law § 91— denial of continuance — review of discretion**

Defendant moved for continuance on the ground that the solicitor's action in arraigning him in the presence of the prospective jurors on six separate criminal cases and then electing to try him on only four of the cases resulted in impugning his character in the eyes of the jury. The trial court denied the motion, and on appeal defendant contends that the denial amounted to an abuse of discretion and deprived him of a fair trial. HELD: The defendant was not prejudiced by the court's action, since (1) all six of the criminal cases against him arose out of the same connected series of events, the jury thus hearing all of the evidence in any event, and since (2) the defendant testified in his own behalf and admitted on cross-examination he had been previously convicted for a number of much more serious offenses than the two non-felonious charges which were dropped by the solicitor.

3. **Rape § 18— assault on female with intent to commit rape — instruction — failure to define "carnal knowledge"**

In a prosecution for assault on a female with intent to commit rape, there is no error in the failure of the trial judge, absent a special request, to define the words "carnal knowledge."

4. **Criminal Law § 113— instructions — necessity to define words "carnal knowledge"**

Jurors are drawn from the body of the people and are presumed to understand the meaning of English words as they are ordinarily used, and in the absence of a special request, the court is not required to define the words "carnal knowledge."

APPEAL by defendant from *Beal, S.J.*, 29 January 1968 Schedule "D" Criminal Session of MECKLENBURG Superior Court.

Defendant was arraigned on six separate criminal cases charging him with separate offenses all of which arose out of the same series of events. In open court and in the presence of the prospective jurors, defendant entered pleas of not guilty to each offense. Following the noon recess and in the absence of the prospective jurors, the solicitor announced he would elect not to place defendant on trial in two of the cases but would try him on the remaining four. Defendant objected and moved for a continuance. The motion was denied. The jury was then selected and impaneled, and after hearing evidence

for the State and the defendant, found defendant guilty in three of the cases. Judgment of nonsuit was entered in the fourth case. From judgment imposing prison sentences on defendant in the three cases in which he had been found guilty, defendant appeals.

T. W. Bruton, Attorney General, Andrew A. Vanore, Jr., Staff Attorney, for the State.

Nivens and Brown, by Calvin L. Brown, for the defendant appellant.

PARKER, J.

[1, 2] Defendant's principal assignment of error is directed to the trial court's action in denying his motion for a continuance. "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." *State v. Ipock,* 242 N.C. 119, 86 S.E. 2d 798; *State v. Birchfield,* 235 N.C. 410, 70 S.E. 2d 5. Defendant's motion for continuance was on the grounds that the solicitor's action in arraigning him in the presence of the prospective jurors on six separate criminal cases and then electing to try him on only four of the cases, resulted in impugning his character in the eyes of the jury even before trial of the cases against him actually commenced. He contends that under these circumstances the denial by the trial judge of his motion for continuance amounted to an abuse of discretion and resulted in depriving him of a fair trial. We do not agree. The defendant was in no way prejudiced by the court's refusal to grant him a continuance. All six of the criminal cases against him arose out of the same connected series of events, plenary evidence of which was properly presented to the jury in the trial of the four cases on which the solicitor elected to try him. The jury heard all of the same evidence in any event. Furthermore, in this case the defendant took the stand in his own defense, and on cross-examination admitted he had been previously convicted for a number of much more serious offenses than the two nonfelonious charges presented to the prospective jurors at the time defendant was arraigned and which were later dropped from this particular trial. For example, defendant admitted that he had been convicted of armed robbery, larceny, assault on a female, temporary larceny of an automobile, carrying a concealed weapon, and three cases of assault with a deadly weapon with intent to kill. In view of these admissions, defendant could hardly have been prejudiced in the eyes of the jurors by having been arraigned and having pleaded

not guilty to the two less serious offenses for which the solicitor elected not to try him at the time. There was no error in refusing his motion for continuance.

[3, 4] One of the cases on which defendant was tried and convicted arose on a bill of indictment charging him with the crime of assault on a female with intent to commit rape. The court, in charging the jury in this case, on several occasions used the words "carnal knowledge." Defendant assigns as error that the court failed to define adequately these words. Examination of the entire charge reveals that the judge fully declared and explained the law arising on the evidence given in the case, and the jury was given a completely adequate explanation of all elements of the offense for which defendant was being tried. Jurors are drawn from the body of the people and are presumed to understand the meaning of English words as they are ordinarily used. In this case defendant made no special request that the trial court define the words "carnal knowledge" for the jury. The North Carolina Supreme Court dealt with a similar problem in the case of *State v. Davenport,* 225 N.C. 13, 33 S.E. 2d 136, in which the Court held that it was not error for the trial judge, absent a special request, to define the words "lewdly and lasciviously cohabit" in his charge to the jury. In that case, Seawell, J., speaking for the Court said:

> "Not infrequently, especially in respect to the statute law, the language used is so simple, comprehensive and self-definitive that the trial court could find no words more appropriate than those used in the statute in which to couch an explanation. The Court finds itself compelled, after searching through synonyms and substitute phrases, to return to the well considered words of the law as containing the more enlightening expression. . . . What situations demand an explanation of the law through proper instruction to the jury without special prayer, and what explanations may be regarded as matters of subordinate elaboration, must be referred to the history of the subject as developed in our Reports, rather than to any fixed rule. New situations must be dealt with as they arise. We can only say here that the statute itself employs simple and understandable terms which directly define the offense, and we think the instruction was comprehensible. If the explanation given by the Court in these simple terms was not thought to be sufficient, it became the privilege of defense counsel to ask for further instructions."

Other instances in which the Supreme Court has held it was not

error for the trial judge, absent a special request, to define words or phrases for the jury, may be found in: *State v. Holland,* 216 N.C. 610, 6 S.E. 2d 217 (the words "feloniously" and "willfully" as used in an indictment for murder, where the court had otherwise fully charged the jury on the law of murder); *State v. Webster,* 218 N.C. 692, 12 S.E. 2d 272 (the words "gambling" and "gambling device"); *State v. Jones,* 227 N.C. 402, 42 S.E. 2d 465 (the word "attempt" in an indictment for an attempt to commit a highway robbery); *State v. Plemmons,* 230 N.C. 56, 52 S.E. 2d 10 (the words "with intent to kill," the court saying: "There is no point in elaborating the obvious."); *State v. McNeely,* 244 N.C. 737, 94 S.E. 2d 853 (the words "attempt to commit robbery"). The trial court's charge considered as a whole was clear, complete, and comprehensive, and there was no error in failing to elaborate a definition of the words "carnal knowledge," absent any special request from defendant's counsel to do so.

Defendant's remaining assignment of error has been carefully considered and is found to be without merit.

In the entire trial we find

No error.

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

STATE OF NORTH CAROLINA v. TOMMY FULLER

No. 68SC208

(Filed 14 August 1968)

1. Criminal Law § 43— authentication of photographs

The accuracy of a photograph as a true representation of the scene, object or person it purports to portray may be established by any witness who is familiar with such scene, object, or person, or who is competent to speak from personal observation, it not being necessary to prove the accuracy of a photograph by the photographer who took the picture.

2. Criminal Law § 43— authentication of illustrative photographs

In a prosecution for second degree murder, the court properly admitted a photograph of the head of the deceased as it appeared at the autopsy to illustrate the testimony of the coroner who testified as to the cause of death where the coroner identified the photograph as a picture of the skull of the deceased.

3. Witnesses § 1— objection to competency of a witness

Objection to the competency of a witness must be made in the trial court by a motion for the judge to pass upon the competency.

4. Witnesses § 1— competency of a witness — discretion of trial court — review on appeal

The question of the competency of a witness rests in the discretion of the trial judge, and his decision is not reviewable except for a clear abuse of discretion or where his ruling is based on an erroneous conception of the law.

5. Witnesses § 1— competency of a witness — discretion of trial court — abuse of discretion

In a prosecution for second degree murder, no abuse of discretion is shown by the trial court's refusal to disqualify a witness who defendant contended was an alcoholic and under heavy medication where the record shows that the witness testified in a clear, consistent and rational manner, the trial court having heard the testimony and observed the demeanor of the witness.

6. Criminal Law § 122— instructions after jury has failed to reach a verdict

In a prosecution for second degree murder, it is not error for the court, after the jury had deliberated for two hours and had informed the court that they were unable to reach a verdict, to urge the jury to agree upon a verdict where the court also cautioned the jurors that it was their duty to reach a verdict only if they could do so without doing violence to their conscience.

APPEAL by defendant from *Bailey, J.*, 5 December 1967 Regular Criminal Session of DURHAM Superior Court.

Defendant was indicted for first-degree murder of one Robert Jenkins. Upon call of the case for trial the solicitor announced he would not try the defendant for first-degree murder but for second-degree murder, to which charge defendant pleaded not guilty. The principal witness for the State was one Margaret Campbell, who testified that on the afternoon and night of 2 April 1966 she was visiting the deceased, Robert Jenkins, in his hotel room where they consumed a quantity of wine. Later in the evening the defendant, Tommy Fuller, came into the room and he and Jenkins walked into the hall and started arguing. About midnight Jenkins came back into the room, and was standing looking out the window when defendant came into the room, picked up a baseball bat, stepped up and hit Jenkins on the back of the head. Jenkins fell, the defendant picked him up and threw him on the bed, but he rolled to the other side of the bed and onto the floor, and never moved again.

The Coroner testified that on 3 April 1966 he examined the body of Robert Jenkins; that Jenkins had a large lacerated wound across

the top of the right side of his head; that this wound was deep enough to go down into the brain, the skull was shattered and portions of the brain were protruding; and that in his opinion the wound caused Jenkins' death.

The jury returned a verdict of guilty of second-degree murder. From judgment of imprisonment thereon, defendant appeals.

T. W. Bruton, Attorney General, Ralph Moody, Deputy Attorney General, and Andrew A. Vanore, Staff Attorney, for the State.

W. G. Pearson, II, and C. E. Johnson, for defendant appellant.

PARKER, J.

[1, 2] Defendant's first assignment of error is directed to the action of the trial court in allowing into evidence, for purpose of illustration, a photograph of the head of the deceased as it appeared at the autopsy. The purpose of this photograph was to illustrate the testimony of the Coroner who testified as to the cause of death. At the time the photograph was introduced into evidence the court carefully instructed the jury that it was admitted in evidence solely to illustrate the testimony of the witness and for no other purpose. Defendant's contention that the State did not properly authenticate the photograph prior to its introduction is not supported by the record, since the record clearly discloses that prior to the introduction of the photograph the Coroner, who was testifying, identified the photograph as a picture of the skull of the deceased. It is not necessary to prove the accuracy of a photograph by the photographer who took the picture; the accuracy of a photograph as a true representation of the scene, object or person it purports to portray may be established by any witness who is familiar with such scene, object, or person, or who is competent to speak from personal observation. *State v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824; Stansbury, N.C. Evidence 2d, § 34. The photograph was properly admitted into evidence for purpose of illustrating the testimony of the Coroner.

Defendant's second assignment of error is directed to the court's refusal to disqualify the witness, Margaret Campbell. Defendant contends that this witness should have been ruled incompetent to testify on the grounds that she was an alcoholic and was under heavy medication at the time she testified.

[3, 4] "Objection to the competency of a witness must be made in the trial court by a motion for the judge to pass upon the competency. The question must be left 'mainly, if not entirely,' to the discretion of the trial judge, and his decision is not reviewable ex-

cept, perhaps, for a clear abuse of discretion, or where the ruling is based on an erroneous conception of the law." Stansbury, N. C. Evidence 2d, § 55.

[5] The record before us indicates that the witness Campbell testified in a clear, consistent, and rational manner. The trial judge heard her testimony, observed her demeanor in the courtroom and on the witness stand, and ruled that she was competent to testify as a witness. The question of her competency was within the sound discretion of the trial judge, and we find no error in the manner in which he exercised that discretion.

[6] The defendant's last assignment of error is directed to the instruction given by the court to the jury, when the jury had returned to the courtroom after deliberating on its verdict for approximately two hours and had informed the court they were unable to arrive at a verdict. Upon inquiry by the court, the jury revealed they were divided ten to two and that they were divided between second-degree murder and manslaughter. The court thereupon instructed the jury as follows:

> "COURT: All right, gentlemen of the jury, it is your duty to reach a decision if you can do so without doing violence to your conscience. This case is an important one both to the State and to the defendant. Some jury has to pass upon it. It is your duty to consider the evidence and not to decline to agree with other on account of stubbornness, to decline to agree if one can do so without doing violence to his conscience is not necessarily a mark of great intelligence or high citizenship; it is your duty to agree if you can reason with each other as intelligent men and reconcile your differences. The court, however, is not attempting to force you to agree. If you can in good conscience, without doing violence to your own conscience, compromise your differences, reconcile them, it is your duty to do so but only if you can do that without compromising your own conscience. I remind you that some jury somewhere, some time will have to pass upon this case. It is not likely that we will find any better jury than we have now. I will let you resume your deliberations for the time being."

In the foregoing the court repeated four times the clear instruction to the jurors that it was their duty to reach a verdict only if they could do so without doing violence to their conscience. This instruction was in the form which has been many times approved by the North Carolina Supreme Court; see opinion by Parker, C.J.,

in *State v. McKissick,* 268 N.C. 411, 150 S.E. 2d 767, in which the North Carolina cases on this subject are cited and analyzed.

In the entire trial we find

No error.

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

LOUISA M. TORRES, PLAINTIFF, v. AETNA CASUALTY & SURETY COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND SECURITY GENERAL INSURANCE COMPANY, DEFENDANTS

No. 68SC220

(Filed 14 August 1968)

1. Pleadings § 3; Parties § 3— joinder of causes and defendants — G.S. 1-69

In an action by plaintiff against three insurance companies to recover upon a judgment obtained against the negligent driver in a prior action for damages arising out of an automobile accident, plaintiff alleged (1) that the driver of the automobile was insured under a policy issued by one of the defendants, (2) that the father of the driver was insured by a co-defendant under a family automobile policy which afforded protection to his 16 year old unemancipated son, and (3) that plaintiff herself was insured at the time of the collision under a policy issued by the third defendant to her husband; plaintiff further alleged that under one of the three policies she is entitled to recover the amount of the judgment but that she is in doubt as to the correct one. *Held:* Joinder of the causes of action against the three insurers is permissible under G.S. 1-69, and a demurrer by one insurer for misjoinder of parties and causes of action was properly overruled.

2. Insurance § 106— automobile liability insurance — action against insurer by person injured — pleadings

In an action by plaintiff against automobile liability insurer to recover upon a judgment obtained against the negligent driver in a prior action, an allegation that the policy issued by the defendant afforded liability insurance protection to the driver under the provisions of the policy and by statute, *is held* sufficient to withstand demurrer.

APPEAL from *McLean, J.,* at the 11 March 1968 Session, BUNCOMBE County Superior Court.

This case is a supplement to and arises out of the case of *Torres v. Smith,* 269 N.C. 546, 153 S.E. 2d 129. In that case the background

facts of the automobile collision are set out. In brief, the plaintiff in a previous action obtained a judgment against Michael Zeb Smith who was the driver of a Ford automobile belonging to Elizabeth A. Lowry. As a result of the decision of the Supreme Court in *Torres v. Smith, supra,* the plaintiff has a judgment for $2,000 against Smith, and Lowry was eliminated.

In the present action, the plaintiff alleges that at the time of the automobile collision in question Lowry had a valid automobile liability insurance policy, conforming with the statutory requirements of the North Carolina Motor Vehicles Laws, issued by Aetna; that this policy provided coverage for Smith and that pursuant thereto Aetna is responsible and should pay the plaintiff the amount of the judgment. Plaintiff in this action further alleges that Security, at the time of the collision in question, had issued a policy to the father of Smith; that this was a family auto policy and afforded liability insurance protection to Smith who was an unemancipated 16 year old dependent son of the father and living in the father's household. Plaintiff further alleges that, at the time of the automobile collision in question, State Farm had issued an automobile liability policy to the husband of the plaintiff, and under the terms of said policy, the plaintiff was an insured person; that the State Farm policy complied with the Motor Vehicle Safety and Financial Responsibility Act of the State of North Carolina and afforded protection to the plaintiff against uninsured motorists because of bodily injury. The plaintiff further alleges that under the terms and provisions of one of the three insurance policies issued by the respective defendants she is entitled to recover the amount of the judgment which she has obtained against Smith but that she is in doubt as to the correct one.

Aetna filed an answer denying any liability to the plaintiff. State Farm filed an answer denying liability to the plaintiff on the ground that Smith was not an uninsured motorist but was protected and covered by the policy of either Aetna or Security. Security filed a demurrer for misjoinder of parties and causes of action and for failure of the complaint to state a cause of action against Security.

Judge McLean entered an order 11 March 1968 overruling the demurrer and allowing Security time within which to file an answer. It is from this order that the defendant Security appealed to this Court.

Loftin & Loftin by E. L. Loftin, Attorneys for plaintiff appellee.

Uzzell and Dumont by Harry Dumont, Attorneys for Security General Insurance Company, defendant appellant.

CAMPBELL, J.

[1] G.S. 1-69 provides:

> *"Who may be defendants.* — All persons may be made defendants, jointly, severally, or in the alternative, who have, or claim, an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the questions involved. In an action to recover the possession of real estate, the landlord and tenant may be joined as defendants. Any person claiming title or right of possession to real estate may be made a party plaintiff or defendant, as the case requires, in such action. If the plaintiff is in doubt as to the persons from whom he is entitled to redress, he may join two or more defendants, to determine which is liable."

This statute was construed in *Conger v. Insurance Co.*, 260 N.C. 112, 131 S.E. 2d 889, and as stated in that case:

> "The trial of this action will unfold one connected story. It may have one chapter or it may have two, but there is no logical reason why it should take two law suits to tell it. The whole matter can be completely and finally determined, with all parties before the Court at one time, in one action without embarrassing or prejudicing the rights of either defendant. On the trial plaintiff may be unable to sustain either of the causes she has alleged or, the evidence may require the submission of both causes to the jury under proper instructions The alternative causes are not separate and distinct; they are so interwoven that if one defendant is liable the other is not. Of course, neither may be liable. It seems to us that this complaint, though it contains alternative factual allegations, discloses one of the situations for which G.S. 1-69 was passed sixty-three years after G.S. 1-123."

We think *Conger v. Insurance Co., supra,* is controlling in this case.

[2] With regard to the second ground of demurrer, namely, that the complaint does not state facts sufficient to constitute a cause of action against Security, we are of the opinion that the allegation in the complaint, "(t)hat the policy issued by the defendant, Security General Insurance Company, afforded liability insurance protection to Michael Zeb Smith under the provisions of said policy and by statute", is sufficient to withstand the demurrer.

Affirmed.

BRITT and MORRIS, JJ., concur.

IN THE MATTER OF THE CUSTODY OF JERRY EDWARD PITTS, JR., MICHAEL TODD PITTS, AND RODNEY CRAIG PITTS, MINORS

No. 68SC174

(Filed 14 August 1968)

1. Parent and Child § 6; Habeas Corpus § 3— custody of minor child — "welfare of the child" rule

G.S. 50-13.2(a), which became effective 1 October 1967, provides that an order for custody of a minor child "shall award the custody of such child to such person, agency, organization or institution as will, in the opinion of the judge, best promote the interest and welfare of the child"; this statutory directive merely codifies the rule that in custody cases the welfare of the child is the polar star by which the court's decision must ever be guided.

2. Habeas Corpus § 3— custody of minor child — review of court's decision

The decision to award custody of a minor is vested in the discretion of the trial judge who has the opportunity to see the parties in person and to hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion.

3. Habeas Corpus § 3— custody of minor child — sufficient evidence to support award to mother

In a habeas corpus proceeding to determine the custody of minor children, the trial court did not abuse its discretion in awarding custody of the children to the mother, notwithstanding there was evidence to support the husband's charge that his wife had engaged in an illicit affair with another man, since there was sufficient evidence to fully support the court's finding that the mother was a fit and proper person to have custody of the children.

APPEAL by petitioner from *Bailey, J.*, 29 January 1968 Civil Session of ALAMANCE Superior Court.

This action was instituted by Jerry Edward Pitts, Sr., as petitioner, against his estranged wife, Nancy Louise Pitts, by application for Writ of *Habeas Corpus* to determine the custody of their three minor children who were aged two, four, and nine years respectively. At the hearing both petitioner and respondent were present in person and represented by counsel and both presented testimony of a number of witnesses and evidence in the form of affidavits and exhibits. Upon completion of the hearing the court entered an order making extensive findings of fact and concluded that both the petitioner father and the respondent mother were fit and proper persons to have custody of their three minor children. In this order the court also concluded:

"5. That it is in the best interest of each of the minor children, born of the marriage of the parties hereto, that his cus-

tody be placed in his mother, the respondent, Nancy Louise Pitts, and that such action will be conducive to the full development of his physical, mental and moral faculty.

"6. That it is in the best interest of the said children that their father, the petitioner herein, be allowed to visit with them and have them visit with him and to be in his custody from time to time."

Based on these findings of fact and conclusions the court ordered that the custody of the three children be placed in the mother, but that the father should have the right to have the children in his custody on the first and third weekends of each calendar month and for a period of six weeks following the close of the school year. From the entry of this order, petitioner appeals.

Ross, Wood & Dodge, by Harold T. Dodge, for petitioner appellant.

Latham, Pickard & Ennis, by M. Glenn Pickard, for respondent appellee.

PARKER, J.

[1, 2] Appellant assigns as error the trial court's finding that respondent is a fit and proper person to have custody of her three minor children and the order based thereon granting her primary custody and control. The petition in this case was filed 24 October 1967 and is controlled by Chapter 1153 of the 1967 Session Laws which became effective 1 October 1967. That statute provides that an order for custody of a minor child "shall award the custody of such child to such person, agency, organization or institution as will, in the opinion of the judge, best promote the interest and welfare of the child." G.S. 50-13.2(a). This statutory directive merely codified the rule which had been many times announced by the North Carolina Supreme Court to the effect that in custody cases the welfare of the child is the polar star by which the court's decision must ever be guided. *Wilson v. Wilson,* 269 N.C. 676, 153 S.E. 2d 349, and cases cited; 3 Lee, N. C. Family Law, 3rd, § 224. While this guiding principle is clear, decision in particular cases is often difficult and necessarily a wide discretion is vested in the trial judge. He has the opportunity to see the parties in person and to hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion. Appellant's counsel recognizes this in his brief when he states that the question before the Court on this appeal is "simply whether the trial court abused its

discretion" in applying the long established formula that the court's primary concern must be to further the best interest and welfare of the child.

[3] In the present case a preliminary order had been entered requesting the Chief Family Counselor for the District Court of Cumberland County, where the parties had resided prior to their separation and where respondent continued to reside, to make an investigation of the family life of the parties and their three children. The report of this investigation was presented to the court at the hearing and in addition the Chief Family Counselor and his assistant, who together had made the requested investigation, appeared in person and testified. Their report and testimony would fully support the court's finding that the respondent mother was a fit and proper person to have custody of her children. Appellant points to the evidence presented by him tending to support his charge that his wife had engaged in an illicit affair with another man, contending that this evidence would compel a finding that she was not a fit person to have custody of her small children. It was, however, the function of the trial court to evaluate this evidence together with all other evidence in the case. In our opinion, and we so hold, the evidence to which appellant points would not compel the trial court to conclude that respondent was unfit to have custody of her own children, particularly in the light of the very substantial evidence before the court to the effect that in her relationship with her children she had been and continued to be a good mother. In the record before us we find no abuse of the trial court's discretion, and in the order appealed from we find

No error.

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

MARION N. BRITTON AND WIFE, ODESSA R. BRITTON, v. ZETTA K. GABRIEL

No. 68SC87

(Filed 14 August 1968)

1. Reference § 3— *compulsory reference*

Trial court did not abuse its discretion in refusing to order a compulsory reference under G.S. 1-189(1) since the record disclosed that there was very slight difference between the contentions of the parties

as to what had been paid pursuant to a contract to build a house, and the defendant having failed to show in what way he was prejudiced by the court's ruling.

2. **Contracts §§ 4, 18— modification of contract — new consideration**
There must be some new consideration for the modification of an executed contract.

3. **Seals— equity may inquire into consideration of contract under seal**
A court of equity can look behind the seal to see if there is valuable consideration to support a contract.

4. **Contracts § 18— modification — new consideration — jury issue**
Trial court did not err in submitting to the jury the issue of whether there was any consideration for an agreement which modified an executed contract to build a house by increasing the purchase price thereof.

APPEAL by defendant from *Johnston, J.*, 6 November 1967 Session, FORSYTH Superior Court.

Plaintiffs and defendant entered into a contract dated 29 December 1952, whereby defendant agreed to build for the plaintiffs a house for the sum of $4,000.00. A down payment of $546.69 was acknowledged in the contract. The balance of the $4,000.00 was to be paid at the rate of $35.00 monthly to cover interest and principal, and to begin upon completion of construction. In addition, plaintiffs were to pay annual taxes and insurance. The contract further provided that in the event of a default all payments would be credited as rent.

On 28 April 1953 the house had been completed and plaintiffs and defendant signed an agreement upon the margin of the original contract agreeing that the total price would be $4,476.08 less the down payment, instead of the $4,000.00 less the down payment as originally agreed. The plaintiffs immediately moved into the house.

On 30 December 1966, plaintiffs instituted this action alleging they had made all payments required under the original contract, except taxes which defendant had been unable to determine for them because the property was listed with other of defendant's property. The plaintiffs seek by this action to obtain specific performance by the defendant of the contract to convey, and seek to have $793.15 in overpayments on the contract credited to any taxes due.

The defendant by her answer alleges that plaintiffs are bound by the contract as amended on 28 April 1953; that they have not made all of the monthly payments of $35.00; that they have not paid insurance and taxes; and that the payments made have been

credited to rent. Defendant seeks possession of the premises from plaintiffs, and other monetary relief.

The jury resolved all issues in favor of the plaintiffs, including recovery of $132.10 in overpayment on the contract.

From the verdict and judgment requiring defendant to convey the property to the plaintiffs, and ordering payment by defendant of $132.10 and costs, the defendant appeals.

Booker and Sapp, by Robert H. Sapp for plaintiff appellees.

Deal, Hutchins and Minor, by Fred S. Hutchins, for defendant appellant.

BROCK, J.

The defendant brings forward seven assignments of error. The first, third, fifth, sixth and seventh all relate to the refusal of the Court to set aside the verdict and grant a new trial. These assignments of error will not be discussed because they will be disposed of by disposition of the remaining assignments of error.

[1] The defendant's second assignment of error is to the refusal of the Court to order a compulsory reference. The only grounds that might have existed under G.S. 1-189 for the Court to order a compulsory reference would be that provided under Section 1 relating to the examination of a long account on either side. The record discloses that there is a very slight difference between the contentions of the parties as to what had been paid, and the defendant has failed to show in what way the failure to order a compulsory reference has been prejudicial to the defendant. No abuse of discretion on the part of the judge is disclosed.

[2-4] Defendant's assignment of error number four is broken into several subsections. These subsections primarily relate to the action of the Court in submitting to the jury the question of whether there was any consideration for the "marginal" amendment in 1953 to the original 1952 contract. There is considerable argument by counsel on each side as to whether or not the amendment is under seal; and there is exception by the defendant to the judge ruling that the amendment was not under seal. In our view, it makes no difference whether the amendment is under seal or not. There must be some new consideration for the modification of an executed contract. 17 Am. Jur. 2d, Contracts, Sec. 469, p. 939. The contract in this case insofar as the construction was concerned, was fully executed at the time of the amendment. A court of equity can look behind the seal

to see if there is valuable consideration to support the contract. *Cruthis v. Steele,* 259 N.C. 701, 131 S.E. 2d 344. Therefore, whether the alleged amendment was under seal or not, it was appropriate for the Court to inquire whether it was supported by a valuable consideration. This issue was submitted to and answered by the jury against the defendant.

The other subsections to defendant's assignment of error number four are difficult to relate to the record because the defendant has given us no assistance along this line. Although there may be technical error in the instructions given by the trial judge, the defendant has failed to point out any prejudice resulting therefrom. Therefore defendant's assignment of error number four is overruled.

In the trial we find no prejudicial error.

Affirmed.

MALLARD, C.J., and PARKER, J., concur.

FRED D. HODGE v. GENO ROBERTSON, ALLEN WILLIS, BUSTER HINTON, J. H. BRYANT, CHARLIE ROBERTSON, JOE ROBERTSON T/A RAINBOW CAB COMPANY

No. 68IC86

(Filed 14 August 1968)

1. Master and Servant § 85— Industrial Commission — nature of jurisdiction

The Industrial Commission, while primarily an administrative agency of the State, is constituted a special or limited tribunal to hear and determine matters in dispute between employer and employee in a claim for compensation under the Workmen's Compensation Act; its procedure conforms as near as may be to the procedure in courts generally.

2. Master and Servant § 93— proceedings before the Commission — application for taking of witness' deposition

There is no abuse of discretion by the Industrial Commission in denying a claimant's application for the taking of a deposition pursuant to G.S. 97-80 of an out-of-state witness' testimony, the application having been made, not prior to the trial, but after two hearings had already been held, at both of which evidence was taken.

APPEAL by defendants from order and award of the North Carolina Industrial Commission filed 9 November 1967.

Claimant was an employee of Rainbow Cab Company. On 7 December 1965, he filed his claim for compensation for injuries received in an automobile collision while on duty. A hearing was conducted on 28 February 1967, and evidence was offered by claimant and defendants. The case was continued to allow the parties to obtain the presence of witnesses who did not respond to subpœna, and a second hearing was had on 12 April 1967. At that hearing, after evidence had been taken and defendant had again cross-examined plaintiff, defendants informed the Commission that the subpœna for the passenger in the cab at the time of the accident had been returned "not to be found" and that defendants still wished to examine that witness. On 3 May 1967, defendants filed a written application to take the deposition of Mary Virginia Davis, alleging that her whereabouts had just been determined and that she was residing in New York. Defendants further alleged that the testimony of the witness was important to the defense and asked that the case remain open for that purpose and also that defendants might again cross-examine claimant with respect to a statement allegedly made by him which had just come to defendants' knowledge. Plaintiff filed written reply objecting to the taking of the deposition and further cross-examination.

On 29 May 1967, the Industrial Commission entered an order denying the request to take further testimony in the State of New York. The order concluded "The Commission will file an opinion and award based on the evidence in the record within the next few days, and then either side has a right to appeal if they are not satisfied with the award." No exception was taken to the entry of the order. On 2 August 1967, order was entered finding that plaintiff sustained an injury by accident arising out of and in the course of his employment. Defendants appealed to the Full Commission excepting to the findings of fact and contending that the hearing commissioner committed error in failing to grant defendants' application to take the deposition of the passenger. At the hearing before the Full Commission, defendants again moved that the matter be remanded to the hearing docket and they be allowed to take the deposition of the witness living in New York, allegedly a passenger. On 9 November 1967, the Full Commission entered an order denying the motion to take a deposition and making an award of compensation to plaintiff.

Samuel S. Mitchell for defendant appellants.

I. Weisner Farmer for plaintiff appellee.

MORRIS, J.

The record in this case contains no grouping of exceptions and assignments of error. Appellants list five "Points on Appeal". While this is clearly not in compliance with Rule 19(c) nor G.S. 1-282, we have, nevertheless, considered the one question brought forward by appellants in their brief. They contend that it was error for the Commission not to allow the taking of the deposition requested and that their failure to appeal from the order denying their application does not prevent their raising the question on appeal.

[1] We find no merit in appellants' contention. The Industrial Commission, while primarily an administrative agency of the State, is constituted a special or limited tribunal to hear and determine matters in dispute between employer and employee in a claim for compensation under the Workmen's Compensation Act.

> "The procedure upon the consideration and determination of a matter within the jurisdiction of the Industrial Commission, agreeable to the provisions of the act and the rules and regulations promulgated by the Commission, conforms as near as may be to the procedure in courts generally." *Hanks v. Utilities Co.*, 210 N.C. 312, 186 S.E. 252.

[2] G.S. 97-80 provides that any party to a proceeding under the Act may take the deposition of a witness within or without the State, upon application to the Commission, which deposition shall set forth the materiality of the evidence to be given. They are to be taken "after giving the notice and in the manner prescribed by law for depositions in actions at law" except they are to be directed to the commissioner or deputy commissioner instead of the clerk.

Here, the application for the taking of a deposition was not prior to trial. Two hearings had already been held, at both of which evidence was taken. There was no dispute as to whether there was a passenger in the cab at the time of the accident nor was there any question but that she left the scene. Whether to grant another continuance to allow defendants to take her deposition and to cross-examine the plaintiff for the third time we think was a decision resting in the sound discretion of the commissioner, and we so hold. We find no abuse of discretion.

No error.

CAMPBELL and BRITT, JJ., concur.

BARBARA H. WILLIS v. ABRAM L. WILLIS
No. 68DC192

(Filed 14 August 1968)

Divorce and Alimony § 23; Contempt of Court § 6— wilful failure to comply with support order — sufficiency of findings

A finding that defendant possessed the means to comply with an order for payment of child support during the time of his alleged delinquency is necessary to support the court's conclusion that the failure to make the payments was deliberate and wilful, and in the absence of such finding the decree committing him to prison for contempt must be set aside.

APPEAL by defendant from *Lee, J.*, 8 February 1968 Session, District Court, DURHAM County.

This matter was heard upon a motion filed in the cause by plaintiff and an order to show cause issued 24 November 1967 why defendant should not be held in contempt of court for failure to comply with an order of the Durham County Civil Court dated 23 December 1965 providing support in the amount of $70.00 per month for his infant daughter. The record discloses that the matter was set for hearing 8 December 1967 and was continued, at defendant's request, five times. Two of the continuances were requested due to inclement weather. When the matter was heard on 8 February 1968, defendant did not appear but was represented by counsel. From the verified pleadings, affidavits and evidence presented by plaintiff and defendant, the court found facts and based thereon, adjudged defendant in contempt of court and ordered him to pay to plaintiff $420.00, the amount in arrears, by 29 February 1968; otherwise, to be taken into custody and placed in jail until such time as he had purged himself of his contempt. From the order, defendant appealed.

Gus Davis for defendant appellant.

Hofler, Mount & White by Richard M. Hutson, II for plaintiff appellee.

MORRIS, J.

The court found as facts that defendant is a single, thirty-two year old man experienced in and trained as a paint foreman; that he has proven his ability to earn in excess of $90.00 per week in his trade as established by his former employers; that he has no dependents other than his minor daughter, lives with his father who is in the retail seafood business at Salter Path, N. C.; that defendant is not seeking employment but is apparently assisting his father in his business for which he is paid an undisclosed amount; that de-

fendant apparently has an interest in a 73 foot oil screw named "Delores", owned by his father, as evidence disclosed he is personally responsible for part of its financing; that defendant is the owner of and in possession of a 1966 Ford automobile upon which installment payments are $91.31 per month.

Upon these facts the court further found that defendant had willfully failed to comply with the terms of the 23 December 1965 order and "is in contempt of this court". Defendant was ordered to pay the arrearage of $420.00 by 29 February 1968, and if he failed to do so, "the Sheriff of Carteret County is ordered to take the defendant, Abram L. Willis, into custody and deliver him to the Sheriff of Durham County to be placed in the common jail of Durham County until such time as defendant has purged himself of his contempt."

> "The findings of fact by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence, *Cotton Mill Co. v. Textile Workers Union,* 234 N.C. 545, 67 S.E. 2d 755, and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment. *In re Adams,* 218 N.C. 379, 11 S.E. 2d 163." *Rose's Stores v. Tarrytown Center,* 270 N.C. 206, 211, 154 S.E. 2d 313.

In order to hold defendant in contempt for failure to pay the sums required by the 23 December 1965 order, there must be particular findings that defendant possessed the means to comply with the order *during the time of his alleged delinquency. Yow v. Yow,* 243 N.C. 79, 89 S.E. 2d 867. This is so because a failure to abide by the terms of a court order cannot be punished by contempt proceedings unless the failure is willful, which imports knowledge and a stubborn resistance. *Mauney v. Mauney,* 268 N.C. 254, 150 S.E. 2d 391.

In *Mauney v. Mauney, supra,* the facts found were these:

> "(T)he defendant 'is a healthy, able bodied man, 55 years old, presently employed in the leasing of golf carts and has been so employed for many months; that he owns and is the operator of a Thunderbird automobile; that he has not been in ill health or incapacitated since the date of Judge Latham's order entered on the 5th day of October, 1964; that the defendant has the ability to earn good wages in that he is a trained and able salesman, and is experienced in the restaurant business; and has been continuously employed since the 5th day of October, 1964; that since October 5, 1964, the defendant has not made any motion to modify or reduce the support payments.' "

Our Supreme Court held that these findings were not sufficient to support the conclusion that defendant's conduct was willful and deliberate and in contempt and said ". . . the court must find not only failure to comply but that the defendant presently possesses *the means* to comply."

For the same reasons the judgment here is deficient and must be set aside and the case remanded for further hearing and findings of fact.

Error and remanded.

CAMPBELL and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. EDWARD GREEN

No. 68SC146

(Filed 14 August 1968)

Burglary and Unlawful Breakings § 6— felonious breaking or entering — instructions

In a prosecution upon an indictment charging defendant with felonious breaking and entering a store building with intent to steal merchandise therefrom, it is error for the court to fail to instruct the jury that for the defendant to be found guilty of the felony of breaking and entering, the jury must find that the breaking or entering was done "with intent to commit a felony or other infamous crime."

APPEAL by defendant from *Parker, Joseph W., J.*, February 1968 Criminal Session of WILSON Superior Court.

Defendant was indicted for felonious breaking and entering a store building with intent to steal merchandise therefrom and for larceny. He pleaded not guilty to both charges contained in the bill of indictment. The jury returned a single verdict of guilty. The court thereupon entered judgment sentencing defendant to prison for not less than eight nor more than ten years on the count of felonious breaking and entering, and for a similar term on the count of larceny, the sentence imposed for larceny to begin at the expiration of the sentence imposed for breaking and entering. From this judgment, defendant appeals.

T. W. Bruton, Attorney General, Christine Y. Denson, Staff Attorney, for the State.

Gardner, Connor & Lee, by Turner B. Bunn, III, for defendant appellant.

PARKER, J.

In connection with the charge of felonious breaking and entering, the court instructed the jury as follows:

> "Now, gentlemen of the jury, the Court instructs you in regard to breaking and entering that the least force necessary to effectuate an entrance into a store or building is sufficient to constitute a breaking. And if a person follows through that entrance into a building, then such act would constitute breaking and entering."

[1] At no point in the court's charge was the jury instructed that for the defendant to be found guilty of the *felony* of breaking and entering, the jury must find that the breaking or entering had been done "with intent to commit a felony or other infamous crime."

> "G.S. 14-54, as amended, defines a felony and defines a misdemeanor. The unlawful breaking or entering of a building described in this statute is an essential element of both offenses. The distinction rests solely on whether the unlawful breaking or entering is done 'with intent to commit a felony or other infamous crime therein.'" *State v. Jones*, 264 N.C. 134, 141 S.E. 2d 27.

In the case presently before us, the defendant was being tried on a bill of indictment charging him with the felony defined in G.S. 14-54. For conviction of this offense the State must satisfy the jury from the evidence beyond a reasonable doubt that a building described in the statute was broken into or entered "with intent to commit a felony or other infamous crime therein." Felonious intent is an essential element of the crime for which defendant was being tried, and failure of the court to so instruct the jury was prejudicial error. *State v. Friddle*, 223 N.C. 258, 25 S.E. 2d 751.

We have not passed upon defendant's other assignments of error, since in any event there must be a new trial and the same questions will probably not reoccur. We note that the jury rendered but a single verdict, so that defendant will necessarily be entitled to a new trial on both offenses with which he has been charged.

New trial.

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

WADE DAVIS SHEPHARD v. NORTH CAROLINA STATE HIGHWAY COMMISSION

No. 68IC31

(Filed 14 August 1968)

1. Appeal and Error §§ 41, 45— record on appeal — transcript of the evidence — failure to include appendix of evidence in brief

Where the evidence in the record on appeal is submitted under Rule of Practice 19(*d*)(2) in the Court of Appeals, the appeal will be dismissed 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.

2. State § 8; Highways and Cartways § 9— overweight vehicle on highway bridge — contributory negligence

In an action for personal injuries against the State Highway Commission under the Tort Claims Act, the Industrial Commission properly concluded that plaintiff was guilty of contributory negligence upon findings supported by competent evidence that plaintiff drove a truck loaded with cement upon a highway bridge which was under reconstruction, that the vehicle had a weight in excess of the weight limitation posted on the bridge, in violation of G.S. 136-72, and that the bridge collapsed, resulting in injuries to plaintiff.

3. State § 8; Highways and Cartways § 9— overweight vehicle on highway bridge — negligence per se

In an action under the Tort Claims Act for injuries received when a bridge under reconstruction collapsed while plaintiff was delivering cement to the construction site, the Industrial Commission properly concluded that plaintiff was negligent *per se* in violating G.S. 136-72 by driving upon the bridge a vehicle which exceeded the posted weight limitation where the evidence showed that the bridge remained open to traffic during the construction work.

APPEAL by plaintiff from Industrial Commission, J. W. Bean, Chairman.

This is an action for recovery of damages for personal injuries brought under the Tort Claims Act. Plaintiff was employed by Standard Company, Inc. as a truck driver. He generally drove a Reo tandem truck with a seven cubic yard mixer and was driving that truck when the accident occurred. He had delivered a load of cement to defendant's bridge construction site at old bridge #241 spanning the Roaring River in Wilkes County. As he drove onto the bridge, at the direction of an employee of defendant, the bridge collapsed, the truck fell to the riverbed, and plaintiff was injured. The defendant's employee received severe injuries resulting in death. Hearing

was had before Deputy Commissioner Delbridge who entered a decision and order adjudging defendant negligent and plaintiff contributorily negligent and denying recovery. Both plaintiff and defendant filed exceptions to his findings of fact and conclusions of law and appealed to the Full Commission. From the order of the Full Commission affirming the deputy commissioner and adopting as its own the findings of fact and conclusions of law entered by him, plaintiff appealed.

Franklin Smith for plaintiff appellant.

Thomas Wade Bruton, Attorney General, by Harrison Lewis, Deputy Attorney General; Henry T. Rosser, Assistant Attorney General; and Fred P. Parker, III, Trial Attorney, for defendant appellee.

MORRIS, J.

[1] At the outset, we are met by appellant's failure to comply with the rules of the Court of Appeals. Although he has filed one copy of the transcript of the testimony, he has not, as required by Rule 19(d)(2), attached 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 rules, the appeal is dismissed.

We have, nevertheless, conducted a voyage of discovery through the record and find that there is sufficient competent evidence to sustain the findings of fact of the deputy commissioner and that the findings of fact are sufficient to support his conclusion of law that plaintiff was guilty of contributory negligence. There was competent evidence tending to show that signs were posted at either end of the bridge designating the maximum weight limit for that bridge of 18 tons for truck and trailer. An employee of defendant — a witness for plaintiff — testified that there were signs on the bridge "but it didn't say for that much limit on it" and that he saw the signs on the day of the accident. Another employee of defendant testified that the signs were there the day before and day after and he noticed no evidence of their having been removed and replaced. He testified the signs showed a weight limit of 18 tons for tractor-trailers. Plaintiff strenuously objects to the admission of a photograph depicting the signs. However, the photograph was not admitted as substantive evidence, but only for the purpose of illustrating the witness' testimony.

Although plaintiff testified that he did not know the weight of the equipment he was driving nor how much cement he was carrying, his employer testified that "there is a delivery ticket with each load, the driver knows what he is taking along with the directions where he is going." The testimony was that the equipment driven by plaintiff weighed 39,000 to 40,000 pounds.

[3] Plaintiff contends that the conclusion of law that his violation of G.S. 136-72 was negligence *per se* constituted reversible error. G.S. 136-72 reads as follows:

> "The State Highway Commission shall have authority to determine the maximum load limit for any and all bridges on the State highway system or on any county road systems, to be taken over under §§ 136-51 to 136-53, and post warning signs thereon, and it shall be unlawful for any person, firm, or corporation to transport any vehicle over and across any such bridge with a load exceeding the maximum load limit established by the Commission and posted upon said bridge, and any person, firm, or corporation violating the provisions of this section, shall, in addition to being guilty of a misdemeanor, be liable for any or all damages resulting to such bridge because of such violation, to be recovered in a civil action, in the nature of a penalty, to be brought by the Commission in the superior court in the county in which such bridge is located or in the county in which the person, firm, or corporation is domiciled; if such person, firm, or corporation causing the damage shall be a nonresident or a foreign corporation, such action may be brought in the Superior Court of Wake County."

Our Supreme Court has held, in a fact situation strikingly similar, that violation of this statute constitutes negligence *per se*. *Byers v. Products Co.*, 268 N.C. 518, 151 S.E. 2d 38. Plaintiff contends, however, that this statute is not applicable because the bridge was being used as a construction site, platform, and scaffold and not by plaintiff in the normal course of travel. This contention is without merit. The evidence was that the bridge was open to traffic, and that traffic was stopped at either end by defendant's employees while plaintiff's truck entered the bridge. The finding of fact that "the bridge was opened to traffic during construction work" is supported by competent evidence.

Appeal dismissed.

CAMPBELL and BRITT, JJ., concur.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

FALL SESSION, 1968

STATE OF NORTH CAROLINA v. DONALD WILLIAM HAMRICK
No. 6827SC24

(Filed 23 August 1968)

1. Criminal Law § 124— verdict — words treated as surplusage to verdict

Where in response to the clerk's inquiry as to whether the jury found defendant guilty or not guilty of nonfelonious breaking and entering, the foreman states that the jury found defendant not guilty but adds that the jury found defendant guilty of aiding and abetting, a verdict of not guilty of nonfelonious breaking and entering should be recorded, the words "guilty of aiding and abetting" being mere surplusage since they are not part of the legal verdict.

2. Criminal Law § 126— verdict — acceptance by court

A verdict is a substantial right, and whenever the verdict is complete, sensible and responsive to the bill of indictment, it must be accepted by the court.

3. Criminal Law §§ 122, 126— insensible and unresponsive verdict — redeliberation by jury

Where in response to the clerk's inquiry as to whether the jury found defendant guilty or not guilty of an attempt to commit a nonfelonious breaking and entering, the foreman states that the jury found defendant "guilty of aiding and abetting of breaking and entering of non-felonious attempt," the verdict is not sensible and responsive, and the court properly required the jury to redeliberate and return a proper verdict.

4. Criminal Law §§ 122, 126— verdict of not guilty — jury may not thereafter change verdict to guilty

Where the jury returns a verdict of not guilty of nonfelonious breaking and entering and is directed to redeliberate upon returning an insensible and unresponsive verdict as to an attempt to commit that crime, the jury may not thereafter return a verdict of guilty of nonfelonious breaking and entering, but its further consideration should be limited to a determination of defendant's guilt or innocence of an attempt to commit the crime.

5. Criminal Law § 181; Habeas Corpus § 2— nature of petition determined by substance and relief requested

Although a petition attacking a judgment for error in recording the jury verdict is entitled "Application for Writ of Habeas Corpus," it should be considered as a post-conviction petition under the provisions of G.S. 15-217, *et seq.*, and it is error for the court to consider such petition as a strict *habeas corpus* proceeding under G.S. 17-3 *et seq.*, since it is the substance of the application and the relief sought thereunder which determines its true nature, and not the title appended thereto by the petitioner.

ON Writ of *Certiorari* to review an Order of *Snepp, J.*, entered 23 February 1968, GASTON Superior Court.

The defendant was charged in a bill of indictment in case number 67-477 with the felony of burglary. He was arraigned during the second week of the 9 October 1967 Session of Gaston Superior Court, and upon his plea of not guilty was tried before Froneberger, J., and a jury.

After the jury had deliberated and returned to the courtroom to announce its verdict, the following transpired:

"THE CLERK: Members of the Jury, have you agreed upon a verdict?

"THE FOREMAN: Yes.

"THE CLERK: How do you find the defendant, guilty or not guilty of burglary in the first degree with a recommendation of life imprisonment? Do you find the defendant guilty or not guilty on this charge?

"THE FOREMAN: Not guilty on that charge.

"THE CLERK: You find the defendant not guilty. So say you all. How do you find the defendant, guilty or not guilty of an attempt to burglary in the first degree with a recommendation for life imprisonment?

"THE FOREMAN: Not guilty on that one.

"THE CLERK: You find the defendant not guilty. So say

you all. How do you find the defendant, guilty or not guilty of burglary in the second degree?

"THE FOREMAN: Not guilty.

"THE CLERK: You find the defendant not guilty. So say you all. How do you find the defendant, guilty or not guilty of felonious breaking and entering?

"THE FOREMAN: Not guilty.

"THE CLERK: You find the defendant not guilty. So say you all. How do you find the defendant, guilty or not guilty of an attempt to felonious breaking and entering?

"THE FOREMAN: Not guilty.

"THE CLERK: You find the defendant not guilty. So say you all. *How do you find the defendant, guilty or not guilty of non-felonious breaking and entering?*

"THE FOREMAN: *Not guilty.* We find him guilty of aiding and abetting.

"THE CLERK: Well, *how do you find the defendant, guilty or not guilty of non-felonious breaking and entering?*

"THE FOREMAN: *Not guilty.* (Emphasis added.)

"THE CLERK: You find the defendant not guilty. So say you all. Now, how do you find the defendant, guilty or not guilty of an attempt to non-felonious breaking and entering?

"THE FOREMAN: Guilty.

"THE CLERK: You find the defendant guilty of an attempt to non-felonious breaking and entering. So say you all.

"THE FOREMAN (referring to a slip of paper in his hand): Can I read this? (Reading) 'We find the defendant guilty of aiding and abetting of breaking and entering of non-felonious attempt.'

"THE COURT: Mr. Foreman and ladies and gentlemen of the jury, that is not a proper verdict, in the opinion of the Court. Now, he would be guilty as a principal, not as an aider and abettor, as I charged you in my charge, so you will go back to your jury room and come back with whatever your proper verdict is. It would be either guilty as a principal or not guilty, not as an aider and abettor. You can go back to your jury room.

(The Jury returned to the jury room for further delibera-

tions and returned to the courtroom, and the following transpired:)

"THE CLERK: Members of the jury, have you agreed upon a verdict?

"THE FOREMAN: Yes.

"THE CLERK: How do you find the defendant, guilty or not guilty of an attempt to non-felonious breaking and entering?

"THE COURT: No, wasn't it guilty or not guilty of non-felonious breaking and entering?

"THE CLERK: *How do you find the defendant, guilty or not guilty of non-felonious breaking and entering?*

"THE FOREMAN: *Guilty.* (Emphasis added.)

"THE CLERK: You find the defendant guilty of non-felonious breaking and entering. So say you all."

Thereupon Judge Froneberger entered judgment that the defendant be imprisoned for a term of two years, and commitment was issued to place the sentence into effect.

On 19 February 1968 defendant filed an application for Writ of *Habeas Corpus* in the Gaston Superior Court, alleging that he had been sentenced to a term of imprisonment for an offense (non-felonious breaking and entering) of which the jury had found him not guilty. The Writ was issued and returned before Snepp, J., during the 19 February 1968 Session of Gaston Superior Court. After hearing on the return to the Writ, Judge Snepp found in substance that: (1) defendant was tried upon a valid bill of indictment, (2) the minutes of the court reflect that defendant was found guilty of non-felonious breaking and entering, and was sentenced to a term of two years, and (3) defendant is presently in custody pursuant to commitment issued under the judgment. Thereafter Judge Snepp concluded that the Superior Court of Gaston County had jurisdiction of the defendant and the subject matter, and the sentence was within the statutory limit.

Judge Snepp's Order denied relief and remanded defendant to custody. Defendant petitioned this Court for Writ of *Certiorari* which was allowed.

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

Robert H. Forbes for defendant-petitioner.

BROCK, J.

The Petition for Writ of *Certiorari* was filed in this Court on 19 April 1968. The Attorney General filed Answer thereto on 2 May 1968, and the Petition was first considered by this Court on 6 May 1968. Because of the content of the Petition, on 8 May 1968, we directed counsel for defendant-petitioner to file additional record. The additional record was filed by counsel on 18 June 1968, and we allowed *certiorari* on 24 June 1968. The case was set for argument during the first week of the Fall Session 1968 (the week of 19 August 1968).

[1, 2] It is manifest that the jury returned a verdict of not guilty upon the offense of non-felonious breaking and entering when first queried by the clerk. The additional words "[w]e find him guilty of aiding and abetting" are not a part of the legal verdict on the offense being inquired of, and will be treated as mere surplusage. *State v. Rhinehart,* 267 N.C. 470, 148 S.E. 2d 651. These additional words were so treated by the trial court because the clerk immediately inquired again as to the verdict on the offense of non-felonious breaking and entering, and the foreman of the jury replied, not guilty. Certainly after this second inquiry, it is clear that the jury had returned a verdict of not guilty of the offense of non-felonious breaking and entering, and it should have been so recorded. A verdict is a substantial right, and whenever the verdict is complete, sensible and responsive to the bill of indictment, it must be accepted by the court. 3 Strong, N. C. Index 2d, Criminal Law, § 126, p. 41.

[3] The further voluntary statement by the foreman of the jury, when reading from a slip of paper in his hand, did not constitute a sensible or responsive verdict, and the trial judge correctly required the jury to deliberate again upon its verdict. However, under the proceedings up to that point, the further jury consideration should have been restricted to a determination of the defendant's guilt or innocence of an *attempt* to commit a non-felonious breaking and entering.

[4] When the jury returned the second time the clerk made the proper inquiry, but the trial judge erroneously directed that the inquiry should be made as to its verdict upon the offense of non-felonious breaking and entering. It appears that this was an inadvertence on the part of the trial judge, nevertheless it constituted error. The jury having already rendered its verdict of not guilty of this offense in a clear, sensible and responsive fashion, it could not thereafter change that verdict to guilty. *State v. Hamilton,* 250 N.C. 85, 108 S.E. 2d 46. It follows that the trial court was without ju-

risdiction to enter judgment upon the purported verdict as announced after redeliberation.

[5] The petition which was heard by Judge Snepp was entitled "Application for Writ of Habeas Corpus," however the allegations of the petition attack the judgment upon grounds of error in recording the verdict of the jury. The alleged error in recording the verdict is established by the Record on Appeal before us, to which the Solicitor attached his acceptance of service without objection or exception. The transcript of the taking of the verdict, as set out in our statement of facts, was introduced at the hearing before Judge Snepp after identification by the Assistant Clerk of Superior Court, and the Assistant Clerk also testified from her own knowledge that the jury first returned a verdict of not guilty of the offense of non-felonious breaking and entering. It seems clear to us that Judge Snepp considered the application and the hearing as a strict *habeas corpus* proceeding under G.S. 17-3, *et seq.* In so doing Judge Snepp committed error.

It is the substance of the application, or petition, and the relief which is sought thereunder that determines its true nature, not the title appended thereto by the petitioner. The application, or petition, should have been considered, and the hearing conducted, under the provisions of G.S. 15-217, *et seq.*

The Attorney General concedes that he can find no distinction between this case and the rationale of *State v. Rhinehart, supra; State v. Gatlin,* 241 N.C. 175, 84 S.E. 2d 880; and *State v. Hamilton, supra.*

The Order of Judge Snepp, entered 23 February 1968 is reversed, and this cause is remanded to the Superior Court of Gaston County to the end that the presiding judge (1) strike the verdict of guilty of non-felonious breaking and entering, (2) record the verdict of not guilty, and (3) vacate the judgment by Froneberger, J., entered during the second week of the 9 October 1967 Session.

In view of the delay in getting this matter before this Court after the hearing on 23 February 1968, this Court upon its own motion has this day caused a Writ of Habeas Corpus to issue to the Director of the Department of Correction directing him, or his authorized agent, to have the defendant before the presiding judge of Gaston County Superior Court at ten o'clock a.m., on Monday, 26 August 1968, to the end that said presiding judge may enter an order for defendant's immediate release from confinement under the commitment issued from the Superior Court of Gaston County in case number 67-477 on 20 October 1967, during the second week of

the 9 October 1967 Session. After inquiry into whether there is other authority for restraining the defendant of his liberty, the presiding judge shall enter an appropriate order of discharge from or remand to custody.

The Clerk of this Court is directed to forthwith certify a copy of this opinion to the Clerk of Superior Court of Gaston County to the end that the matter be immediately brought to the attention of the presiding judge for his compliance with the terms of the foregoing paragraphs.

Reversed and remanded.

BRITT and PARKER, JJ., concur.

STATE HIGHWAY COMMISSION AND CITY OF WILSON v. M. H. MATTHIS AND WIFE, FRANCIS D. MATTHIS; JULE D. FORBES AND WIFE, LOTTIE E. FORBES; L. H. GIBBONS, TRUSTEE, AND DIXIE R. SMITH

No. 68SC50

(Filed 18 September 1968)

1. Eminent Domain § 1— nature and extent of power

Eminent domain is the power of the State or some agency authorized by it to take or damage private property for a public purpose upon payment of just compensation.

2. Eminent Domain § 4— delegation of power by legislature

The General Assembly prescribes the manner in which the power of eminent domain may be exercised.

3. Eminent Domain § 4— delegation of power to State agency

An agency of the State established by act of the General Assembly is not empowered to exercise the State's inherent right of eminent domain unless such power is expressly granted by the legislature; when the power is expressly granted, the authority is limited to the express terms or clear implication of the act or acts in which the grant is contained.

4. Eminent Domain § 7— jurisdictional fact in G.S. Ch. 40 proceeding — inability to agree on price

It is a preliminary jurisdictional fact in eminent domain proceedings under G.S. Ch. 40 that there exist an inability to agree for the purchase price; the condemnor must state in its petition that it has not been able to acquire title and the reason for such inability. G.S. 40-11, GS.. 40-12.

5. Highways and Cartways § 1; Eminent Domain § 7— power of Highway Commission

The State Highway Commission, which is an agency of the State duly created by act of the General Assembly, has been expressly granted under prescribed conditions the power of eminent domain, and the Commission must follow the procedures and conditions set out by the legislature before it has the right to exercise such power. G.S. 136-1, G.S. 136-19, G.S. 136-103.

6. Eminent Domain § 7— Highway Commission must follow G.S. Ch. 136 procedures

By virtue of amendment to G.S. 136-19, effective 1 July 1960, the procedure to be used by the Highway Commission in the exercise of its power of eminent domain has been changed from that contained in G.S. Ch. 40 to that contained in Article 9 of G.S. Ch. 136; before the power of eminent domain is vested in the Commission, however, there is a requirement that the Commission and the landowner be unable to agree as to the price of the property to be taken. G.S. 136-19.

7. Eminent Domain § 7— compliance of "declaration of taking" with statute

The Highway Commission's "Declaration of Taking" filed in condemnation action *is held* to be in substantial compliance with the provisions of G.S. 136-19.

8. Eminent Domain § 7— G.S. Ch. 136 condemnation — allegations of jurisdictional facts — no necessity to allege that parties are unable to agree on price

In order for the court to obtain jurisdiction in a condemnation proceeding instituted by the Highway Commission pursuant to G.S. Ch. 136 it is not necessary that the Commission alleged in its complaint that the Commission and the owners are unable to agree as to the price of the lands sought to be condemned. G.S. 136-103.

9. Pleadings § 2— statement of cause of action — demurrer

In a civil action the complaint must contain, among other things, "a plain and concise statement of the facts constituting a cause of action;" if not, it is demurrable. G.S. 1-122.

10. Eminent Domain § 7— G.S. 1-122 is inapplicable to G.S. Ch. 136 condemnation

The distinguishing difference between eminent domain proceedings brought under G.S. Ch. 40 and proceedings brought under Article 9 of G.S. Ch. 136 by the Highway Commission is that the legislature in effect has made inapplicable to G.S. Ch. 136 proceedings the provision of G.S. 1-122 insofar as it relates to complaints filed in eminent domain cases by the Highway Commission arising after 1 July 1960. Section 3 of Ch. 1025 of the 1959 Session Laws.

11. Eminent Domain §§ 7, 13— demurrable petition — motion for leave to amend

Where it is determined on appeal that a demurrer to a petition in condemnation proceedings should have been sustained, the petitioner may apply for leave to amend the petition under G.S. 1-131.

12. Eminent Domain § 7— pleadings in G.S. Ch. 136 condemnation

In a G.S. Ch. 136 condemnation proceeding, complaint which fails to allege that the Commission and the landowners are unable to agree on

the price of land sought to be condemned *is held* to allege a defective statement of a good cause of action.

13. Eminent Domain § 7— landowners precluded from attacking Commission's complaint

In a condemnation proceeding instituted by the Highway Commission pursuant to G.S. Ch. 136, defendant landowners have no standing to attack the Commission's complaint which alleges a defective statement of a good cause of action where (1) the defendants in their answer admit the power, fact and necessity of the exercise of eminent domain by the Commission, and where (2) the defendants have petitioned the court for payment of, and have received, the sum paid into court by the Commission as its estimate of just compensation.

14. Eminent Domain § 6— evidence of value — testimony concerning proposed subdivision

In condemnation proceedings instituted by the Highway Commission, the trial court did not err in refusing to allow defendant landowners to show the effect that highway construction would have upon the planned development of their property, since the property was at most a proposed subdivision in that defendant had not subdivided the property on the ground, nor sold any lots therein, nor dedicated any streets, nor recorded the proposed maps to the subdivision.

15. Eminent Domain § 6— evidence of value — option on land in proposed subdivision

The trial court did not commit prejudicial error in excluding, on the issue of damages, defendant landowners' testimony as to the adverse effect of highway condemnation proceedings on the exercise of an option by a third party for the purchase of lots in the defendants' proposed subdivision, it appearing from the evidence that there was no existing subdivision but only plans for one.

16. Eminent Domain § 6— evidence of value — remoteness of testimony

Testimony by real estate appraiser as to the value of defendants' land before the taking by the Commission is properly excluded, it appearing that the witness first saw the land more than three years after the date of the taking and that at the time the witness saw the land the highway and embankment had already been constructed thereon.

17. Evidence § 48— exclusion of expert testimony — effect of failure to qualify the witness

Where the party tendering a witness has made no request that the witness be qualified as an expert, and the witness has not been found to be an expert when hypothetical questions are asked of him, the exclusion of the witness' expert testimony will not be reviewed on appeal.

18. Trial § 42— quotient verdict defined — prohibited

A quotient verdict is one that is rendered in a civil action in pursuance of an agreement by the jurors to accept one-twelfth of the aggregate amount of their several estimates of the measure of damages, without the assent of their judgment to such a sum as their verdict; such a verdict is invalid and not permitted.

19. Trial § 46— impeaching the verdict — evidence

In order to impeach the verdict of a jury, the evidence must come from sources other than the jurors themselves.

20. Trial §§ 42, 54— quotient verdict — motion for new trial — sufficiency of evidence

In order to have a verdict invalidated as a quotient verdict, it must be shown that the jurors agreed, prior to obtaining the quotient, that they would accept it as their verdict; consequently, a motion for new trial on the ground that the jury returned a quotient verdict is properly denied where the only evidence is that, immediately after the return of the verdict, appellant's attorney entered the jury room and found a paper whereon twelve figures had been written down and divided by 12, and that the figure arrived at was the exact amount of the verdict.

APPEAL by all defendants from *Fountain, J.*, October 1967 Civil Session of WILSON Superior Court.

Proceedings instituted by plaintiff State Highway Commission for condemnation of an "easement, in perpetuity, for right of way for all purposes for which the plaintiff is authorized by law to subject the same."

Defendants M. H. Matthis and wife, Frances D. Matthis, and Jule D. Forbes and wife, Lottie E. Forbes, owned a 17.77-acre tract of land situated in Wilson Township, Wilson County, subject to a deed of trust to L. H. Gibbons, Trustee for Dixie R. Smith, as recorded in Book 720, page 358, Wilson County Registry. On 21 September 1963 plaintiff filed its complaint, declaration of taking, and notice of deposit as required by Article 9, Chapter 136 of the North Carolina General Statutes. The easement taken covers 2.97 acres of defendants' 17.77-acre tract and is a part of State Highway Project 8.24407, Wilson County.

Upon motion of the State Highway Commission, the City of Wilson was made a party. The City of Wilson filed answer alleging that on State Highway Project 8.24407 it had entered into a reimbursement agreement with the State Highway Commission concerning all expenditures for "damages by jury awards above the Commission's estimate of damages deposited at the time of filing of Complaint, Declaration of Taking and Notice of Deposit."

A consent order was entered in which it appears that all issues raised by the pleadings were determined or stipulated except that of just compensation.

There appears in this consent order the following:

"That the plat filed by the plaintiff in this action and entitled 'PROPERTY DESCRIBED IN CIVIL ACTION ENTITLED NORTH CAR-

OLINA STATE HIGHWAY COMMISSION VS. M. H. MATTHIS, ET UX, ET AL.,' is a correct portrayal of what it purports to show and is a fair and accurate representation of the property affected by the appropriation and the property and property rights appropriated. The defendants, however, by their failure to object to said map, do not waive their right to introduce evidence to show that the property involved had been subdivided into residential building lots prior to the time of the taking by the plaintiff. The plaintiff reserves the right to object to the competency of such evidence."

With its declaration of taking, the plaintiff State Highway Commission deposited the sum of $15,850 as its estimate of just compensation due.

The court submitted the issue of just compensation which the jury fixed at $18,726. From judgment in accordance with the verdict, including interest thereon, the defendants appealed, assigning errors.

Attorney General Thomas Wade Bruton, Deputy Attorney General Harrison Lewis, and Trial Attorney Robert G. Webb for plaintiff appellee State Highway Commission.

Lucas, Rand, Rose, Meyer & Jones by Z. Hardy Rose, and on Reargument, David S. Orcutt for the City of Wilson.

Robert B. Morgan and Carr & Gibbons by L. H. Gibbons for defendant appellants.

MALLARD, C.J.

This case was first argued in this court on 24 April 1968. Thereafter on 23 May 1968 and pursuant to the provisions of Rule 31 of the Rules of Practice in this court, it was ordered by the court that the case be set for reargument during the week of 2 September 1968. It was reargued as ordered upon the following questions:

"(1) Under G.S. Chaps. 40 and 136, is it necessary for the condemnor to make a good faith attempt to purchase the subject property; and to allege in the complaint, or the declaration of taking, the prior good faith attempt in order for a complaint in a condemnation proceeding to state a cause of action?

(2) If so, does the failure to so allege constitute a jurisdictional defect so as to require the court *ex mero motu* to take notice and dismiss; or may the defect be cured by amendment, if allowed in the discretion of the court?"

[1, 2] Eminent domain is the power of the State or some agency authorized by it to take or damage private property for a public purpose upon payment of just compensation. 3 Strong, N. C. Index 2d, Eminent Domain, § 1. The General Assembly prescribes the manner in which the power of eminent domain may be exercised. *Power Co. v. King,* 259 N.C. 219, 130 S.E. 2d 318.

[3] An agency of the State established by act of the General Assembly is not empowered to exercise the State's inherent right of eminent domain unless such power is expressly granted by the General Assembly. 26 Am. Jur. 2d, Eminent Domain, § 5; *Hedrick v. Graham,* 245 N.C. 249, 96 S.E. 2d 129. When the power is expressly granted, the authority is limited to the express terms or clear implication of the act or acts in which the grant of the power of eminent domain is contained. 26 Am. Jur. 2d, Eminent Domain, § 18.

This court said in an opinion by Brock, J.:

> "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.*" *Redevelopment Commission v. Abeyounis,* 1 N.C.App. 270, 161 S.E. 2d 191.

[4] G.S. 40-12 requires the petition in the special proceeding under Chapter 40 to state that the condemnor has not been able to acquire title and the reason of such inability. G.S. 40-11 provides that before the right of eminent domain accrues to the condemnor thereunder, there must exist an inability to agree for the purchase price. This has been held to be a preliminary jurisdictional fact in eminent domain proceedings under Chapter 40 of the General Statutes. *Board of Education v. McMillan,* 250 N.C. 485, 108 S.E. 2d 895; *Winston-Salem v. Ashby,* 194 N.C. 388, 139 S.E. 764.

[5] The State Highway Commission is an agency of the State of North Carolina duly created and established by act of the General Assembly. G.S. 136-1.

In the act establishing the State Highway Commission, as amended from time to time, the General Assembly has expressly granted to it, under prescribed conditions, the power of eminent do-

main and has set forth the procedure to be followed in the exercise of such power. This procedure *must be* followed, and the conditions prescribed therein must be met *before* the State Highway Commission has the right to exercise the power of eminent domain. G.S. 136-19; G.S. 136-103.

[6] Prior to 1 July 1960, the State Highway Commission was authorized to institute eminent domain proceedings pursuant to the authority granted by the former provisions of G.S. 136-19. The procedure to be followed was that prescribed in G.S. 40-11, *et seq.*

By Chapter 1025, Session Laws of 1959, G.S. 136-19 was amended and a new article, designated Article 9, was added to Chapter 136, effective 1 July 1960. The case under consideration was instituted by issuance of a summons thereunder on 21 September 1967.

After the foregoing amendment, the pertinent part of G.S. 136-19 reads:

> *"Whenever the Commission and the owner* or owners of the lands, materials, and timber required by the Commission to carry on the work as herein provided for, *are unable to agree as to the price thereof, the Commission is hereby vested with the power to condemn* the lands, materials, and timber *and in so doing the ways, means, methods, and procedure of Article 9 of this Chapter shall be used by it exclusively."* (emphasis added)

Thus, by this amendment the General Assembly has changed the "ways, means, methods and procedure" to be used by the State Highway Commission in the exercise of its power of eminent domain from that contained in Chapter 40 of the General Statutes to that contained in Article 9 of Chapter 136 of the General Statutes. However, according to the foregoing amendment to G.S. 136-19, before the power of eminent domain is vested in the State Highway Commission, there is a requirement that the Commission and the owner be unable to agree as to the price of the property to be taken.

Article 9 of Chapter 136 of the General Statutes consists of G.S. 136-103 through G.S. 136-121. G.S. 136-103 sets out the exclusive procedure for the institution of the action. It provides that "in case condemnation shall become necessary the State Highway Commission shall institute a civil action" by the filing of "a complaint and a declaration of taking." It is then required, among other things, that the declaration shall contain or have attached to it the following:

> "(1) A statement of the authority under which and the public use for which said land is taken.

(2) A description of the entire tract or tracts affected by said taking sufficient for the identification thereof.

(3) A statement of the estate or interest in said land taken for public use and a description of the area taken sufficient for the identification thereof.

(4) The names and addresses of those persons who the Highway Commission is informed and believes may have or claim to have an interest in said lands, so far as the same can by reasonable diligence be ascertained and if any such persons are infants, non compos mentis, under any other disability, or their whereabouts or names unknown, it must be so stated.

(5) A statement of the sum of money estimated by said Commission to be just compensation for said taking."

It is also provided that the complaint *shall* contain or have attached thereto the following:

"(1) A statement of the authority under which and the public use for which said land is taken.

(2) A description of the entire tract or tracts affected by said taking sufficient for the identification thereof.

(3) A statement of the estate or interest in said land taken for public use and a description of the area taken sufficient for the identification thereof.

(4) The names and addresses of those persons who the Highway Commission is informed and believes may have or claim to have an interest in said lands, so far as the same can by reasonable diligence be ascertained and if any such persons are infants, non compos mentis, under any other disability, or their whereabouts or names unknown, it must be so stated.

(5) A statement as to such liens or other encumbrances as the Commission is informed and believes are encumbrances upon said real estate and can by reasonable diligence be ascertained.

(6) A prayer that there be a determination of just compensation in accordance with the provisions of this Article."

When the complaint and the declaration are filed, it is required by this statute that they shall be accompanied by the deposit with the Clerk of the Superior Court of a sum of money estimated by the State Highway Commission to be just compensation.

[7] The "Declaration of Taking" filed herein is in substantial compliance with the provisions of G.S. 136-19.

The complaint reads as follows:

"1. That the State Highway Commission is an agency of the State of North Carolina with its principal office in Raleigh, North Carolina; that it possesses the powers, duties and authority, including the power of eminent domain, vested in it by the General Assembly of North Carolina.

2. That the plaintiff is informed and believes and alleges upon information and belief that those persons whose names and addresses are set forth in Exhibit 'A', attached hereto and made a part hereof, are the only persons who have or claim to have an interest in the property described in attached Exhibit 'B', insofar as the same can, by reasonable diligence, be ascertained; that said persons are under no legal disability except as stated in Exhibit 'A'.

3. That the tract or tracts of land affected by the taking are described in Exhibit 'B', attached hereto and made a part hereof.

4. That the plaintiff is informed and believes and alleges upon information and belief that said property is subject only to such liens and encumbrances as are set forth in Exhibit 'A' attached hereto.

5. That pursuant to the authority vested in the plaintiff under the provisions of G.S. 136-19 and G.S. 136-103, et seq., and pursuant to a resolution of said Commission duly passed, it is necessary to condemn and appropriate an interest or estate in the property described in Exhibit 'B', for public use in the construction of that certain highway project described in Exhibit 'C', attached hereto and made a part hereof; that said interest or estate and the area appropriated are described in Exhibit 'B', attached hereto.

6. That the plaintiff has filed in the Superior Court in the county in which this action is pending a Declaration of Taking and Notice of Deposit and has deposited with said Court the sum of money estimated by the Commission to be just compensation for the taking.

WHEREFORE, plaintiff prays that just compensation for the taking of the interest or estate herein set forth be determined according to the provisions of Article 9 of Chapter 136 of the General Statutes and for such other relief as to the Court may seem just and proper."

Neither in the complaint nor in the declaration filed herein is there a specific allegation that the Commission and the owners are

unable to agree as to the price of the lands sought to be condemned. This failure under the provisions of G.S. 40-12 has been held to be a jurisdictional defect. *Board of Education v. McMillan, supra; Winston-Salem v. Ashby, supra.* However, no case has come to our attention in which this jurisdictional question was raised or decided in a condemnation case involving the State Highway Commission.

[8] The complaint in the case under consideration complies with G.S. 136-103 in that the allegations required by this section are set out. However, we are also concerned here with the question of whether *it is necessary* in order for the court to obtain jurisdiction *to allege* that the Commission and the owners are unable to agree. We are of the opinion and so decide that under G.S. 136-103, it is not required for jurisdictional purposes that such be alleged because the statute specifically prescribes what shall be alleged. G.S. 136-19 is a condition precedent to the State Highway Commission's right of eminent domain, but the General Assembly, by the express provisions of G.S. 136-103, has set out the procedure required and the necessary allegations of a complaint. The proceedings under Chapter 40 of the General Statutes is designated a special proceeding and specifically requires that a petition to be filed thereunder must, in effect, state that the condemnor has not been able to acquire title and the reason for such inability. G.S. 40-12. There is no such provision in G.S. 136-103 which designates the proceedings a "civil action."

[9, 10] Under G.S. 1-122, in a civil action the complaint must contain, among other things, "a plain and concise statement of the facts constituting a cause of action." If not, it is well settled that it is demurrable. *Gillespie v. Goodyear Service Stores,* 258 N.C. 487, 128 S.E. 2d 762. However, the General Assembly, as it has the power to do (26 Am. Jur. 2d, Eminent Domain, § 5) in Section 3 of Chapter 1025 of the 1959 Session Laws, in effect made inapplicable the provisions of G.S. 1-122 insofar as it relates to complaints filed in eminent domain cases by the State Highway Commission arising after 1 July 1960, the effective date thereof. This is the distinguishing difference between cases brought under the provisions of Chapter 40 and by the State Highway Commission under Article 9 of Chapter 136 (G.S. 136-103, et seq.).

The case of *State Ports Authority v. Felt Corp.,* 1 N.C.App. 231, 161 S.E. 2d 47, is distinguishable from the case under consideration. This court was there construing Article 9 of Chapter 136 of the General Statutes in connection with G.S. 143-218.1. G.S. 143-218.1 provides that all transactions relating to the acquisition of real property by the 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." Judge Parker, speaking for the court, said, "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." In this case brought by the State Ports Authority, the plaintiff alleged that it had the power of eminent domain under the provisions of Chapter 143 of the General Statutes. The defendant demurred for the reason that the complaint failed to allege facts sufficient to state a cause of action inasmuch as, among other things, it failed to allege the prior approval of the acquisition by the Governor and Council of State of North Carolina. The Superior Court sustained the demurrer on this ground but did not dismiss it, and this court affirmed the action of the Superior Court.

[11] Where it is determined on appeal that a demurrer to a petition in condemnation proceedings should have been sustained, the petitioner may apply for leave to amend the petition under the provisions of G.S. 1-131. *Gastonia v. Glenn,* 218 N.C. 510, 11 S.E. 2d 459.

[12, 13] We are of the opinion and so decide that the complaint in the case under consideration alleges a defective statement of a good cause of action but because of the admissions in the answer, it cannot be attacked by the defendants herein, or anyone else.

In the case now under consideration, the defendants filed an answer admitting all of the allegations in the complaint except so much of paragraph five thereof "as alleges that the area appropriated by the Commission is described in Exhibit 'B' ", asserting further in the answer to paragraph five:

> "Exhibit 'B' purports to show the existence of certain streets within the boundaries of the highway right-of-way, whereas, in fact, no such streets exist. The Commission has appropriated the entire area within the northerly and southerly boundaries of the proposed highway delineated on the map attached to Exhibit 'B' and the plaintiffs are entitled to be compensated for the entire area taken."

Thereafter, in an amended answer the defendants amended this paragraph five, in part, to read that "no such streets exist as dedicated streets."

Thus, the defendants in this case, having admitted the power of, the fact of, and the necessity of the exercise by the State Highway Commission of the power of eminent domain, cannot be heard now

to deny the same in this case. It is also shown, by an addendum to this record, that the defendants have heretofore petitioned the court for payment of and have received the sum paid into court by the State Highway Commission as its estimate of just compensation. In the case of *City of Durham v. Bates,* 273 N.C. 336, 160 S.E. 2d 60, which was a proceeding brought by the City of Durham under the provisions of Article 9 of Chapter 136 of the General Statutes, Justice Branch said, "Upon accepting the benefits under the statute, defendants are precluded from attacking the statute, the jurisdiction of the court to enter the order putting plaintiff in possession of the property, or the failure of the plaintiff to strictly comply with the provisions of the statute which defendants attack."

Defendant appellants in their brief assert that there are seven questions presented on this appeal.

[14] The first question is: Did the trial court err in refusing to permit the witness M. H. Matthis to testify concerning and use defendant's exhibit #3 to illustrate to the jury the effect the construction of the highway would have upon the planned development of the property of defendants? The answer to this question is "no". The defendants have based this question on the assumption that there was an existing subdivision. Defendants raise this question upon assignments of error one and two, which are based upon twelve exceptions. On page nineteen of the record defendants' exhibit #3 was "offered and received into evidence for purposes of illustration." Defendants' exceptions one and two as brought forward in their brief do not refer to defendants' exhibit #3 as they contend but to the offering into evidence of defendants' exhibit #5. The witness testified that exhibit #5 was the same map as defendants' exhibit #3 with the exception that different areas thereon were indicated by various colors. Even if the defendants in their brief meant to refer to defendants' exhibit #5, the exclusion thereof was not prejudicial error. The other exceptions brought forward in defendants' brief relating to these assignments of error numbered one and two are to the sustaining by the judge of objections to questions concerning the taking or damage to projected or potential building lots in a proposed subdivision of the 17.77-acre tract of land owned by defendants. They are all overruled. All except three of these exceptions were taken to objections made to questions asked by defendants out of the presence of the jury.

The evidence tended to show that the defendants had made maps of the 17.77-acre tract through which the highway was placed. These maps had not been recorded. The 17.77-acre tract was shown on the

maps as Section Five and Section Six, Montclair Subdivision. No lots shown on these maps had been sold. No stakes had been put in the ground. The property had not been actually subdivided on the ground. This 17.77-acre tract was a part of an original 30.5-acre tract, part of which had theretofore been subdivided and sold by the defendants. The only tangible improvements located on this 17.77-acre tract were some dirt hauled thereon, a sewer line extending through it to serve an earlier development of the defendants, and some undedicated rough roads or streets which had been cut therein.

Defendants in their answer deny the existence of any streets within the boundaries of the highway right-of-way.

Defendants make contradictory contentions. On the one hand, they assert that the streets shown on the proposed subdivision of the 17.77-acre tract are owned by them, and they contend that they are entitled to compensation for the area included in Fleming Street which they contend was not dedicated and did not exist as a public street. On the other hand, defendants contend that they are entitled to compensation on the basis of subdivided building lots fronting on this non-existent street.

We are of the opinion and so decide that inasmuch as the defendants had not dedicated any streets in the proposed subdivision, had not sold any lots therein, and had not caused the proposed maps thereof to be recorded, this is at most a proposed subdivision and not one which affects the unity of the land. It is a subdivision on paper and in the minds of the defendants. It can be changed or done away with by the simple act of destroying the paper map. *Barnes v. Highway Commission,* 250 N.C. 378, 109 S.E. 2d 219; see also 6 A.L.R. 2d 1197.

[15] The second and fourth questions raised by the defendants relate to the trial court's refusal to admit evidence of the witnesses M. H. Matthis and Roger Mann concerning the cost of completing the development and the extent of other efforts made to develop and sell a portion of the 17.77-acre tract. The assignments of error cited and the exceptions relied on relate to evidence tending to establish the cost of "completing the development" of defendants' property and tending to establish that the defendants had given an option to Harold L. Jackson on all of the lots in the proposed subdivision, as shown on defendants' exhibit #1 in Section Five.

This option was dated 1 August 1962 and described the property as follows: "Being Lots Nos. 1 through 22 upon a plat entitled Section Five, Montclair Subdivision, prepared by L. M. Phelps, R.S., in February 1962, and *to be recorded* in the Wilson County

Registry." (emphasis added) The option then provides for a specified price for each of the lots. To have admitted it in evidence would have been error. This "option" was dated and, in fact, the defendant Matthis testified that the defendants purchased the land, after the defendants were aware that there was to be a highway through the area. In fact, the defendant Matthis testified that they purchased the land after they knew of the planned highway through there. The record does not show that this option was recorded. The map was not recorded. None of the lots shown on the map were sold.

In response to a question as to whether Harold Jackson exercised his option, Mr. Matthis would have answered:

> "He asked for a deed, *but we told him he had better get his building permit — get that straightened out first,* to be sure that he would want the deed. Since they didn't give him a useable building permit, he felt the lots were not worth anything to him, so we did not give him a deed to them." (emphasis added)

From this answer, it appears that perhaps Mr. Matthis was solicitous for Mr. Jackson's welfare in his concern that Mr. Jackson knew what he was doing in his effort to purchase two of the lots shown only on an unrecorded map. Upon being asked why he had never recorded the map of Section Five of Montclair Subdivision, which is defendants' exhibit #1, Mr. Matthis would have further replied:

> "Because — We had it right ready to record. If we had recorded it, we would have been giving up our rights to collect damages — certain part of the damages from the highway right-of-way."

It is readily apparent from the above that there was no existing subdivision but only plans for one. It is also apparent that the defendants were keeping control over their property as a single unit in order to collect damages from the Highway Commission for the condemnation of the right-of-way.

The validity of the option is not properly before us. We do not pass upon the question of whether the option, which refers only to numbered lots on an unrecorded map, contains a sufficient description of the lots referred to. We are of the opinion and so decide that the trial court did not commit prejudicial error in excluding the option and the evidence of the witness M. H. Matthis as to the option and the negotiations thereunder. It was not prejudicial error to exclude the evidence of the witness Roger Mann as to the additional cost of the development of the property because of the presence of the highway. The court permitted the witness M. H. Matthis to testify as to the highest and best use of the property before and after the taking. It

was not proper to allow testimony concerning the effect of the appropriation upon proposed lots.

> "The measure of compensation is not, however, the aggregate of the prices of the lots into which the tract could be best divided, since the expense of cleaning off and improving the land, laying out streets, dividing it into lots, advertising and selling the same, and holding it and paying taxes and interest until all of the lots are disposed of cannot be ignored and is too uncertain and conjectural to be computed.
>
> . . .
>
> It is proper to show that a particular tract of land is suitable and available for division into lots and is valuable for that purpose, but it is not proper to show the number and value of lots as separated parcels in an imaginary subdivision thereof. In other words, it is not proper for the jury in these cases to consider an undeveloped tract of land as though a subdivision thereon is an accomplished fact. Such undeveloped property may not be valued on a per lot basis. The cost factor is too speculative. . . ." *Barnes v. Highway Commission, supra;* see also *Highway Commission v. Conrad,* 263 N.C. 394, 139 S.E. 2d 553.

The third question set out in defendants' brief as arising on their assignments of error eleven and twelve is: "Did the trial court err in refusing to permit the witness Carlos Williams to testify as to his opinion of the value of the subject property before the taking?"

[16] The witness Carlos Williams testified that he lives in Fayetteville, that he is in the real estate sales and appraisal business and has been for seventeen years, and that the first time he ever went upon the property in question was about 23 November 1966. At that time the highway was there and had already been paved. That "Dr. Matthis told me the changes that had been made in the property by virtue of the highway taking the property. He gave me a picture of the way it was before the highway did any work in there. He told me that it was a continuous grade just like the existing subdivision that this property joined. *The picture in my mind that I assumed when I was told* is that it would have been just a continuous grade similar to the subdivision that's now existing there adjacent to it." (emphasis added) . . . "I also made an investigation as to land sales of similar property in the area, and visited the area in which such sales were made." This witness was permitted to give his opinion as to the highest and best use of the property and also that it was suitable for residential use but the court sustained

the objection to the following question propounded to the witness: "Mr. Williams, do you have an opinion satisfactory to yourself as to the fair market value of the property in litigation before the taking of the highway right-of-way in September, 1963, and before the highway was constructed?"

The witness, if permitted to answer, would have said, "$112,800.00," which would not have been responsive to the question. We do not know from this record, but we will assume that he would have answered it "yes," if his answer had been responsive to the question.

We are of the opinion and so decide that under the circumstances here, the trial judge did not commit error in excluding the testimony of the witness Williams as to the value of the land before the taking. The witness lived in Fayetteville; the property was in Wilson. The date of the taking was more than three years prior to the time the witness first saw the land. A highway embankment and a highway had been constructed across the land before the witness saw it. The record does not disclose what changes or improvements, if any, had occurred in the entire area surrounding the land in question during those three years.

> "An objection has been made to the testimony of witnesses directed to the measure of damages caused by the fire: That they were not qualified to express an opinion because they did not testify that they saw the premises *immediately* before and *immediately* after the fire. (emphasis added)
>
> We are of the opinion that the evidence disclosed to the jury that both views, 'before and after,' were taken with sufficient nearness to the burning as to make the evidence competent; Beam saw the house a few days before the fire, and what remained of it two or three days after it. 'Immediately,' in the strict sense, is not essential. It is a question of reasonable nearness." *Crouse v. Vernon,* 232 N.C. 24, 59 S.E. 2d 185.

[17] There were two hypothetical questions asked the witness Carlos Williams, the answers to which were excluded by the judge, and to each an exception was taken. The witness was not tendered as an expert, either then or later. The witness had not been found to be an expert when these two questions were asked. The judge, after all the evidence was in, apparently on his own motion, as appears in the record just before the charge of the court, found "that Mr. Carlos Williams is an expert real estate appraiser." After this finding, no question was asked the witness.

Defendants contend in their brief that the witness was an expert

witness and should have been permitted to answer these hypothetical questions but defendants had not tendered him as such, and the court had not so found. In Stansbury, N. C. Evidence 2d, § 133, the principle of law applicable is succinctly stated as follows: "On objection being made, the party offering a witness as an expert should request a finding of his qualification; if there is no such request, and no finding or admission that the witness is qualified, the exclusion of his testimony will not be reviewed on appeal." In the case of *LaVecchia v. Land Bank,* 218 N.C. 35, 9 S.E. 2d 489, the Supreme Court held that "(t)he competency of a witness to testify as an expert is a question primarily addressed to the sound discretion of the court, and his discretion is ordinarily conclusive." In the case now under consideration, there is no abuse of discretion asserted, and none has been shown. See also *State v. Moore,* 245 N.C. 158, 95 S.E. 2d 548; *Hardy v. Dahl,* 210 N.C. 530, 187 S.E. 788; and *Pridgen v. Gibson,* 194 N.C. 289, 139 S.E. 443.

Defendants' fifth and sixth questions relate to the charge of the court. The defendants' assignments of error to the charge of the court as to the measure of damages and the requirements of G.S. 1-180 are without merit. The charge of the court correctly and accurately stated and applied the law arising on the evidence given in the case.

Defendants' seventh question is: "Did the court err in refusing to set aside the verdict on the grounds that it was a quotient verdict?"

A quotient verdict is one that is "rendered in a civil action in pursuance of an agreement by the jurors to accept one-twelfth of the aggregate amount of their several estimates of the measure of damages, without the assent of their judgment to such a sum as their verdict." 53 Am. Jur., Trial, § 1030, p. 710.

[18, 19] It is well settled that a quotient verdict by jurors is invalid and not permitted. *Daniel v. Belhaven,* 189 N.C. 181, 126 S.E. 421; 8 A.L.R. 3d, Quotient Verdict, § 2, p. 340. It is equally well settled that in order to impeach the verdict of a jury, the evidence must come from sources other than the jurors themselves. *Johnson v. Allen,* 100 N.C. 131, 5 S.E. 666; *Baker v. Winslow,* 184 N.C. 1, 113 S.E. 570; *State v. Hollingsworth,* 263 N.C. 158, 139 S.E. 2d 235.

[20] The defendants moved for a new trial on the grounds that the verdict returned by the jury was a quotient verdict. The following occurred relative to this motion:

"MR. MORGAN: Your Honor, we move to set the verdict aside — and I will have to give you some supporting evidence on it

— on the ground that the verdict is a quotient verdict. The papers I just handed to Your Honor were found on the jury room table, immediately after they walked out of the room yesterday afternoon, and handed to the Court Reporter. Your Honor, there are three cases under North Carolina law:

Vandiford v. Vandiford, 215 N.C. 461; *Bartholomew v. Parrish,* 186 N.C. 81; *Daniel v. Town of Belhaven,* 189 N.C. 181.

In those three cases the Supreme Court has held that a quotient verdict is not a proper verdict. I realize to get this matter properly before the Court we will have to furnish Your Honor some additional evidence as to this matter.

THE COURT: Well, did you say that you yourself found this in the jury room?

MR. MORGAN: Yes, sir. Immediately after the jury was discharged, I walked in the jury room. Those were the papers lying on top of the table. I brought them out and gave them to the Court Reporter and asked that she preserve them.

THE COURT: All right, sir. Well, I'll let the record show that you said that you found them in the jury room after the verdict, and I accept your statement that you did as a fact — If that's what you have reference to —

MR. MORGAN: That's what I have reference to. I, frankly, don't know, Your Honor, whether that has to be sworn testimony —

THE COURT: Well, I'm accepting your statement as a statement of fact. I don't question that —

MR. MORGAN: Well, I picked them up myself. And I think if Your Honor will look at those figures there, it is obvious that it is a quotient verdict. There are twelve figures written down, and 12 divided into it, and the exact verdict that came down is the figure written down. So, rather than it being a verdict arrived at from the evidence, and after a consideration of all the evidence and being a unanimous verdict, it is obvious it is a compromise verdict.

THE COURT: Well, I will let this go in the record, and I overrule your motion on that ground."

Each of the three cases cited by the defendants is distinguishable from the case under consideration. In *Wannamaker v. Traywick,* 136 S.C. 21, 134 S.E. 234, the facts are almost on all fours with the case under consideration. In this South Carolina case, within ten

minutes after the verdict was rendered, several persons walked into the room where the jury had been deliberating, and there found a sheet of paper on top of the desk in that room. This sheet of paper contained twelve items of figures, ranging from 1,000 to 3,000, placed in column form. Beneath this column of figures were the figures 21,000, the total of the figures in the column; this last sum had been divided by twelve, giving as the result the quotient of 1,750. The verdict was $1,750. A witness testified that the figures on this sheet of paper were in the handwriting of one of the jurors, a Mr. Ulmer. The South Carolina Supreme Court in that case held that the party moving for a new trial had the burden of establishing that a quotient verdict was rendered, and said:

> "Jurors are presumed to do their duty, and there is a presumption that they have regarded their oaths. The court would not be justified, except upon a clear showing, to hold contrary to these presumptions. If the verdict was rendered in pursuance of the plan outlined by us hereinbefore, it is not a quotient verdict and is not illegal, as is distinctly held in the authority cited — Ruling Case Law. There, it is expressly stated:
>
> 'Thus where one of the jurors of his own accord sets down the estimates of the others and ascertains the average sum and proposes the result as the amount of the verdict, which they assent to, it is no ground for objection to the verdict.'
>
> It is our opinion that the appellant has failed to show that the circuit judge committed error in overruling the motion for a new trial."

"Although there is some authority in support of the position that evidence of papers and figures establishing the jurors' use of the quotient process is sufficient, in itself, to raise the presumption that the quotient process has been improperly used in connection with an antecedent agreement to be bound by it, and that an invalid quotient verdict has therefore been rendered, *the clearly prevailing view appears to be to the contrary and to reject such a presumption.*" (emphasis added) Annot. 8 A.L.R. 3d 335, 367 (1966).

> "In order to have a verdict in either a civil or criminal case invalidated as a quotient verdict, it is, as a general rule, insufficient to show merely that the jurors used the quotient process at some stage of their deliberations and that their verdict corresponded exactly or approximately to the amount of the quotient. It is generally considered vital to show also that the jurors agreed, prior to obtaining the quotient, that they would be

bound by it and accept it as their verdict." Annot. 8 A.L.R. 3d 335, 349 (1966).

In the case of *Collins v. Highway Commission,* 240 N.C. 627, 83 S.E. 2d 552, it is said:

"While the amount of the verdict may prompt the surmise that it was a quotient verdict, it alone is insufficient to compel the conclusion, as a matter of law, that it was in fact a quotient verdict."

Applying these principles of law to the case under consideration, we conclude that the trial judge did not commit error in refusing to set aside the verdict on the grounds that it was a quotient verdict.

We have carefully examined all of the assignments of error and the exceptions brought forward in defendants' brief and are of the opinion that the defendants have had a fair trial, free from prejudicial error.

No error.

BROCK and PARKER, JJ., concur.

ALAIN C. DE LOTBINIERE (ALSO KNOWN AS EDMOND JOLY DE LOTBINIERE, AND CORRECTLY DESIGNATED AS ALAIN CHARTIER EDMOND JOLY DE LOTBINIERE), MARY DE LOTBINIERE MACKAY, MADELEINE DE LOTBINIERE WIDAWSKA, RICHARD C. TEMPLE, ANTHONY TEMPLE, AND MARY AGNES DE LOTBINIERE, PETITIONERS, v. WACHOVIA BANK AND TRUST COMPANY, TRUSTEE UNDER THE WILL OF W. J. SLAYDEN, ALAIN CHARTIER JOLY DE LOTBINIERE, MICHEL BENOIT JOLY DE LOTBINIERE, PAULINE LUCY JOLY DE LOTBINIERE, CHRISTINE AGNES JOLY DE LOTBINIERE, ROBERT ALAIN MACKAY, BRADLEY MACKAY, DEBORAH MACKAY, PETER ANDREW MACKAY, SUZANNE MACKAY, ANDREW MACKAY, MARGARET DIANNA MACKAY, MARY AGNES MACKAY, LUCY DEGREMONT, PAULINE DEGREMONT, PHILIPPE DAVID DEGREMONT, LUCY MARTHA TEMPLE AND THE UNBORN ISSUE OF MARY AGNES DE LOTBINIERE, AND JOHN S. STEVENS, GUARDIAN AD LITEM FOR ALL MINOR RESPONDENTS NAMED IN THIS ACTION AND FOR ALL UNBORN ISSUE OF MARY AGNES DE LOTBINIERE, RESPONDENTS

No. 68SC225

(Filed 18 September 1968)

1. Constitutional Law § 23— legislation affecting vested rights

While the legislature may not destroy or interfere with vested rights, it may enact valid retroactive legislation affecting only expectant or contingent interests.

2. Infants § 6; Judgments § 36; Wills § 73— construction of will — unborn beneficiaries — guardian ad litem — retroactive effect of G.S. 1-65.2 — res judicata — parties concluded

Testator's will provided that a specified annuity be paid to his daughter during her life, that at the daughter's death the estate be held in trust for her issue, that the income be paid to such issue during their minority, and that the entire estate be paid to the daughter's issue *per stirpes* upon their majority. In a 1936 action in which the unborn issue of testator's daughter and the unborn issue of the daughter's children were represented by a guardian *ad litem*, it was declared that the children of testator's daughter have a vested interest in the accumulated income of the trust estate. *Held:* The enactment in 1955 of G.S. 1-65.2, which authorizes the appointment of a guardian *ad litem* for unborn persons in actions involving wills and trusts, and G.S. 1-65.4, which gives such authorization retroactive effect, validated the appearance in the 1936 proceedings by the guardian *ad litem* in behalf of the minor and unborn issue of the children of the testator's daughter, whose interest in the estate is merely contingent, but did not validate his appearance in behalf of unborn issue of the testator's daughter, who have a vested interest in the estate, nor were such unborn issue before the court by virtual representation; therefore, the 1936 judgment is *res judicata* as to the minor and unborn issue of the children of testator's daughter but not as to the unborn issue of testator's daughter.

3. Judgments § 36— no appeal from erroneous judgment — parties concluded

Where no appeal is taken from a judgment entered in an action in which minor and contingent beneficiaries of an estate are represented by a guardian ad litem, such beneficiaries are bound by the judgment even though it may be erroneous.

4. Evidence § 4— presumption of possibility of issue

It is presumed that a person may have issue as long as he lives.

5. Trusts § 8; Wills § 35— distribution of income to those having vested right thereto

No abuse of discretion is shown by the court's order increasing monthly payments from the estate income and distributing a portion of the accumulated income to beneficiaries having a vested interest in the accumulated and future income of the estate.

APPEAL by minor respondents and unborn issue of Mary Agnes de Lotbiniere through their Guardian *Ad Litem* from *Martin, Harry C., J.*, 19 February 1968 Regular Term of BUNCOMBE Superior Court.

W. J. Slayden died on 30 September 1918, a resident of Buncombe County, leaving a last will and testament which was duly admitted to probate. The estate has been fully administered, and all of the specific and annuity bequests under the will have been satisfied with the exception of an annuity created under the second section of Item Tenth as follows: "Out of income derived from my estate,

my trustee shall pay to my daughter, Mary Agnes de Lotbiniere, of Montreal, Canada, the sum of Two Hundred and Fifty ($250) Dollars per month during the term of her natural life." The residue of the estate was disposed of by the fifth section of Item Tenth as follows: "All the rest and residue of my estate, including lapsed legacies, if any, shall at the death of my daughter, Mary Agnes de Lotbiniere, be held in trust for her issue and the income therefrom shall be paid to such issue or to their guardian for their use during their minority and upon the coming of age of such issue said trustee shall pay my entire estate so held in trust to said issue as (sic) my daughter per stirpes and not per capita."

On 24 July 1936 a judgment was entered in a proceeding instituted by Madeleine de Lotbiniere, Lucy de Lotbiniere, Mary Agnes de Lotbiniere, Alain C. de Lotbiniere, the last two by their guardian, C. S. Davis, and Mary Agnes de Lotbiniere, wife of Alain J. de Lotbiniere, plaintiffs, against Wachovia Bank and Trust Company, Trustee under the will of W. J. Slayden, and Julius Martin, II, guardian *ad litem* for the unborn issue of the plaintiffs and each of them. Plaintiffs were Mary Agnes de Lotbiniere, daughter of testator, and her children. Among the findings of fact made by the court were these:

"3. That the plaintiffs and each of them are bound by the construction of the Last Will and Testament of W. J. Slayden, Deceased, given in the Judgment rendered in the case of Madeline de Lotbiniere, Lucy de Lotbiniere and Mary Agnes de Lotbiniere, by their next friend C. S. Davis, Versus the Wachovia Bank & Trust Company, Executor and Trustee under the Will of W. J. Slayden, Deceased, begun in the Superior Court of Buncombe County, North Carolina, by the issuing of a Summons dated the 12th day of November, 1921, which judgment was rendered at the June Term, 1922 of this Court by his Honor T. J. Shaw, Judge of the Superior Court, the record of which has been exhibited to this Court and examined by it, and the Court finds that the construction of said Will made in said Judgment is res adjudicata (sic) as to said plaintiffs and the Court, therefore, denies any relief to the plaintiffs based on their contention that they are entitled, under said Will, as a matter of law, to receive all of the income of the Estate of W. J. Slayden, Deceased, not necessary to pay taxes, expenses of administration and to pay the annuities provided by the Will of said W. J. Slayden. This holding, however, shall not be construed to affect or impair the right and power of the Court, in its discretion, to make the allowances hereinafter set out.

4. The Court further finds and holds that by virtue of the Last Will and Testament of W. J. Slayden, Deceased, and by virtue of the proceedings and judgments heretofore rendered in the several proceedings hereinbefore referred to, the plaintiffs, Madeline de Lotbiniere, Lucy de Lotbiniere, Mary Agnes de Lotbiniere and Alain C. de Lotbiniere, children of Mary Agnes de Lotbiniere and grandchildren of W. J. Slayden, Deceased, are entitled, and each of them is entitled, to a vested interest in the net income heretofore accumulated and hereafter to accumulate in the Estate of W. J. Slayden, Deceased."

The court further found: ". . . that the children of the said Alain J. de Lotbiniere and Mary Agnes de Lotbiniere, plaintiffs herein, in the event they survive their said Mother and the other legatee, Alice Lummus, mentioned in said Will, and in the event said Mary Agnes de Lotbiniere has no other children born to her, will be the sole owners of the entire amount of said estate, including corpus and income; . . ."

Upon the evidence the court found as facts that the plaintiffs had no income from property belonging to them, were not trained to follow any occupation, would be entirely dependent upon their parents if deprived of the allowances previously made for them by the court, that their father for several years had been unable to provide for them because of circumstances which had arisen since the death of testator not foreseen or expected by him, that at the time of the making of the will testator acted on the belief and assumption that his daughter's husband would have a large permanent income more than sufficient to support and maintain his family. Upon the facts found, the court ordered the trustee to pay to each of the children of Mary Agnes de Lotbiniere $2200.00 annually.

Plaintiffs excepted to that portion of the judgment set out in paragraph 3, and gave notice of appeal but did not perfect their appeal. No exception was taken by the trustee or the guardian *ad litem.*

On 29 April 1952, Lucy de Lotbiniere Wood died, and on 10 April 1954, by judgment entered upon petition in the cause, Richard Temple and Anthony Temple, minor children of Lucy de Lotbiniere Wood were adjudged entitled to represent their mother, *per stirpes,* and be paid by the trustee the $2200.00 annually which their mother would have received.

On 9 October 1967, a petition was filed by Mary Agnes de Lotbiniere, her children, Alain C. de Lotbiniere, Mary de Lotbiniere MacKay, and Madeline de Lotbiniere Widawska; and Richard C.

Temple and Anthony Temple, children of Lucy de Lotbiniere Wood, deceased daughter of Mary Agnes de Lotbiniere, against Wachovia Bank & Trust Company, Trustee; the grandchildren of Mary Agnes de Lotbiniere, and John S. Stevens, Guardian *Ad Litem* for all minor respondents and for all unborn issue of Mary Agnes de Lotbiniere. The petition alleged, in its pertinent portions, the 1936 judgment adjudging that the plaintiffs in that action (the same as the plaintiffs here) are entitled to a vested interest in the net income heretofore accumulated and hereafter to accumulate in the estate of W. J. Slayden, the 1954 judgment substituting Richard and Anthony Temple to receive their mother's share of the income, that the trust estate amounted to more than $800,000.00 and produced a gross annual income in excess of $38,000.00, that due to changed conditions, the petitioners were in need of additional funds from the income of the trust for their maintenance and support.

Answer was filed by the trustee admitting the factual allegations of the petition. None of the adult respondents filed answer. The guardian *ad litem* filed answer denying that plaintiffs have a vested interest in the income and denying allegations of need for additional income on the part of the children of Mary Agnes de Lotbiniere. By his further answer, he alleged the minors in this action and all unborn issue of Mary Agnes de Lotbiniere were not parties to prior actions and not bound by prior judgments; that to pay to petitioners all or part of the income and increase payments to Mary Agnes de Lotbiniere, would be contrary to the express terms of the will; and the court is without authority to make any additional payments.

The parties waived trial by jury and agreed that the court would make all findings of fact and conclusions of law.

Judgment was entered finding as facts that: The parties plaintiff in the 1936 judgment are, in practical effect, the same persons as petitioners in this suit; that the parties defendant in the 1936 suit are, in practical effect, the same parties as respondents in this suit; that no appeal from the 1936 judgment was perfected and that judgment constitutes a final judgment in the 1936 case; that the trust estate amounts to approximately $950,000.00, with accumulated income of $150,000.00, and annual income of $39,000.00; that Mary Agnes de Lotbiniere, now 79 years of age, is in acute need of additional income to support herself and to attend to her medical and physical needs; that her children, together with Richard and Anthony Temple, are the only persons having a vested interest in the income of the estate and are in need of funds. The conclusions of law were as follows:

"1. Under the provisions of paragraph TENTH, sub-paragraph

(5) of the will of W. J. Slayden, and pursuant to the JUDGMENT of July 24, 1936 signed by the Honorable F. Donald Phillips, the petitioners Alain C. de Lotbiniere (also known as Edmond Joly de Lotbiniere), Mary de Lotbiniere MacKay, Madeleine de Lotbiniere Widawska, Richard C. Temple and Anthony Temple (the last two petitioners taking through their mother, Lucy de Lotbiniere) each have a vested interest in the net income heretofore accumulated and hereafter to accumulate in the estate of W. J. Slayden.

2. That the aforesaid judgment signed by the Honorable F. Donald Phillips on July 24, 1936, as well as other determinations made by the Court in matters pertaining to the will of W. J. Slayden, constitute res judicata as to the rights of the parties in the accumulated and future income of the W. J. Slayden estate.

3. The court, in its equitable jurisdiction, has the power to authorize a distribution of all or a part of the income accumulated in the estate of W. J. Slayden to, or for the benefit of, the persons entitled thereto and to authorize future distributions of such income to the parties with a vested interest therein."

Thereupon the court ordered the present distribution of $60,000.00 of accumulated income ratably to petitioners, the payment of $600.00 per month to Mary Agnes de Lotbiniere, the payment of $300.00 monthly to each of her children, and $150.00 per month to each of Richard and Anthony Temple.

From the entry of the judgment, the guardian *ad litem* appealed, assigning as error the findings of fact and conclusions of law set out above.

John S. Stevens, Guardian Ad Litem for the minor respondents and all the unborn issue of Mary Agnes de Lotbiniere, appellants.

Womble, Carlyle, Sandridge & Rice by W. P. Sandridge, Jr. for Mary Agnes de Lotbiniere, appellee.

Van Winkle, Buck, Wall, Starnes and Hyde by Roy W. Davis, Jr. for respondent, Wachovia Bank and Trust Company, Trustee.

MORRIS, J.

Two questions are presented by this appeal: (1) Is the 1936 judgment, adjudging that the children of Mary Agnes de Lotbiniere together with Richard and Anthony Temple, have a vested interest in the estate of W. J. Slayden, valid and binding upon the minor

respondents and all unborn issue of Mary Agnes de Lotbiniere? and (2) Did the court err in making distribution of income?

[2] The guardian *ad litem* strenuously contends that present minor and possible unborn respondents were not before the court in the 1936 action by reason of the appointment of a guardian *ad litem* and are not bound by any judgment entered in that action. He further contends that this is not cured by G.S. 1-65.1, and G.S. 1-65.2, and G.S. 1-65.4, providing for the appointment of guardians *ad litem* for minors and possible unborn persons, for that to make these provisions retroactive would constitute a deprivation of the property of the minors and possible unborn persons without due process of law.

G.S. 1-65.2 provides:

"In all actions and special proceedings in rem and quasi in rem and in all actions and special proceedings which involve the construction of wills, trusts and contracts or any instrument in writing, or which involve the determination of the ownership of property or the distribution of property, if there is a possibility that some person may thereafter be born who, if then living, would be a necessary or proper party to such action or special proceeding, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend on behalf of such unborn person. No prior service of summons or other process upon such unborn person shall be required, and service upon the guardian ad litem appointed for such unborn person shall have the same force and effect as service upon such unborn person would have had if such person had been living. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons."

G.S. 1-65.4 provides:

"The remedies provided by §§ 1-65.1 to 1-65.3 are in addition to any other remedies authorized or permitted by law, and they shall not be construed to repeal or to limit the doctrine of virtual representation or any other law or rule of law by which unborn persons or nonexistent corporations, trusts or other entities may be represented in or bound by any judgment or order entered in any action or special proceeding. Sections 1-65.1 to 1-65.3 shall apply to all pending actions and special proceedings to which they may be constitutionally applicable. All judgments and orders heretofore entered in any action or special

> proceeding in which a guardian or guardians ad litem have been appointed for any unborn person or persons or any nonexistent corporations, trust or other entities, are hereby validated as of the several dates of entry thereof in the same manner and to the full extent that they would have been valid if §§ 1-65.1 to 1-65.3 had been in effect at the time of the appointment of such guardians ad litem; provided, however, that the provisions of this sentence shall be applicable only in such cases and to the extent to which the application thereof shall not be prevented by any constitutional limitation."

In *McPherson v. Bank,* 240 N.C. 1, 81 S.E. 2d 386, before the Supreme Court in 1954, trustor and his children, primary beneficiaries of a trust, brought an action against the trustee, minor grandchildren of trustor, and all other persons *in esse* or not in being "who are now or might by any contingency become beneficiaries of or entitled to any right, title, or interest in" the trust estate. A guardian *ad litem* was appointed to represent the minor grandchildren and "all other persons, . . . *in esse* or not in being, who are now or might by any contingency become beneficiaries" of the trust. The trial court entered judgment allowing the amendment requested. The guardian *ad litem* appealed. The opinion, Johnson, J., speaking for the Court, cast considerable doubt upon the legality of the practice of having a guardian *ad litem* appointed to defend and represent infants *in posse* who might have an interest in the trust estate. The Court noted that the guardian *ad litem* had limited his representation to the grandchildren to the exclusion of possible unborn children of trustor and said:

> "Indeed, no such direct representation by guardian *ad litem* is sanctioned by law. The rule is that, in the absence of statute, the capacity to be sued exists only in persons in being. (citations) With us, in the absence of statute, an unborn infant cannot be made a defendant in an action and be represented by a guardian *ad litem. Deal v. Sexton,* 144 N.C. 157, 56 S.E. 691. No statute has been called to our attention, and our investigation discloses none, authorizing the joinder of possible unborn children in an action like this one."

The Court noted that G.S. 41-11.1 appeared to be limited to actions involving the mortgage, sale, or lease of property. For the reasons given, the Court held that the judgment rendered was inconclusive as to the interests of possible unborn children of trustor.

G.S. 1-65.1 through G.S. 1-65.4 were enacted by the 1955 General Assembly. Appellant argues that the defect, if any there was,

is not cured by legislative enactment, because to make G.S. 1-65.1 retroactive, as provided by G.S. 1-65.4, thus making minor and unborn respondents bound by the 1936 judgment, would be unconstitutionally to diminish the estate which would ultimately go to them. Appellant relies on *Trust Co. v. Andrews,* 264 N.C. 531, 142 S.E. 2d 182. We do not agree that that case is controlling. There the sole question before the Court was whether certain adopted children were beneficiaries along with natural children of the trust estate. The statute in question was G.S. 48-23, which had been rewritten since the death of the testator and gave to adopted children the same legal status as if they were born the legitimate children of the adoptive parents. The guardian *ad litem* for the adopted children did not argue that the statute divested vested rights, but argued that it created a presumption that the words "great niece" and "great nephew" were understood by testator to include both natural born and adpted children. The Court held that the statute clearly stated it had no application where the terms of the instrument made it plainly apparent that the maker had a contrary intent, and the testator, by the language of his will, clearly expressed the intent to exclude adopted children from the trust he created by his will.

[1] Here the appellant does not contend that the minor and unborn children (grandchildren of Mary Agnes de Lotbiniere) represented by a guardian *ad litem* in the 1936 action had any vested interest in the trust estate. It is, of course, conceded that the Legislature may not constitutionally destroy or interfere with vested rights, but it may enact valid retroactive legislation affecting only expectant or contingent interests. *Anderson v. Wilkins,* 142 N.C. 153, 55 S.E. 272; *Springs v. Scott,* 132 N.C. 548, 44 S.E. 116. The *Springs* case discussed the constitutionality of retroactive application of Chapter 99, Laws 1903 (now G.S. 41-11). There a special proceedings had been instituted for the sale for partition of lands devised under the will of Julia Springs. The will provided that Alva Springs should share equally with the rest of the children "but he can only receive the interest during his life; at his death the interest will be paid to his children until they are of age, and if no children or heirs of his body, it must be equally divided among his brothers and sisters or their heirs. I appoint Eli Springs his trustee." The trustee was a party. Alva Springs, at the time of the proceedings, had no children. The defendants objected on the ground that it could not be known who the heirs would be, who would be entitled to take at the death of Alva C. Springs and those heirs were not parties. The Court held that the judgment of the superior court affirming the clerk's order of sale was correct for that all persons either *in esse* or *in posse* were

bound by reason of the fact that the trustee was a party and authorized to represent all parties in interest and further that the statute was constitutional and applicable retroactively since the interests of those not in being were not vested.

[2] We are of the opinion and so hold that any defect in the 1936 proceedings by reason of the appointment of a guardian *ad litem* was cured by the enactment of G.S. 1-65.2 through G.S. 1-65.4 and that the minor and unborn respondents, grandchildren of Mary Agnes de Lotbiniere, are bound by the terms of the judgment entered.

[3] But the appellant also contends that the 1936 judgment was void because erroneous in that it was inconsistent in its provisions. Appellant argues that in finding of fact No. 4 the court found that the children of Mary Agnes de Lotbiniere have a vested interest in the income heretofore accumulated and hereafter to accumulate and by a portion of finding of fact No. 5, "in the event said Mary Agnes de Lotbiniere has no other children born to her, will be the sole owners of the entire amount of said estate, including corpus and income," states their interest is contingent. We find no inconsistency. The court clearly states that the children, plaintiffs in the action, have a vested interest in the income and if no other children are born to their mother, will at death own the entire estate. This merely reaffirms the vested interest in income and points out a contingent interest in the corpus. However, even should it be conceded that the judgment was erroneous, it is not void and the parties are bound by it. No appeal was taken and the interests of the unborn and minor respondents, grandchildren of Mary Agnes de Lotbiniere, are not vested. *Smathers v. Insurance Co.*, 211 N.C. 345, 190 S.E. 229.

[4] We are not inadvertent to the legal presumption of the possibility of Mary Agnes de Lotbiniere's having other children. *Hicks v. Hicks*, 259 N.C. 387, 130 S.E. 2d 666. The evidence was that at the time of the hearing she was 79 years of age and not in good health. The record shows that in no order thus far entered has there been a direction to the trustee to pay out all of the annual income of the trust nor all of the accumulated income of the trust.

[2] As we have already noted, the Legislature may not constitutionally destroy or interfere with vested rights. This being true, the enactment of G.S. 1-65.2 through G.S. 1-65.4 does not have the effect of making the 1936 judgment binding on the children of Mary Agnes de Lotbiniere not *in esse*. Under the facts of this case, we do not think the doctrine of virtual representation can be applied to bring them before the court and thus make them bound by the judgment. *McPherson v. Bank, supra.* We, therefore, are constrained to hold

that as to the unborn children of Mary Agnes de Lotbiniere the 1936 judgment is not *res judicata.*

[5] The appellant's remaining assignments of error are addressed to the court's ordering increased payments of income and a present distribution of accumulated income. The findings of fact with respect to the size of the trust estate, accumulated income, annual income, needs of the beneficiaries, their changed circumstances, are all amply supported by the evidence. We find no abuse of discretion.

For the reasons stated herein, this matter is remanded for the entry of judgment providing that the unborn children of Mary Agnes de Lotbiniere are not bound by the 1936 judgment and directing that sufficient income shall be retained to enable the trustee to make pro rata payments of income to or for the benefit of any child or children of Mary Agnes de Lotbiniere who might hereafter be born.

Error and remanded.

CAMPBELL and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. THOMAS BERNARD MORRIS CASE #13,612
No. 6822SC218

(Filed 18 September 1968)

1. Constitutional Law § 32— right to counsel — misdemeanor cases — necessity for finding that defendant waived counsel

In prosecution in the Superior Court for a misdemeanor, it was not error for the trial judge to proceed to trial without making a specific finding that the defendant intelligently and understandingly waived representation by counsel, it appearing from the record that defendant was not an indigent, that he had a privately-retained attorney at his trial in the recorder's court, that he was free on bond at all times, and that he had ample opportunity and resources to retain an attorney in Superior Court.

2. Constitutional Law § 30; Criminal Law § 99— due process — duty of trial judge to aid misdemeanant

On appeal from defendant's conviction of a misdemeanor in the Superior Court, the defendant not having been represented by counsel during the course of the trial, there is no merit in defendant's contention that the trial judge erroneously failed to aid him in the presentation of his defense, since the fundamental requirement of judicial impartiality, which is mandatory for a fair trial, would be destroyed if the trial judge became

an active and interested participant in the presentation of defendant's case.

3. Automobiles § 126; Criminal Law § 75— drunken driving prosecution — testimony as to defendant's intoxication — voir dire examination

In a prosecution for operating a motor vehicle on a public street while under the influence of intoxicants, testimony of police officers as to the intoxicated condition of the defendant is admissible without the necessity for a *voir dire* examination where (1) the testimony of the officers is based merely upon their observation of the defendant's appearance and behavior in their presence and where (2) the defendant's own testimony in the trial removes whatever incompetency surrounded his conversations with the officers in his home.

4. Criminal Law § 138— severity of sentence — trial in Superior Court by appeal from inferior court — imposition of greater sentence

Under the provisions of G.S. 15-177.1, trial in the Superior Court upon appeal from an inferior court is *de novo*, and therefore the Superior Court has power to impose a greater sentence than that imposed by the inferior court, provided the sentence is within the limit prescribed by law.

APPEAL from *McLaughlin, J.*, 22 January 1968, Mixed Session, DAVIDSON County Superior Court.

On Sunday afternoon, 24 September 1967, around 5:30, the defendant was seen by George Burton, a police officer of the City of Thomasville. Burton at the time was off duty and was standing in front of his home. Burton observed the defendant come out of a house about three houses from where Burton was standing. Burton saw the defendant "come out and stagger down the steps and staggering on to a white 1959 Chevrolet parked on the left side of the street, not exactly in front of the house he came out of but a little further up the street. He got in the car and started the car up; there was an elderly man came out of the same house and got in the car with him as a passenger. He attempted to go forward and the car cut off and he cranked the car back up and backed up a few feet and then attempted to go forward again. When he went forward that time, he struck some mail boxes on the left side on the curb there. . . ."

Burton, being off duty, called to his wife and requested that she call the police. Burton got in his own personal automobile and followed the defendant. Burton testified: ". . . he was driving over to the left side of the street some, kind of weaving." Burton lost sight of the defendant in traffic, but in a few minutes he saw a white 1959 Chevrolet parked in the driveway beside a house. He recognized it as being the same automobile and the same license number that he

had previously seen. Burton was joined by Officers Smith and Batten who had arrived in a patrol car. Burton and the two officers went to the door of the house and knocked. The wife of the defendant invited them into the house. In the house, Burton talked to the defendant about the mail boxes. He told the defendant that the people were very angry about their mail boxes being knocked down and asked the defendant to do something about them. Officer Batten testified: "Mr. Morris was highly under the influence of some intoxicating beverage, and Mr. Burton was talking to him and wanting to know about the mail boxes, and Mr. Morris became very belligerent and started cursing us, and he called me a white s. o. b., and said his colored brothers was all right, but for us to leave his house. We started out of his house and he continued cursing and followed us into the street in the front of his house. When he got in the street, Officer Smith placed him under arrest for disorderly conduct and public drunk." From this episode, five warrants were issued for the defendant charging him with the following offenses: (1) operating a motor vehicle on a public street in the City of Thomasville while under the influence of an intoxicating beverage, (2) disorderly conduct and creating a disturbance by cursing and using profanity and indecent language on a public street in the City of Thomasville, (3) hit-and-run driving doing property damage, (4) public drunkenness, and (5) resisting arrest and assaulting an officer.

After his arrest, the defendant was admitted to bail, and he remained on bond for his appearance in the Recorder's Court of the City of Thomasville. On 16 October 1967, the five cases against the defendant were tried in the Recorder's Court of the City of Thomasville. The defendant appeared with his privately-retained attorney and entered a plea of not guilty to each charge.

In the recorder's court the defendant was tried without a jury. The charge of hit-and-run driving doing property damage was dismissed by the recorder's court judge and the defendant was found guilty on the other four charges.

On the charge of operating a motor vehicle on a public street while under the influence of an intoxicating beverage, the defendant was sentenced to twelve months in the county jail to be assigned to work under the supervision of the State Prison Department. This sentence was suspended for two years upon condition that the defendant remain of good character and not violate any laws; that he spend three nights in the city jail from 6:00 p.m. to 6:00 a.m.; that he not drive a motor vehicle for twelve months; and that he pay a fine of $100 and the costs. In the other three cases, judgment was

suspended upon condition that he comply with the judgment in the case of operating a motor vehicle on a public street while under the influence of an intoxicating beverage.

The defendant gave notice of appeal to the superior court and gave a justified bond for his appearance in the amount of $300 in one case, $50 each in two other cases, and $100 in the last case.

The defendant remained free on bond until his cases were called for trial in the superior court on 22 January 1968. Upon the call of the cases in the superior court, the State took a *nol pros* with leave on the charges of public drunkenness, disorderly conduct, and resisting arrest.

The defendant was placed on trial upon the warrant charging him with operating a motor vehicle on a public street in the City of Thomasville while under the influence of an intoxicating beverage. The defendant entered a plea of not guilty. A duly empaneled jury of twelve found the defendant guilty of the offense as charged.

The defendant moved to set aside the verdict as being against the greater weight of the evidence and for a new trial for errors committed in the progress of the trial. The motions were overruled and the defendant excepted. Judgment was entered sentencing the defendant to jail for a period of eighteen months to work under the direction and supervision of the North Carolina State Department of Correction. The defendant appealed to this Court.

The defendant remains free on a bail bond in the penal sum of $1,000.

J. LeVonne Chambers and James E. Ferguson, II, Attorneys for defendant appellant.

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

CAMPBELL, J.

The defendant presents four questions.

[1] One, the defendant asserts that it was incumbent upon the trial court to advise the defendant that he had a constitutional right to counsel; that if he could not afford counsel, the court would appoint counsel for him; that the court must advise the defendant of the possible adverse consequences of going to trial without counsel; and that it was error to proceed to trial without a specific finding of waiver of counsel.

Counsel for defendant have been most diligent in their presentation of this point. They have cited numerous cases with regard to the constitutional right of accused persons to have counsel. They take the position that where the offense is punishable by as much as two years imprisonment, no one can be tried until and unless the trial court makes a finding to the effect that the defendant not only understands that he is entitled to counsel to represent him but that he further understands that if he is indigent and does not have counsel, the State will afford him counsel. They also assert that the court must further find that he "intelligently and understandingly" rejects the offer for counsel. They rely upon the case of *Carnley v. Cochran,* 369 U.S. 506, 8 L. Ed. 2d 70, 82 S. Ct. 884, wherein it is stated:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

This same argument was advanced and was considered by the Supreme Court of North Carolina in *State v. Sherron,* 268 N.C. 694, 151 S.E. 2d 599. In that case, Pless, J., speaking for the Court referred to the North Carolina Statute pertaining to appointment of counsel for indigent defendants, and stated:

> "Interpreting the statute, it is clearly apparent that the Legislature intended to make a distinction between the right of one charged with a felony to have court-appointed counsel and the duty to appoint attorneys for persons charged with a misdemeanor. It places upon the judge the affirmative duty to advise the defendant in felony cases that he is entitled to counsel and to appoint counsel for him if he is indigent, or unless the defendant executes a written waiver of his right thereto. None of these provisions are included as to misdemeanors, and even for an indigent defendant the judge may exercise his discretion as to appointing counsel, and shall do so only when the judge is of the opinion that the appointment is warranted."

In the *Sherron* case the defendant was tried on three charges of misdemeanors subjecting him to a maximum of two years in each or a total of six years. He was actually convicted in two of the misdemeanors and acquitted in the third and was given a sentence of ninety days. In the *Sherron* case the Supreme Court of North Carolina points out that the Supreme Court of the United States has made no requirement regarding misdemeanors and "(n)either has it

in any case we can find put a responsibility on a State court greater than that imposed by its State statute. Here, with no record to support it, the defendant can prevail only if we hold that the silence of the record must be interpreted to mean that the judge should have found that the appointment of counsel was warranted, that the defendant was indigent, and that the Court abused his discretion in failing to appoint counsel."

In the instant case the defendant has never claimed to be an indigent or illiterate. To the contrary, the record discloses a person who owns his own automobile, who worked as a landscape gardener carrying out beautification programs for different housing authorities, who lived with his wife in their own home, and whose wife was "Director of Thomasville Nursery School." The defendant had his own privately-retained attorney when he appeared in the Recorder's Court in the City of Thomasville. He appears in this Court with two privately-retained attorneys. He has been free on bail bond ever since the offense was committed 24 September 1967, and he has paid all costs for perfecting this appeal. At no time has he made the contention that he is indigent and unable to afford private counsel.

On the present record where the defendant charged with a misdemeanor is not an indigent, where he had a privately-retained attorney at his trial in the Recorder's Court in the City of Thomasville, where he has been free on bond at all times, and where he has had ample opportunity and resources to have an attorney appear for him in the superior court, if he desired, we hold it was not error for the trial court to fail to make a specific finding that the defendant "intelligently and understandingly" elected to have no attorney appear for him.

This assignment of error is overruled.

[2] Two, the defendant asserts that it was error on the part of the trial court not "to adequately aid the defendant in the presentation of his defense."

In support of this position, counsel for defendant cite *Sheppard v. Maxwell,* 384 U.S. 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507. This case does not support the defendant's position; it stands for the proposition that a trial judge must protect an accused "from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom . . ."

Counsel for the defendant cite no authority to sustain their position that it is incumbent upon the trial court to become the advocate for a defendant who appears without counsel. For a trial court to be-

come the advocate of a defendant in such a situation would deprive society of one of its bulwarks. The trial judge must conduct himself so that there is fairness and equality of justice between the accused on the one hand and society on the other.

In all legal proceedings, judicial impartiality is mandatory for a fair trial; but this fairness would be destroyed if a trial judge became an active and interested participant in the presentation of a defendant's case. It would be error for the trial judge to become the advocate of either party.

The record in the instant case shows that the judge at all times acted fairly and properly in order to afford the defendant due process of law and a fair trial.

This assignment of error is overruled.

[3] Three, the defendant asserts that the trial court committed error in failing to exclude statements made by the defendant to police officers and by permitting the police officers to testify as to the intoxicated condition of the defendant.

In support of this position, counsel for the defendant assert that the trial court should have had a *voir dire* examination from which it should have made a determination as to whether or not the defendant voluntarily and freely made a confession. The defendant also asserts that evidence was illegally obtained by a search and that the trial court was in error in permitting such illegal evidence to be introduced. Counsel for the defendant rely upon *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602; *Malloy v. Hogan,* 378 U.S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489; *Escobedo v. Illinois,* 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758; *Mapp v. Ohio,* 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684; *Johnson v. Zerbst,* 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019; *State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511; and *State v. McDaniel,* 272 N.C. 556, 158 S.E. 2d 874.

The authorities cited by counsel for the defendant pertain to illegal searches and confessions by defendants under such circumstances that they are incompetent to be used in a trial of the defendant or that they were not voluntarily given and were in violation of the constitutional rights against self-incrimination of the particular defendant.

None of these cases and contentions is applicable in the instant case.

The defendant was being tried for operating a motor vehicle upon a public street in the City of Thomasville at a time when he was un-

der the influence of some intoxicating beverage. The State relied upon the testimony of Police Officer George Burton who testified that he saw the defendant drive the automobile on a public street and that at the time the defendant was under the influence of some intoxicating beverage. This officer testified from personal view of the defendant before he entered the automobile to start driving. This witness further testified as to the manner in which the defendant drove the vehicle. He testified to going to the home of the defendant and being invited into the home by the defendant's wife. This witness on direct examination did not testify as to any conversation with the defendant while he was in the home of the defendant. The defendant himself voluntarily brought out on cross-examination of this officer the contents of this conversation.

The State also relied upon the testimony of Police Officer Gilbert Batten. Batten did not see the defendant driving the vehicle. He did testify as to the appearance of the defendant when he observed him in the defendant's home. This did not constitute a search or any voluntary confession on the part of the defendant. It was simply the observation of the witness and his description of what he observed when looking at the defendant. There was nothing objectionable in this testimony; and even if there was, the defendant himself on cross-examination of this witness went into detail as to the conversation that he had with this witness in his home.

Police Officer Leonard Smith was not a witness on behalf of the State. The defendant himself called Police Officer Smith as one of his witnesses.

Police Officers Burton, Batten, and Smith all testified that from their personal observations of the defendant they were of the opinion that the defendant was under the influence of some intoxicating liquor. Only Officer Burton testified as to the driving of a motor vehicle on a public street by the defendant.

The defendant himself went on the witness stand. He admitted that he was driving the motor vehicle on the street but denied that he was under the influence of any intoxicating beverage at the time. If, by any reasoning, it could be established that what was said by the defendant in his home amounted to an involuntary confession and an illegal search, the defendant removed any incompetency pertaining thereto by his own testimony. *State v. McDaniel, supra.* The evidence on behalf of the defendant from the passenger in the automobile and the wife of the defendant was sharply conflicting with that of the State. A question was presented for jury determination. It is interesting to note that the charge of the court must have been

fair and impartial and a correct statement of the law, for no exception was taken to it. The evidence on behalf of the State was clearly competent and violated no constitutional rights of the defendant.

The authorities cited by the defendant in support of this assigned error are correct statements of the law when applicable, but in this case they are not apropos.

This assignment of error is overruled.

[4] Four, the defendant asserts that it was error for the trial court to impose a greater sentence than the defendant had received in the Recorder's Court of the City of Thomasville.

The North Carolina Statute, G.S. 15-177.1, provides:

> "In all cases of appeal to the superior court in a criminal action from a justice of the peace or other inferior court, the defendant shall be entitled to a trial anew and de novo by a jury, without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon."

This statute was enacted in 1947. It was construed in *State v. Meadows,* 234 N.C. 657, 68 S.E. 2d 406. In that case the defendant had been tried in the Recorder's Court of New Hanover County upon a charge of driving a motor vehicle upon the public highways while his operator's license was revoked. He was sentenced to pay a fine of $200 and the costs of court and, in default of said payment, he was sentenced to ninety days in jail. He appealed from this judgment, and in the superior court he was given a jail sentence of twelve months. The question presented was whether the superior court had power to impose a greater sentence than that imposed by the inferior court from which the appeal was taken. Ervin, J., speaking for the Court, stated:

> "Since the trial in the Superior Court is without regard to the proceedings in the inferior court, the judge of the Superior Court is necessarily required to enter his own independent judgment. Hence, his sentence may be lighter or heavier than that imposed by the inferior court, provided, of course, it does not exceed the limit of punishment which the inferior court could have imposed."

Counsel for the defendant rely upon *Patton v. North Carolina,* 381 F. 2d 636 (4th Cir., 1967), cert. den., 390 U.S. 905, 19 L. Ed. 2d 871, 88 S. Ct. 818. In that case the 4th Circuit of the United States Courts of Appeals held that where a retrial was obtained because of a federal constitutional defect in the first trial, a harsher penalty could not be imposed on the second trial.

In that case the retrial was in the superior court where the defendant was originally tried. In the instant case it is not a question of a retrial in the same court, but it is an entirely new trial in the superior court "without regard to the proceedings in the inferior court." To support the contention of the defendant in this case would be tantamount to saying that an inferior court may establish limitations upon the superior court and would give a defendant a vested right in a penal sentence which another defendant convicted of the same offense by the same court and jury would not and does not have. This would unduly impede the administration of justice and produce a situation which might lead to the necessity of eliminating inferior courts. The view expressed in *Patton v. North Carolina, supra,* is contrary to the view of the 3rd, 7th and 10th Circuits. *United States v. White,* 382 F. 2d 445 (7th Cir., 1967), cert. den., 389 U.S. 1052, 19 L. Ed. 2d 846, 88 S. Ct. 796; *Newman v. Rodriguez,* 375 F. 2d 712 (10th Cir., 1967); *Starner v. Russell,* 378 F. 2d 808 (3rd Cir., 1967), cert. den., 389 U.S. 889, 19 L. Ed. 2d 189, 88 S. Ct. 166, petition for rehearing den., 389 U.S. 997, 19 L. Ed. 2d 501, 88 S. Ct. 488. This conflict among the Circuit Courts has not been resolved by the Supreme Court of the United States.

The North Carolina Supreme Court takes the position that upon the granting of a new trial at defendant's request there is to be a retrial of the whole case, including punishment. This is true where the retrial is in the same court that conducted the original trial. *State v. Paige,* 272 N.C. 417, 158 S.E. 2d 522. This view should apply all the more in a situation such as in the instant case where there is to be a completely new trial *de novo* in the superior court after an appeal from an inferior court.

We follow the North Carolina Statute as construed in *State v. Meadows, supra,* and the North Carolina Supreme Court in *State v. Paige, supra.*

This assignment of error is overruled.

From a review of the entire record in this case, we are of the opinion that the defendant has had a fair and impartial trial. The evidence was sharply conflicting on the factual issue. The jury decided against the defendant, and the judgment which was imposed does not exceed the limit of punishment provided in such cases. If the defendant is aggrieved thereby, his remedy is with the Parole Board, for in the trial in the superior court we find

No error.

MALLARD, C.J., and MORRIS, J., concur.

SMOTHERS *v.* SCHLOSSER

H. P. SMOTHERS, JR., AND WIFE, TILLIE SMOTHERS; J. RALPH PELL AND WIFE, JEWEL PELL; W. B. HULL AND WIFE, RACHEL HULL; AND GEORGE B. REID AND WIFE, ANNE P. REID, PETITIONERS, v. ANDREW J. SCHLOSSER, JR., AND WIFE, ANGELINE SCHLOSSER; AND WILLIAM J. SCHLOSSER AND WIFE, RACHEL SCHLOSSER, RESPONDENTS

No. 6818SC342

(Filed 18 September 1968)

1. Boundaries §§ 8, 9— processioning proceeding

The sole purpose of a processioning proceeding is to establish the true location of a boundary line; what constitutes the line is a matter of law, and where it is located is a matter of fact.

2. Boundaries § 8— processioning proceeding — burden of proof

The burden of proof rests upon the petitioner in a processioning proceeding to establish the true location of the disputed boundary line.

3. Evidence § 25; Boundaries § 13— contents of court maps

A court map in a processioning proceeding should show the lands involved and the contentions of the parties as to the location of the disputed boundary.

4. Boundaries § 14— boundary disputes — survey of lands involved

While G.S. 38-4 does not require the court to order a survey of the lands in dispute when the boundaries of lands are in question, it is the better practice to do so.

5. Boundaries § 2— inconsistent calls — which call controls

Where calls are inconsistent, a call to a natural object controls course and distance; a call to another's line or to a well-recognized corner of an adjacent tract is a call to a natural object within the meaning of this rule.

6. Boundaries § 6— disputed boundary — junior and senior deeds

Where a junior deed calls for a corner or line in a prior deed as the dividing line between the adjoining tracts, the dividing line must be located from the description in the prior deed before resort may be had to any call in the junior deed.

7. Boundaries § 6— junior and senior deeds

Where a deed calls for the corner of an adjacent tract as the beginning point, such deed is the junior deed notwithstanding the deeds are from a common source and bear the same date.

8. Trial § 6— contradictory stipulations

Contradictory stipulations nullify each other.

9. Boundaries § 15; Judgments § 4— boundary dispute — ambiguous judgment — new trial

Where the judgment in a processioning proceeding contains inconsistent conclusions as to the description of the disputed boundary line, and the

description of the adjudged boundary line is not supported by the record, a new trial will be awarded.

APPEAL by respondents from *Bowman, S.J.*, 1 April 1968 Non-Jury Session of Superior Court of GUILFORD County.

In this processioning proceeding the petitioners alleged, and the respondents admitted, that there was a dispute concerning the location of the boundary line between a tract of land owned by the petitioners and a tract owned by the respondents.

Petitioners allege that they are the owners of a "certain tract of land lying and being in the City of Greensboro, County of Guilford, and State of North Carolina, and described as follows:

> "BEGINNING at a point in the intersection of the center lines of South Elm Street and Meadowview Road and running with the center line of Meadowview Road South 89 degrees 27 minutes 20 seconds East 566.82 feet to a point; thence South 00 degrees 24 minutes 00 seconds East 817.56 feet to an iron stake in the respondents' line; thence South 88 deg. 26' 15" West 516.35 feet to the center line of South Elm Street; thence with the center line of South Elm Street North 1 deg. 29' 15" West 837.72 feet to the point of beginning."

Petitioners alleged, and respondents admitted, that the disputed boundary line is the southern line of the petitioners' land and the northern line of the respondents' land. Petitioners alleged in substance that the boundary line between the two tracts has been established as described in paragraph seven of their amended petition by deed, estoppel, acquiescence or agreement. Respondents assert that the boundary line between them is the Kirkman line as described in a deed from Victor E. Kirkman to petitioners' predecessors in title, R. J. Harris and P. O. Wilson, dated 12 January 1950 and recorded in Guilford County Registry in Book 1306, page 405. Petitioners contend that the description in this deed to them is in error and that the foregoing is the correct description of their land. Petitioners and respondents agree that the southeast corner of this "Kirkman" tract of land is their common corner and that there is no dispute about where this corner is located on the ground. The controversy arises over the direction the line takes as it extends to the eastern margin of South Elm Street Extension.

From an adverse judgment rendered by the Clerk of the Superior Court, the respondents appealed to the Superior Court for trial *de novo* as provided in G.S. 38-3(b).

A jury trial was waived. After a hearing, the court made find-

ings of fact, conclusions of law, and signed judgment in favor of the petitioners. Respondents excepted and appealed to the Court of Appeals.

Douglas, Ravenel, Hardy & Crihfield by R. D. Douglas, Jr., and Norman & Reid by William G. Reid for petitioner appellees.

Hoyle, Boone, Dees & Johnson by T. C. Hoyle, Jr., and Harry Rockwell for respondent appellants.

MALLARD, C.J.

In the record filed herein the petitioners are sometimes referred to as plaintiffs and the respondents are sometimes referred to as defendants.

Respondents took fifty-three exceptions and group them in ten assignments of error. In their brief respondents assert that only two questions are presented; one, that the trial judge failed "to apply the correct rules of boundary law" and the other, that the trial judge failed to find "as a matter of law" that the disputed boundary line between the parties is that contended by respondents.

[1, 2] In *Coley v. Telephone Co.*, 267 N.C. 701, 149 S.E. 2d 14, Justice Bobbitt, speaking for the Court, said:

> "The sole purpose of a processioning proceeding is to establish *the true location* of disputed boundary lines. *Pruden v. Keemer*, 262 N.C. 212, 136 S.E. 2d 604, and cases cited. 'What constitutes the line, is a matter of law; where it is, is a matter of fact.' *McCanless v. Ballard*, 222 N.C. 701, 703, 24 S.E. 2d 525; *Jenkins v. Trantham*, 244 N.C. 422, 426, 94 S.E. 2d 311.
>
> The burden of proof rests upon the petitioner to establish the true location of a disputed boundary line. *Plemmons v. Cutshall*, 234 N.C. 506, 67 S.E. 2d 501; *McCanless v. Ballard, supra.* 'If the plaintiffs are unable to show by the greater weight of evidence the location of the true dividing line at a point more favorable to them than the line as contended by the defendants, the jury should answer the issue in accord with the contentions of the defendants.' *Cornelison v. Hammond*, 225 N.C. 535, 35 S.E. 2d 633, and cases cited."

In this case it appears that the parties have attempted to use a diagram drawn on a blackboard, admitted for illustrative purposes, in lieu of a proper map. A photocopy of this diagram, marked exhibit "X", is in the exhibits filed here. The stipulation was that it was to be used for illustrative purposes and was not "intended to reflect,

except roughly, courses, distances, angles and other details, . . ." There are no courses or distances marked on this diagram. Letters were placed on the blackboard to indicate corners shown thereon. There is no map in this record accurately showing the contentions of the parties. There is nothing else in this record with appropriate letters thereon, as used in the transcript by the witnesses and the attorneys, to which we can refer. A "map" is referred to by the witnesses without identifying what "map." It appears that the lawyers, witnesses and court were referring to the blackboard diagram as a map. However, we are, from this record, unable to determine with accuracy to what they were referring.

Petitioners' exhibit #1 is a map by R. D. Trogdon, dated 9 November 1951, and shows the boundary line between the parties to be a straight line running South 88° 26′ 15″ West.

Some of the petitioners and the predecessors in title of the other petitioners sold to respondents the 1.8-acre tract described in petitioners' exhibit #2, which is a deed dated 9 November 1951, and this deed calls for the south line thereof to run with grantors' southern line South 88° 26′ 15″ West 210 feet. This 1.8-acre tract is a part of the lands conveyed to petitioners' predecessors in title as described in respondents' exhibit #4.

Respondents' exhibit #1, which is a deed from R. J. Harris et ux to P. O. Wilson et ux, dated 16 February 1950, calls for the boundary line between the parties to run North 85° 30′ West.

Respondents' exhibit #2, duplicated by respondents' exhibit #5, is a deed from petitioners H. P. Smothers, Jr., et ux to petitioners W. B. Hull et ux and is dated 23 April 1955. It calls for the boundary line between the parties (which is described as the "original Kirkman line") to run North 85° 30′ West.

Respondents' exhibit #3 is a drawing having a legend located in the northwest corner thereof indicating that it was prepared by Moore, Gardner and Associates, Inc., Consulting Engineers. The pointer presumably indicating North on this drawing is pointed toward the bottom thereof instead of toward the top. This drawing has, among other things, two lines beginning at the same unidentified point located somewhere East of South Elm Street. One of these lines is designated, "Line Surveyed by Trulove Engineers, Inc.," and it is shown thereon that it runs from the unidentified point situated in an unidentified line South 88° 50′ 30″ East for an undisclosed distance to another unidentified point located at an undisclosed distance East of South Elm Street. The other line beginning at the same unidentified point as the line just described is designated, "Line

surveyed by Southern Mapping & Engineering Co.," and it is shown thereon that it runs North 88° 20′ 45″ East for an undisclosed distance to another unidentified point located an undisclosed distance East of South Elm Street.

[3, 4] This map or drawing does not attempt to show the lands of the parties, does not show their contentions, and has no lettering thereon designating corners. A court map should show the lands of and the contentions of the parties as to the location of the disputed boundary. While G.S. 38-4 does not require the court to order a survey of the lands in dispute when the boundaries of lands are in question, it is the better practice to do so.

There is no map marked as a court map in this record. If, as stated by one of the respondents' attorneys on oral argument, the respondents' exhibit #3 is intended to be such a "map," it is entirely inadequate in that it does not set out the contentions of the parties and it is lacking or deficient in other details referred to above.

[5-7] In 2 Strong, N. C. Index 2d, Boundaries, § 2, we find the following general rule stated with respect to inconsistent calls:

> "Where the calls are inconsistent, the general rule is that calls to natural objects control courses and distances. A call to a wall, *or to another's line,* if known or established, is a call to a monument within the meaning of this rule, as is a call to a highway. (emphasis added)
>
> . . .
>
> A call to a natural object which is permanently located controls course and distance, and a well-recognized corner of an adjacent tract is a call to a natural object within the meaning of this rule."

In 2 Strong, N. C. Index 2d, Boundaries, § 6, we find the following general rule stated with respect to the calls in junior and senior deeds:

> "Where a junior deed calls for a corner or line in a prior deed as the dividing line between the adjoining tracts, the dividing line must be located from the description in the prior deed, even to the extent of reversing a call in such prior deed when necessary, before resort may be had to any call in the junior deed, and in such circumstances the question of lappage cannot arise. The correct boundaries can be established only by surveying the senior conveyance.
>
> Where a deed calls for the corner of an adjacent tract as the beginning point, such deed is the junior deed notwithstanding the

fact that the deeds to both tracts, from a common source, bear the same date."

Respondents' exhibit #4 is a deed dated 12 January 1950 from Victor E. Kirkman to R. J. Harris and P. O. Wilson recorded in Book 1306, page 405. It is clear, in applying the foregoing principles of law, that the boundary line between the parties, unless changed in some lawful manner, is the South line in this deed (Res. Exh. #4), provided this line can be established. Respondents' exhibit #4 is the senior deed. The deed to the respondents from E. D. Yost and wife dated 13 July 1951, introduced into evidence as respondents' exhibit #7, is the junior deed calling for the Kirkman line as its North boundary line and has as its beginning corner the southwest corner of V. Kirkman in the eastern margin of South Elm Street. The South line of the Kirkman deed (Res. Exh. #4) runs from the southeast corner North 85° 30' West 758 feet to a stake in the eastern margin of South Elm Street Extension. The North line of respondents' tract is "Beginning at an iron pipe in the eastern margin of South Elm Street *V. Kirkman's Southwest Corner, and running thence with said Kirkman's South line South 88° 59' East 741.88 feet to an iron rod, Kirkman's southeast corner; . . .*" (emphasis added) It is clear from the courses of these two lines in these two deeds that the boundary line between the parties is a straight line, beginning at Kirkman's southeast corner and extending to the eastern margin of South Elm Street. Although the courses in the two deeds are different, the parties agree that their common corner is the southeast corner of the Kirkman tract and that they are in agreement as to where it is on the ground. But they disagree as to the location of the southwest corner of the Kirkman tract and the connecting line between the two corners. There are five different courses called for in different instruments as to the course of the boundary line between the parties.

The parties stipulate:

"(1) That the illustrative diagram herein designated as Exhibit 'X' is an accurate representation of the blackboard diagram used for illustrative purposes in the trial of this action.

(2) That the diagram is not drawn to scale and is not intended to reflect, except roughly, courses, distances, angles and other details, but is intended to illustrate the general relative positions of points and corners referred to in the testimony.

(3) That point O, an iron rod, is the southeast corner of the Kirkman land, is the southeast corner of the land conveyed by Kirkman to Harris and Wilson by deed recorded in Book 1306, page 405, which is Respondents' Exhibit #4, and is the south-

east corner of the 1.8-acre tract conveyed by Harris and Wilson and Pell and Reid to Schlosser by deed recorded in Book 1442, page 453, which is Petitioners' Exhibit #2.

(4) That point E, an iron stake, is the northeast corner of said 1.8-acre tract, and is in the east line of the Kirkman land and in the east line of the land conveyed by Kirkman to Harris and Wilson by the deed above mentioned, Exhibit #4.

(5) That the line O to D is the Petitioners' contention as to the true dividing line, and line O to C is the Respondents' contention as to the true dividing line."

It should be noted that there is no substantive evidence in this record using letters therein or thereon to which the stipulations designated by letters can apply. In fact, the only exhibit containing a line or lines marked "O to D" and "O to C" is the blackboard diagram. This was received for illustrative purposes. We are unable to determine from this record to what these stipulations refer. Respondents state in their brief that:

"Reference by alphabetical letters to lines and corners are to the illustrative diagram designated Exhibit 'X', which is a reproduction of the blackboard diagram used in the trial."

[8] It appears from the evidence and stipulations in this case that the southeast corner of the Kirkman land, the southeast corner of the land conveyed by Kirkman to Harris and Wilson by deed recorded in Book 1306, page 405, which is respondents' exhibit #4, and the southeast corner of the 1.8-acre tract conveyed by Harris and Wilson and Pell and Reid to Schlosser by deed recorded in Book 1442, page 453, which is petitioners' exhibit #2, is a known admitted corner.

The parties have by stipulation agreed that point "E" on exhibit "X", the blackboard diagram, is an iron stake and is the northeast corner of the 1.8-acre tract, and *that it is in the east line of the Kirkman land and in the east line of the land conveyed by Kirkman to Harris and Wilson* by respondents' exhibit #4. This appears to be, from this record, a contradictory stipulation inasmuch as the east line of the 1.8-acre tract, as shown on petitioners' exhibits #1 and #2, runs South 00° 24′ 05″ East from the northeast corner thereof to the known and stipulated southeast corner, and the East line in respondents' exhibit #4 runs a different course, to wit, South 03° 28′ West to the same known and stipulated southeast corner. Petitioners exhibit #2 is dated 9 November 1951, and respondents' exhibit #4 is dated 12 January 1950. The East line of the "Kirkman land" is

not separately identified in the stipulation other than as it may be referred to in the exhibits above mentioned. We are of the opinion and so decide that these contradictory stipulations would have the effect of nullifying each other. Respondents' exhibit #6, which was not admitted in evidence, purports to show the contentions of the parties by the use of internal angles instead of courses. However, the beginning point for the determination of these angles in each instance is the same East line and thus apparently does not take into account the differences in the location of and courses of these lines as shown in petitioners' exhibits #1 and #2 and respondents' exhibit #4.

The condition of this record in the failure to have a map is such that we are unable to rule on many of the exceptions to the evidence because of our inability to ascertain to what the evidence relates.

The petitioners assert that the boundary line between the parties, as they contend for, is an agreed line, or one established by estoppel or acquiescence. The judge in entering the judgment found "(t)hat the respondents, in accepting the deed for the 1.8-acre tract of land dated November, 1951, and recorded in Book 1442, page 453, with the southern boundary described therein and made pursuant to the Trogdon plat, agreed that the bearing on said southern boundary constituted the true dividing line between the parties and they are therefore estopped to deny that the dividing line between the parties is the line as set out in said deed."

Petitioners excepted to this finding on the grounds that there was no evidence thereof in this record. Since the case must go back for a new trial, and in view of the record herein, we do not decide the question as to whether there was competent evidence to support such a finding. The applicability of this principle of law is not properly presented by this record on appeal. However, in discussing the question of the fixing of boundary lines by parol agreement, Chief Justice Parker said for the Court in *Andrews v. Andrews,* 252 N.C. 97, 113 S.E. 2d 47:

> "A multitude of jurisdictions hold that an uncertain and disputed boundary line may, under certain circumstances, be fixed permanently by parol agreement, if accompanied by sufficient acquiescence and possession, but where there is no *uncertainty* as to the boundary line, a parol agreement fixing a boundary line in disregard of those fixed by the deeds is void under the Statute of Frauds, as it amounts to a conveyance of land by parol. 11 C.J.S., Boundaries, Sec. 67; 8 Am. Jur., Boundaries,

Sec. 73; Tiffany Real Property, 3rd Ed., Sec. 653; Annotation 69 A.L.R. 1433. This general rule of law invoked by respondent is not applicable to the facts here, and it is not necessary for us to decide as to whether or not it is in conflict with some of our decisions, for the reason that here there is no uncertainty as to what the true boundary line is, and its true location on the premises can be fixed by the deeds and a survey.

This Court said in *Haddock v. Leary,* 148 N.C. 378, 62 S.E. 426: 'For nothing is better settled in this State than that if the calls of a deed are sufficiently definite to be located by extrinsic evidence, the location cannot be changed by parol agreement, unless the agreement was contemporaneous with the making of the deed.'

This Court said in *Kirkpatrick v. McCracken,* 161 N.C. 198, 76 S.E. 821: 'Where a division line between tracts of land is well ascertained, and can be located by the plain and unambiguous calls of the deed, the acts and admissions of the parties claiming the respective tracts are not competent evidence, either to change the line or to estop the party from setting up the true line. *Shaffer v. Gaynor,* 117 N.C. 15. But where the dividing line is in dispute, and is unfixed and uncertain, the acts and admissions of the adjoining proprietors recognizing a certain line as the proper division line is evidence competent to be submitted to the jury.'

'If the calls in a deed are sufficiently definite to be located by extrinsic evidence, the location cannot be changed by parol agreement unless the agreement was contemporaneous with the making of the deed.' *Daniel v. Power Co.,* 204 N.C. 274, 168 S.E. 217.

The true principle is laid down by Smith, C.J., in laconic language in *Davidson v. Arledge,* 97 N.C. 172, 2 S.E. 378: 'The rejected evidence would have been competent to fix an uncertain and controverted boundary, but not to change that made in the deed that distinctly defines it.'

Wiggins v. Rogers, 175 N.C. 67, 94 S.E. 685, was an action brought to recover a parcel of land the ownership of which depended on the true location of the dividing line between adjoining landowners. The Court said: 'Plaintiff proposed to show that the line had been run some years before the time of the trial by Posey Hyde, and that the respective owners had recognized it as the line of division between them for many years. This evidence was excluded by the Court, but we think it was compe-

tent, not to change the boundaries of the land (*Davidson v. Arledge,* 97 N.C. 172), or, in other words, to show that the parties had orally agreed upon a line different from the true line, but as some evidence to prove where was the true line.'"

For more on the establishment of a boundary line by oral agreement or acquiescence, see 113 A.L.R. 421.

[9] After hearing the evidence and making extensive findings of fact, the judge concluded as a matter of law that:

"(T)he disputed boundary line is located as contended by the petitioners, which is described as follows:

BEGINNING at a point which is South 88 deg. 26' 15" West, 210 feet from an iron stake at the southeast corner of the *1.84-acre tract* above referred to, and continuing from said beginning point *South 88 deg. 26' 15"* West to the eastern margin of South Elm Street." (emphasis added)

There is no 1.84-acre tract of land mentioned in the judgment or in the record, and hence "above referred to" means nothing.

Thereupon, it was adjudged that the common boundary between the parties was located:

"BEGINNING at a point which is located South 88 deg. 26' 15" West 210 feet from an iron stake, the southeast corner of the *1.84-acre tract* conveyed by Pell et al to Schlosser, et al, by deed recorded in Book 1442, page 453, in the Guilford County Registry; and running from said beginning point *South 88 deg. 20' 45" West* to the eastern margin of South Elm Street." (emphasis added)

This description is different from the description of the location of the boundary line appearing in the conclusions of law as set out in this judgment. Thus, the two descriptions of the location of the boundary line in the judgment are inconsistent. The judgment is ambiguous and is not supported by the record insofar as it attempts to change the boundary line from one straight line extending from the known and agreed southeast corner of the Kirkman land to South Elm Street.

"Where a judgment remains ambiguous after resort to the pleadings and record to ascertain its meaning, and is not supported by the record, a new trial will be awarded." 5 Strong, N. C. Index 2d, Judgments, § 4.

The parties would be well advised, before this case is tried again, to have one map made showing the location of the lands of the pe-

titioners and the respondents as well as the location of the boundary line between them as contended for by each of the parties. *Perkins v. Clarke,* 241 N.C. 24, 84 S.E. 2d 251.

In view of the contradictions in the stipulations, the condition of the record as set forth herein, and the contradictions in the location of the line as set out in the judgment, a new trial is ordered. We do not deem it necessary to discuss other exceptions of the respondents, some of which may have merit but may not occur on a new trial.

The judgment of the Superior Court is reversed, and a new trial is awarded.

Reversed.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES MARK ADAMS

No. 6821SC280

(Filed 18 September 1968)

1. **Criminal Law § 104— nonsuit motion — consideration of evidence**

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 that may be drawn from the evidence.

2. **Criminal Law § 106— nonsuit motion — sufficiency of evidence**

If there is any competent evidence to support the charge contained in the bill of indictment, the case is one for the jury.

3. **Homicide § 21— manslaughter prosecution — sufficiency of evidence of 14-year-old boy's guilt in shooting his father**

In a prosecution upon indictment charging a 14-year-old defendant with manslaughter for the killing of his father, the issue of defendant's guilt is properly submitted to the jury where the evidence tends to show that, (1) during the afternoon of the killing the father, who had been continually drinking beer, made threats repeatedly in front of the defendant that he was going to kill defendant's mother when she returned home from work, (2) the defendant put four cartridges in a 30-30 rifle which he hid in a cocked position under a sofa in the garage, (3) upon the mother's arrival home the father ordered her into the garage and started towards her when she refused to go, whereupon the defendant picked up the rifle and told his father to stop, and that (5) as the defendant was retreating before his father through the door of the garage, the rifle fired, striking the father in the chest.

4. Homicide § 27— instructions on accidental killing — failure to instruct on culpable negligence

Where, in a prosecution for manslaughter, defendant relies upon the defense of accidental killing, an instruction to the effect that where a man is doing a lawful act in a careful manner and without any unlawful intent and accidentally kills another the homicide is excusable, but that the absence of any of these elements would involve guilt, *is held* erroneous since it leaves the jury free to consider ordinary rather than culpable negligence as sufficient to deprive to defendant of the plea of accidental killing.

5. Homicide § 10— child's right to kill in defense of a parent

A person has the right to kill not only in his own self-defense but also in the defense of another who stands in a family relationship to him, and this right extends to the defense of one's parent; the privilege includes the right of a child to kill his father in defense of the child's mother and the father's wife.

6. Homicide § 10— limitation of right to kill in defense of another

The right to kill in defense of another cannot exceed such other's right to kill in his own defense, including the requirement of reasonable apprehension of death or great bodily harm.

7. Homicide § 13— right to rely on more than one defense

Defense pleas of accident and self-defense are not necessarily inconsistent; defendant may rely on more than one defense and is not required to make an election.

8. Assault and Battery § 5— assault by pointing a gun — element of wilfulness

The literal provisions of G.S. 14-34 are subject to the qualification that the intentional pointing of a gun is in violation of the statute only if done wilfully, that is, without legal justification.

9. Homicide § 28— instructions on self-defense required by the evidence

In a prosecution upon indictment charging a 14-year-old defendant with manslaughter for the killing of his father, the theory of the State's case was that the father died as a result of defendant's unlawful act in pointing a gun at the father. Although defendant contended that the discharge of the gun was accidental, he also contended that he loaded and hid the gun in order to protect his mother from serious harm or death at the hands of his father. There was evidence that on the afternoon of the tragedy the defendant heard his father make numerous threats to kill his wife, and that the father had been stopped from harming his wife on a prior occasion only when defendant's brother fired a shot in the air. *Held:* The failure of the trial judge to instruct the jury on the law of self-defense and defense of others is error, entitling the defendant to a new trial.

BROCK, J., concurring in part and dissenting in part.

STATE *v.* ADAMS

APPEAL by defendant from *Armstrong, J.*, 1 April 1968 Session FORSYTH Superior Court.

By indictment proper in form, defendant, a 14-year-old boy, was charged with manslaughter for the killing of his father, Hayes Baxter Adams, with a 30-30 rifle on the evening of 7 May 1967.

The tragedy occurred in the yard and garage of the family home located on Bramblewood Trail in or near Winston-Salem. Defendant, his mother and young sister were the only eyewitnesses to the occurrence. The mother testified as a witness for the State and was recalled as a witness for the defendant.

Evidence for the State and the defendant tended to show the following:

The defendant, his parents and young sister lived together; defendant's 20-year-old brother lived with them in and prior to 1966 but on the date in question was serving in the Armed Forces.

On Sunday, 7 May 1967, the deceased was the operator of the Wedgewood Lounge at the Wedgewood Golf Course in or near Winston-Salem. Defendant's mother was regularly employed during weekdays at the office of the N. L. R. B. in Winston-Salem. Around 12:30 p.m., the deceased called his wife and advised that the lounge was full of people and that he needed some help. Mrs. Adams went to the lounge but found that her husband was the only person present. Observing that he was drinking, she proceeded to take charge of the lounge while Mr. Adams gathered up some beer and went home.

Throughout the afternoon, while in the home with the defendant and his young sister, Mr. Adams drank one beer after the other. He called his wife on the telephone several times, calling her vile names and threatening to harm her when she returned home. On one occasion he stated, "You g . . . d . . . slut, just as soon as you get home I am going to beat the living hell out of you. I'll kill you." During the afternoon, Mr. Adams kept telling the defendant that he was going to kill his mother, declaring "I am going to kill that damn bitch. I am going to scatter her guts from room to room."

Defendant testified that he was afraid that his father was going to kill his mother when she came home, stating that his father looked like he was out of his mind. Late in the afternoon, Mr. Adams required the defendant to go to the lounge and get him some more beer.

The evidence further disclosed that the deceased on previous occasions had threatened, abused and assaulted his wife. In May 1966,

he had grabbed Mrs. Adams by her hair, swung her around and hit her on her head. Defendant's brother had tried to restrain his father, after which he threatened to kill the whole family. Mrs. Adams ran out the door to escape, with Mr. Adams following her; he backed her against a car and swung at her. Defendant's brother took a pistol and told his father to leave his mother alone; Mr. Adams told defendant's brother that he was not man enough to shoot, whereupon the brother fired the gun several times into the air, and Mrs. Adams and the children went to a neighbor's house where they awaited the police.

Around 6:00 p.m. on the afternoon of the tragedy now before us, defendant took a 30-30 rifle, which he had never fired or used before, from the house, put four cartridges in it, and left the rifle in a cocked position under a cushion of a sofa in the garage. Defendant kept going out to the garage so that he might see his mother when she came home from the lounge and that he might signal her not to stop at the home. Mr. Adams called the defendant into the house several times and told him how he was going to kill Mrs. Adams.

Around 8:00 p.m., defendant saw his mother driving down the street and signaled to her to drive on. Mrs. Adams drove past the house once but returned and drove into the yard. Mr. Adams immediately went from the house into the garage and ordered his wife to throw him the keys to both automobiles, which she did. He then told Mrs. Adams to get inside the garage, but she remained behind the cars and he started after her. At that point, defendant picked up the rifle and told his father to stop. Mrs. Adams told the defendant to put the gun down and "We'll go, we'll run." Mr. Adams saw his son with the rifle and began advancing toward him saying, "You give me that gun or I'll make you use it." Defendant proceeded to walk backward in the garage and through a door leading to the outside; there was a six-inch drop from the level of the garage to the sidewalk outside the door and as defendant backed out of the door, the rifle fired, the bullet striking Mr. Adams in his chest. He fell backward in the garage and died soon thereafter.

Defendant testified that he did not intend to shoot his father and did not intentionally pull the trigger; that he did not know what caused the gun to discharge. He stated that he had the gun for the purpose of shooting into the air if necessary to keep his father from harming his mother.

The jury found the defendant guilty as charged and from an active prison sentence of not less than three nor more than ten years, defendant appealed.

Attorney General T. Wade Bruton by Staff Attorneys Dale Shepherd and Andrew A. Vanore, Jr., for the State.

Smith, Moore, Smith, Schell & Hunter by Norman B. Smith for defendant appellant.

BRITT, J.

The defendant assigns as error the failure of the court to sustain his motion for judgment as of nonsuit.

[1-3] It is well settled in this jurisdiction that in passing upon a motion for judgment as of nonsuit in a criminal prosecution, we must consider the evidence in the light most favorable to the State, and if there is any competent evidence to support the charge contained in the bill of indictment, the case is one for the jury. *State v. Kluckhohn,* 243 N.C. 306, 90 S.E. 2d 768; *State v. Ritter,* 239 N.C. 89, 79 S.E. 2d 164. Furthermore, in the consideration of such motion, the State is entitled to the benefit of every reasonable inference that may be drawn from the evidence. *State v. Ritter, supra; State v. Gentry,* 228 N.C. 643, 46 S.E. 2d 863. Applying the rule as stated in numerous decisions of our Supreme Court with respect to such motions, we hold that the State's evidence in the trial below was sufficient to carry the case to the jury. The assignment of error is overruled.

[4] Defendant also assigns as error the following portions of the charge relating to defendant's plea of accident:

> I suppose at this point I should state to you what meaning the law attaches to the term "accident." I instruct you that an accident is an event from an unknown cause, or it may be an unusual and unexpected event from a known cause; that is, some chance or casualty, and it means an event causing damage or death unexpectedly and without fault.
>
> So, then, members of the jury, where a man is doing a lawful act in a careful manner and without any sort of unlawful intent, accidentally kills another, of course it is an excusable homicide. But these facts must concur, and in the absence of any one of them will involve guilt.

The assignment of error relating to the second paragraph of the quoted portion of the charge is well taken and is sustained.

In *State v. Kluckhohn, supra,* the defendant assigned as error a portion of the charge directed to the defendant's plea of misadventure or accident stated as follows: "The defendant having entered a plea of Not Guilty, contends that the killing was through misad-

venture or accident and the Court instructs you that where one does a lawful act in a careful and lawful manner and without any unlawful intent, accidentally kills, that is excusable homicide, but these facts must all appear and the absence of any one of these elements will involve guilt. Accident is an event that happens unexpectedly and without fault."

In an opinion written by Denny, J. (later C.J.), our Supreme Court declared:

> The vice in this instruction is that it leaves the jury free to consider ordinary rather than culpable negligence as sufficient to make unavailing to the defendant the plea of accidental killing. *S. v. Early,* 232 N.C. 717, 62 S.E. 2d 84; *S. v. Wooten,* 228 N.C. 628, 46 S.E. 2d 868; *S. v. Miller,* 220 N.C. 660, 18 S.E. 2d 143; *S. v. Cope,* 204 N.C. 28, 167 S.E. 456. A mere negligent departure from the conduct referred to in the challenged portion of the charge would not necessarily involve or constitute criminal guilt. A departure to be criminal would have to consist of an intentional, willful, or wanton violation of a statute or ordinance enacted for the protection of human life or limb which resulted in injury or death. Such a violation of a statute would constitute culpable negligence. *S. v. Cope, supra.* "Culpable negligence in the law of crimes is something more than actionable negligence in the law of torts. *S. v. Stansell,* 203 N.C. 69, 164 S.E. 580; *S. v. Rountree,* 181 N.C. 535, 106 S.E. 669. Culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. . . . But, an unintentional violation of a prohibitory statute or ordinance, unaccompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, is not such negligence as imports criminal responsibility." *S. v. Cope, supra.*

We hold that the charge in the instant case contains the same error declared in *Kluckhohn.*

Defendant assigns as error the failure of the trial judge to charge the jury on the doctrine of self-defense and defense of another. This assignment of error is well taken.

[5, 6] A person has the right to kill not only in his own self-defense but also in the defense of another who stands in a family relationship to him, and this right extends to the defense of one's parent. *State v. Carter,* 254 N.C. 475, 119 S.E. 2d 461; *State v. Anderson,* 222 N.C. 148, 22 S.E. 2d 271. The privilege includes the right of a

child to kill his father in defense of the child's mother and the father's wife. *State v. Carter, supra.* However, the right to kill in defense of another cannot exceed such other's right to kill in his own defense, including the requirement of reasonable apprehension of death or great bodily harm. 4 Strong, N. C. Index 2d, Homicide, § 10; *State v. Gaddy,* 166 N.C. 341, 81 S.E. 608.

[7] Defense pleas of accident and self-defense are not necessarily inconsistent. "The defendant's plea of not guilty entitled him to present evidence that he acted in self-defense, that the shooting was accidental, or both. Election is not required. The defendant may rely on more than one defense." Higgins, J., in *State v. Wagoner,* 249 N.C. 637, 107 S.E. 2d 83.

[8] The theory of the State's case was that on the occasion of the fatal shooting, the defendant was engaged in an unlawful act — pointing a gun in violation of G.S. 14-34 — the result of which caused the death of the deceased. But the literal provisions of G.S. 14-34 are subject to the qualification that the intentional pointing of a gun is in violation thereof only if done willfully, that is, without legal justification. *Lowe v. Department of Motor Vehicles,* 244 N.C. 353, 93 S.E. 2d 448.

[9] Although the defendant contended that the actual discharge of the gun was not intended, he also contended that he hid the loaded gun in the garage and later took it in his hands for the purpose of protecting his mother from serious harm or death at the hands of his father. Proper instructions on self-defense and defense of another would have enabled the jury to determine whether the defendant was justified in having the loaded gun in his possession at the time of the fatality.

The tender age of the defendant presented a more compelling reason why the jury should have been charged on the principles of self-defense and defense of another in addition to the defense of accident. The evidence was plenary that throughout the afternoon preceding the family tragedy, the 14-year-old defendant heard his father make numerous and repeated threats to kill the defendant's mother. In addition to that, the evidence disclosed that defendant had witnessed other instances in which the deceased, when drinking, had not only threatened and abused the mother, but his attempt to seriously harm her on one occasion was stopped only when defendant's brother fired a shot into the air. Although the deceased had no weapon that was visible immediately before the fatal shot, the defendant was entitled to have the jury pass upon the issue of "reasonable apprehension of death or great bodily harm" to his mother or even to himself, and to

determine if the defendant was justified in taking the loaded gun into his hands and pursuing the course which he followed.

It is true that the oral testimony of defendant was more pointed toward the defense of accident, but defendant's immaturity in knowing and being able to relate exactly what happened at the time of the tragedy must be considered.

The other assignments of error asserted by defendant will not be discussed, as they may not arise upon a retrial of this case.

Because of the errors in the trial court's charge, the defendant is entitled to a new trial and it is so ordered.

New trial.

PARKER, J., concurs.

BROCK, J., concurs in part and dissents in part.

BROCK, J., concurring in part and dissenting in part: I feel compelled to record my dissent from the majority holding that defendant was entitled to have the case also submitted to the jury upon the theories of self-defense and defense of another; however, I do agree with the majority opinion that the defendant is entitled to a new trial for error in the charge.

One may kill in defense of himself, or his family, when not actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has reasonable grounds for the belief. *State v. Fowler,* 250 N.C. 595, 108 S.E. 2d 892. However there must be evidence from which the jury may find that the defendant believed at the time that it was necessary to kill his adversary to prevent death or great bodily harm to himself or his mother, before he may seek refuge in the principle of self-defense and have the jury pass upon the reasonableness of such belief. *State v. Rawley,* 237 N.C. 233, 74 S.E. 2d 620.

In the case we are considering, the defendant's avowed purpose in getting the rifle out to the garage, and in loading it, was to fire it into the air as he had seen his brother do with a pistol about a year before. On direct examination he testified: "I was going to fire it into the air to scare him . . . if he started to hurt her or started for her . . . my brother did it and it brought the neighbors down and he went inside and stopped bothering her." And he stated that was what he intended to do this time.

And, on cross-examination, in response to the Solicitor's question

as to whether he intended to use the gun on his father, the defendant stated: "No, sir. I wasn't going to use it on him at all . . . I wasn't going to use it on my father." The defendant further testified that when his mother saw him and told him to put the gun down and run, that he didn't put it down because "I was going out the back door to throw it down the hill." It was while backing out the back door that the rifle discharged, the defendant stating that he may have come in contact with the door when backing out, but that he did not pull the trigger. Also the defendant testified that he was his father's favorite son, and that his father had never abused him in punishment or anything. And there was no showing of any threat of violence to defendant on this occasion.

It seems fairly obvious from all of the testimony that defendant's mother was not afraid of what the deceased might do to her. She had his threats relayed to her by the children over the telephone and, according to her testimony, the deceased had also told her over the telephone that he was going to beat her when she got home. Nevertheless, she went home as usual. Also, according to her testimony, when she arrived home and the deceased threatened her, she made no effort to run away from him even up to the point that she says she first saw defendant with the rifle in his hand.

I agree with the majority opinion that a plea of not guilty entitles a defendant to present evidence that he acted in self-defense or defense of another, and that the shooting was an accident; and that defendant is not required to elect to pursue only one of such defenses. However, there must be *evidence* to support a defense before he is entitled to have the jury instructed upon the defense. In this case the entire evidence for the defendant points to an accidental shooting, and such evidence entitled the defendant to have the jury properly instructed upon an accidental homicide. But, although the evidence may support a conclusion that defendant loaded, secreted, and later picked up the rifle in an unwise effort to assist his mother, in my view there is no evidence in the present record to justify submitting the case to the jury upon the theory of self-defense, or defense of another. I agree with the trial judge upon this phase of the case. The courts should not interpose defenses for a defendant whose entire evidence and testimony rejects those defenses.

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

AND

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

No. 6819SC260

(Filed 18 September 1968)

1. Damages §§ 4, 13; Appeal and Error § 49— damages to automobile — testimony as to fair market value

In an action growing out of an automobile collision, ruling of the trial judge sustaining defendants' objection to allowing plaintiff to give his opinion of the fair market value of his automobile immediately after the accident is not prejudicial error where plaintiff was later allowed to so testify and where the jury returned a verdict for more damages to plaintiff's automobile than his opinion tended to show.

2. Automobiles § 45; Damages § 13; Witnesses § 7— daily memorandum of effect of personal injuries

In an action for personal injuries resulting from an automobile collision, the trial court properly refused to allow the introduction into evidence of books in which plaintiffs had kept a daily memorandum of how their injuries affected them, since such records can only be used for the purpose of refreshing the witnesses' recollection when they testify.

3. Evidence § 29— daily record of injuries — reference by counsel to "medical journals"

In an action for personal injuries, the trial court properly sustained defendants' objection to the use of the term "medical journals" by plaintiffs' counsel in referring to daily records kept by plaintiffs as to how their injuries affected them, and properly instructed the jury to disregard any such reference to "medical journals," since that term is inappropriate for such records and is misleading.

4. Damages § 13— consolidated personal injury actions — evidence of drug expenses

In consolidated actions by a husband and wife for injuries sustained in an automobile accident, the trial court properly refused to allow the introduction of both plaintiffs' drug bills in a lump sum with no differentiation between them, since it would be impossible for the jury to determine what portion of the total drug bills belonged to each plaintiff.

5. Appeal and Error § 45— failure to bring assignments forward

Assignments of error not brought forward and argued in the brief are deemed abandoned. Rule of Practice in the Court of Appeals No. 28.

6. Appeal and Error § 30— admission of witness' statements to investigating officer

In an action growing out of an automobile accident, the admission of testimony by defendant as to what she told the investigating patrolman with respect to how the accident occurred will not be held prejudicial error where the witness had given previous testimony which coincided with what she told the officer.

7. Trial § 36— expression of opinion by the court — multiple defendants — reference to one "wrongdoer"

In an action against multiple defendants for injuries sustained in a three-car collision, an instruction that plaintiff is entitled to recover, if at all, damages for past and present injuries resulting from the "wrongdoer's negligent act or acts" *is held* not an expression of opinion by the court that only one of the defendants was responsible for the damages, the words "wrongdoer's" and "wrongdoers' " being pronounced the same way and the placement of the apostrophe by the reporter who transcribed the charge not changing what the judge said to the jury.

8. Trial § 36— expression of opinion by the court — multiple defendants — reference to only one defendant in reading issue to jury

In an action against multiple defendants for personal injuries sustained in a three-car collision, the court's use of the word "defendant" in reading to the jury an issue as to damages will not be held prejudicial error as an expression of opinion by the court that only one defendant was responsible for the damages where the judge referred throughout the charge to all defendants.

APPEAL by plaintiffs from *Seay, J.*, 1 January 1968 Session, RANDOLPH Superior Court.

These actions are by Robert John Goldston to recover for personal injuries and property damage, and by Margaret Stumpf Goldston to recover for personal injuries arising out of an automobile collision. The two cases were consolidated for trial.

The accident occurred on 8 June 1964 at approximately 6:30 p.m. on U. S. Highway Nos. 19 and 23 near Asheville. Robert John Goldston was operating his 1962 Valiant automobile. Margaret Stumpf Goldston was a passenger in her husband's car.

Both plaintiffs alleged in their complaints that Robert John Goldston stopped behind another motorist who was waiting for oncoming traffic to pass in order to make a left turn; that while stopped behind the turning vehicle defendant Brenda Henderson Chambers (now Lynch), operating her then husband's 1962 Buick, ran into the rear of the Goldston vehicle; that immediately following this collision defendant, Henry Sloan Medlin, operating a 1957 Chevrolet owned by Grover Cleveland Medlin, ran into the rear of the Chambers ve-

hicle, knocking it into the rear of the Goldston vehicle a second time.

The evidence for defendants Lynch and Chambers tended to show that their vehicle was completely stopped when the Medlin vehicle collided with the rear of the Chambers vehicle, knocking it into the rear of the Goldston vehicle, and that there had been no prior contact between the Chambers vehicle and the Goldston vehicle. Evidence for defendants Medlin tended to show that the Chambers vehicle did collide with the Goldston vehicle prior to the time that Medlin collided with Chambers.

Plaintiffs admitted on cross-examination that they did not see the Chambers vehicle when it allegedly hit the Goldston vehicle the first time. Their only evidence on this point was to the effect they felt two jolts "and assumed" that the Chambers vehicle had hit first.

These cases were first tried at the 27 February 1967 Session, Randolph Superior Court, with the jury finding that defendants Lynch and Chambers were not negligent; that defendants Medlin were negligent; that plaintiff Robert John Goldston was entitled to recover $7,500.00 for personal injuries and $528.00 for property damage; and that plaintiff Margaret Stumpf Goldston was entitled to recover $3,750.00. These jury verdicts were set aside by the Court in its discretion. On appeal by plaintiffs the ruling of the trial court was not disturbed, and the cases were remanded for trial.

Upon this second trial the jury again found the defendants Lynch and Chambers not negligent and the defendants Medlin negligent. Damages were awarded to plaintiff Robert John Goldston in the amount of $3,000.00 for personal injuries and $528.75 for property damage; Mrs. Goldston was awarded $2,000.00 for her personal injuries.

The plaintiffs moved to set the verdicts aside, which motion was denied, and the plaintiffs appealed.

Ottway Burton, Attorney for plaintiff appellants.

Miller, Beck and O'Briant, by Adam W. Beck, Attorneys for defendant appellees, Lynch and Chambers.

Smith, Moore, Smith, Schell and Hunter, by Richmond G. Bernhardt, Jr., Attorneys for defendant appellees, Medlin.

BROCK, J.

[1] Plaintiffs' Assignment of Error Number One is addressed to the ruling of the trial judge in sustaining the objection of defend-

ants Lynch and Chambers to allowing plaintiff Robert Goldston to give his opinion of the fair market value of his automobile immediately after the incident. This assignment of error might be well taken, except for the fact that the plaintiff was later allowed to testify as to his opinion about the matter, and in fact the jury verdict was for 25 cents more damages than the plaintiff's opinion tended to show. Plaintiffs' Assignment of Error Number One is overruled.

[2, 3] Plaintiffs' Assignment of Error Number Two is to the ruling of the trial judge in sustaining all of defendants' objections to allowing in evidence plaintiffs' Exhibits C, D and G. These exhibits were books furnished to the plaintiffs by counsel for the purpose of maintaining a daily record of how they felt. Obviously there is nothing morally or legally wrong with plaintiffs keeping a daily memorandum of how their injuries have affected them, and, under proper circumstances, to use these memoranda for the purpose of refreshing their recollection when they testify. However, in this case counsel, in his questioning of the plaintiffs on direct examination, referred to these books as "medical journals," which term is not appropriate, and the objection to the use of that term was properly sustained by the trial judge. Also, from an examination of the pages of these "medical journals," each page is devoted to a day, and after the date, appear six printed questions with a variety of answers to be selected by checking a block; for example, question number one on each page reads as follows:

> "Compared to my normal condition of health before the injury, today I feel:" (And then follows a series of answers which can be given by checking an appropriate blank as follows:)
>
> "Very ill.
>
> "Ill.
>
> "Tired and exhausted.
>
> "Nervous and irritable.
>
> "About the same except for the injuries.
>
> "Adequate."
>
> (Then two blank lines follow headed by the word "Explain."
>
> Question number one then continues with a series of possible answers to be given by checking the appropriate block as follows:)
>
> "Compared to my general condition of health for the last week or so, today I feel:

"Continuing deterioration of my condition.

"About the same.

"Slight improvement.

"Considerable progress."

(Again two blank lines follow headed by the word "Explain.")

Without detailing the suggested possible answers that are given for the remaining five questions, it is interesting to note the questions themselves as follows:

"2. Specific symptoms and conditions troubling me today are:" (Twenty suggested answers follow, plus two blank lines headed by the word "Explain.")

"3. Drugs, medicine or therapy used today:" (There follow blank lines for the name of the drug, the amount taken and the time, and for what symptoms it was given. Also, suggested answers as to what relief was given, and two blank lines headed by the word "Explain.")

Question number four is in more general terms concerning the results of undertaking to perform duties, question number five is for comments, and question number six is for expenses incurred that day.

Without commenting upon whether the plaintiffs were qualified to answer the questions propounded on the pages of these books, and without comment upon the admissibility of the printed matter appearing on them, the proper function of any type daily record kept by a plaintiff would be limited to the use thereof for the purpose of refreshing the witness's recollection from notes made by the witness at the time. This the plaintiffs did not undertake to do, but undertook to merely offer the books in evidence after testifying that they had personally made the entries therein. Plaintiffs' Assignment of Error Number Two is overruled.

[3] Plaintiffs' Assignment of Error Number Three is to the action of the trial judge in instructing the jury, "The jury is not to consider any reference to medical journals." This instruction followed the references to the books as "medical journals" by counsel for the plaintiffs in his attempt to offer these books in evidence. As we have already stated above, such a reference was improper. Obviously the books are not entitled to the dignity of the term "medical journals," and such a reference is unnecessarily misleading. Plaintiffs' Assignment of Error Number Three is overruled.

[4] Plaintiffs' Assignment of Error Number Four is addressed to the ruling of the trial judge in sustaining defendants' objection to the introduction in evidence of all of both plaintiffs' drug bills in one lump sum, without differentiating between them. In such a situation it would be impossible for the jury to determine what portion of the total medical bills belonged to either plaintiff. Actually, when counsel was able to differentiate, the evidence of medical bills was allowed in evidence for the jury to consider. Counsel's most strenuous objection along this line was that the trial judge indicated that there might be some duplication in the medical bills, and that this was an affront to counsel. It appears to us from the transcript of the trial that the judge was merely performing a proper function in trying to determine whether the Exhibit E was clear enough to be understood by the jury. There was no accusation against counsel by the Court, but merely a questioning of counsel in order to reach an understanding. Plaintiffs Assignment of Error Number Four is overruled.

[5] Plaintiffs' Assignments of Error Number Five and Six are not brought forward and argued in their brief, and they are therefore deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

[6] Plaintiffs' Assignment of Error Number Seven challenges the ruling of the trial court in allowing the defendant Chambers to testify on direct examination, over objection of the plaintiffs, as to what she told the patrolman with respect to how the accident occurred. In response to the question, she stated this: "I told the patrolman that I was stopped behind the Goldston car when the Medlin car hit me and knocked my car into the Goldston car." If we concede error in allowing the defendant to answer the question, it is clear that the same witness had just testified on direct examination that she had come to a complete stop behind the Goldston car and that the Medlin car struck her car from the rear and knocked it into the Goldston car, and that there was no contact between her car and the Goldston car before the Medlin car struck her. Therefore we hold that the error complained of by the plaintiff was not prejudicial. Plaintiffs' Assignment of Error Number Seven is overruled.

[7] Plaintiffs' Assignment of Error Number Eight is to two portions of the charge of the Court to the jury. In the portion of the charge in which the judge was explaining the law with respect to an award of damages for personal injury, the judge stated among other things the following:

> "If the plaintiff is entitled to recover at all, he is entitled to recover as damages one compensation in a lump sum for all injuries, past and present, in consequence of the wrongdoer's negligent act or acts."

The plaintiff complains that the use of the word "wrongdoer's" was singular and was an expression of opinion by the trial judge that only one of the defendants was responsible for the damages. The word "wrongdoer's" and the word "wrongdoers' " are pronounced exactly the same way, and the mere fact that the reporter in transcribing the charge placed the apostrophe ahead of the "s" instead of after it does not in any way change what the judge said to the jury.

[8] The other portion of the charge to which the plaintiffs except is that portion of the charge where the judge was reading one of the issues to the jury. The record discloses that he read it as follows:

> "What amount, if any, is the plaintiff Margaret Stumpf Goldston entitled to recover of the defendant for her personal injuries?"

In the issue as actually written and handed to the jury, "defendants" appears as plural. Nevertheless, plaintiffs argue that misreading the issue was an expression of opinion by the trial judge that only one defendant was actually responsible for the damages. Aside from the fact that this could be a perfectly understandable error in transcribing by the reporter, or a perfectly understandable *lapsus linguæ* by the judge, throughout the charge to the jury the judge referred to both sets of defendants and the jury could not have been misled by the use of the singular on one occasion, if in fact the singular was used. In view of the fact that there were four defendants (two with respect to each vehicle) we can perceive that had the judge used the plural counsel could as easily argue that he referred to only the defendants involved with one of the vehicles. It seems to us that counsel displays little respect for the intelligence of jurors. Plaintiffs' Assignment of Error Number Eight is overruled.

Plaintiffs' Assignments of Error Number 9, 10, 11 and 12 are formal and are disposed of by what has heretofore been said; therefore each of them is overruled.

This case has been tried twice and 24 jurors have found that only the driver of the Medlin car was negligent, and have awarded damages upon both trials against only the defendants Medlin. The verdict upon the second trial was for slightly less damages than was awarded on the first, and this is obviously the cause of plaintiffs'

displeasure. We hold that the plaintiffs have had a fair trial; that the case was submitted to the jury by the trial judge under proper and applicable principles of law; and in the trial we find no prejudicial error.

Affirmed.

BRITT and PARKER, JJ., concur.

ROBERT REHM v. RUTH BRINK REHM

No. 68SC113

(Filed 18 September 1968)

1. Divorce and Alimony § 22— custody and support of children — jurisdiction of court

Where the consent judgment affecting custody and child support is entered in husband's action for divorce instituted in the general county court, that court retains jurisdiction of the children and the parents so as to hear the wife's petition seeking exclusive custody and support of the minor son of the parties, even though the consent judgment is docketed in the Superior Court.

2. Execution § 3— issuance of execution on general county court judgment

The holder of a money judgment obtained in a general county court has alternate routes for collection: (1) he may have execution issue from the general county court or (2) he may have his judgment transcripted to Superior Court, as is provided for judgments of justice of the peace, where it is to be a judgment of the Superior Court in all respects for the purpose of lien and execution. G.S. 7-296, G.S. 7-166.

3. Divorce and Alimony § 22— custody and child support — jurisdiction of general county court — effect of G.S. 7-296

The statute, G.S. 7-296, which provides that a general county court judgment docketed in the Superior Court is to be a judgment of the Superior Court in all respects for purposes of lien and execution, was not intended by the Legislature to oust the jurisdiction of the general county court in custody and child support matters where the judgment settling custody and support was docketed in the Superior Court as a matter of custom and convenience.

4. Divorce and Alimony § 22; Parent and Child § 7— child custody and support — jurisdiction of court — bigamous marriage

Plaintiff husband's contention that general county court was without jurisdiction to order him to make support payments to his children since the marriage between him and his wife was bigamous and therefore void

ab initio is held a question not presented for review by the record in this case; in any event, plaintiff's obligation to support his children cannot be questioned, since G.S. 50-11.1 provides that a child born of a bigamous marriage is legitimate notwithstanding annulment of the marriage.

APPEAL by plaintiff from *McLean, J.*, January 1968 Session, BUNCOMBE Superior Court.

This action was originally begun by plaintiff Robert Rehm in February 1961 as a divorce action in the General County Court of Buncombe County. Defendant in that action, Ruth Brink Rehm, filed an answer, cross action and counterclaim for alimony without divorce and plaintiff filed a reply. In that action, consent judgment was entered on 22 September 1961 finding as a fact that the parties were married on 15 June 1946. The judgment provided that Robert Rehm was to have sole and exclusive custody of Charles Patrick Rehm, minor son of the parties, and Ruth Brink Rehm was to have sole and exclusive custody of Carolyn Sue Rehm, minor daughter of the parties. It set out visitation rights of each party with respect to the child in the custody of the other. Robert Rehm was ordered to pay to Ruth Brink Rehm $375.00 per month until January 1973, when the monthly payments are to be reduced to $250.00 until her death or remarriage; provided, that if Ruth Rehm should remarry prior to January 1973, the monthly payments would be reduced to $150.00 from the remarriage to January 1973 and then terminate. Plaintiff was further to furnish such college or higher education as the children might desire and to keep in force certain insurance policies with the children as beneficiaries, in addition to carrying them as beneficiaries in any hospital or medical expense policy he might effect. Other property rights were settled, and the judgment specifically provided that its terms and provisions should survive a final divorce obtained by either party and that failure of either party to comply would subject such party to such penalty as may be required by the court as in case of contempt of court. The judgment was signed by both parties *in propria persona* and docketed in the Superior Court of Buncombe County. Thereafter the pleadings and all affidavits in the action were expunged from the record and sealed. On 4 May 1965, Ruth Rehm filed a petition in the original action alleging that on 13 October 1964 Robert Rehm, on four hours' notice, sent Charles Patrick Rehm to her, and she accepted his custody on Robert Rehm's promise to pay an additional $100.00 per month for his support and maintenance; that he had completely and wholly failed to keep his promise although she had repeatedly requested him to do so; that she had accepted the care, custody and control of the child but without assistance from Robert Rehm and

it has placed a heavy financial burden upon her. She asked that she be granted exclusive custody, care and control of Charles Patrick Rehm and reasonable child support for him from 13 October 1964. On 3 June 1965, Robert Rehm filed demurrer alleging that the General County Court is without jurisdiction because the consent judgment was docketed in the Superior Court. At the hearing of the matter on 28 March 1967, Robert Rehm tendered judgment sustaining the demurrer and dismissing the petition. From the refusal of the court to sign the judgment, plaintiff appealed to the Superior Court.

After the hearing, plaintiff tendered the following judgment:

"THIS CAUSE coming on to be heard and being heard, and during the course of the examination of the Defendant, IT APPEARS that the Defendant identified a letter dated 15 April, 1946, directed to J. W. Ehrlich, and signed by the Defendant, 'Ruth B. Hanson'; and,

IT FURTHER APPEARING that the said Defendant identified and admitted that she and the Plaintiff went through a marriage ceremony in the City of Montreal, Province of Quebec, Dominion of Canada, on the 15th day of June, 1946, copies of which said letter and marriage certificate are hereto attached and identified as Exhibits P-2 and P-3.

FROM THE FOREGOING, the Court concludes as a matter of law that the Plaintiff was, at the time of his alleged marriage to the Defendant, married and had a living wife from whom he was not divorced; and, that the said Defendant was fully aware of the impediment existing at the time she and the Plaintiff made application for a marriage license in the Dominion of Canada, as hereinbefore set forth, and at the time the marriage ceremony was solemnized. The Court further concludes that the alleged marriage between the Plaintiff and the Defendant was void ab initio, and that said alleged marriage was absolutely null and void.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that the Defendant's Petitions: (a) for the Plaintiff to show cause why he should not be held in contempt of Court, and (b) for child support and custody, be, and the same are hereby, dismissed. Entered nunc pro tunc this 28th day of March, 1967, as of 13 June, 1966."

This judgment was also refused and plaintiff appealed to the Superior Court.

The court entered judgment finding facts as to plaintiff's income from his profession as a Staff Physician at Oteen Hospital and his expenses; defendant's income from her employment and her expenses; that plaintiff had voluntarily decreased his payments to defendant; that plaintiff had promised to send $100.00 per month for the support of his son; that plaintiff had moved for dismissal for that the court was without jurisdiction which was overruled and plaintiff objected and excepted; that the minor daughter of the parties had lived with defendant since the consent judgment of 1961; that the minor son is not emancipated, is 18 years of age, and desires to live with his mother; that both parties are fit and proper persons to have the care and control of the minor son. The court ordered that the general care and custody of the minor son be in the defendant and that plaintiff pay $60.00 per month for his support and that "any and all provisions of all orders heretofore entered which are not modified by this order shall remain in full force and effect." From the entry of the order plaintiff excepted and appealed to the Superior Court. The Superior Court overruled plaintiff's assignments of error and affirmed the judgment of the General County Court. Plaintiff appealed to this Court assigning as error the entry of the judgment for that the General County Court had no jurisdiction of defendant's motion for that (1) the consent judgment had been docketed in the Superior Court, and (2) an impediment existed; to wit: at the time of the purported marriage between the parties plaintiff had a living wife from whom he had not been divorced.

Richard Ford and Lee & Allen by H. Kenneth Lee for plaintiff respondent appellant.

Gudger and Erwin by Samuel J. Crow for defendant petitioner appellee.

MORRIS, J.

[1] Plaintiff respondent first contends that the General County Court of Buncombe County was without jurisdiction to hear defendant petitioner's motion with respect to custody and support of the minor son of the parties, and the judgment entered by Judge Willson should be vacated. We do not agree.

Plaintiff respondent calls the Court's attention to a portion of G.S. 7-296. This statute provides that:

"Judgments of the general county court may be enforced by execution issued by the clerk thereof, returnable within twenty

days. Transcripts of *such judgments may be docketed in the superior court as now provided for judgments of justices of the peace,* and the judgment when docketed shall in all respects be a judgment of the superior court in the same manner and to the same extent as if rendered by the superior court, and shall be subject to the same statutes of limitations and the statutes relating to the revival of judgments in the superior court and issuing executions thereon." (Emphasis supplied.)

G.S. 7-166 provides for the docketing in the superior court of judgments of the justices of the peace:

"A justice of the peace, on the demand of a party in whose favor he has rendered a judgment, shall give a transcript thereof which may be filed and docketed in the office of the superior court clerk of the county where the judgment was rendered. And in such case he shall also deliver to the party against whom such judgment was rendered, or his attorney, a transcript of any stay of execution issued, or which may thereafter be issued, by him on such judgment, which may be in like manner filed and docketed in the office of the clerk of such court. The time of the receipt of the transcript by the clerk shall be noted thereon and entered on the docket; and from that time *the judgment shall be a judgment of the superior court in all respects for the purposes of lien and execution.* The execution thereon shall be issued by the clerk of the superior court to the sheriff of the county, and shall have the same effect, and be executed in the same manner, as other executions of the superior court; but in case a stay of execution upon such judgment shall be granted, as provided by law, execution shall not be issued thereon by the clerk of the superior court until the expiration of such stay. A certified transcript of such judgment may be filed and docketed in the superior court clerk's office of any other county, and with like effect, in every respect, as in the county where the judgment was rendered, except that it shall be a lien only from the time of filing and docketing such transcript. . . ." (Emphasis supplied.)

Plaintiff respondent relies on *Investment Co. v. Pickelsimer,* 210 N.C. 541, 187 S.E. 813, and *Brooks v. Brooks,* 220 N.C. 16, 16 S.E. 2d 403, the only two cases cited under G.S. 7-296. In *Investment Co. v. Pickelsimer, supra,* plaintiff had obtained a money judgment against defendant in the Buncombe County General Court in the amount of $7500.00. He had had the judgment transcripted to and docketed in the Superior Court. Defendant had real property in

Transylvania County. Plaintiff applied to the County Court for the appointment of a receiver to take over and liquidate defendant's assets. A receiver was appointed over defendant's objection that the General County Court had no jurisdiction. On appeal, our Supreme Court held that the General County Court had no jurisdiction for that "(1) When the judgment was docketed in the Superior Court it was subject to the jurisdiction of that court *in like manner as a justice's judgment when transcripted.* (2) It had no jurisdiction to appoint a receiver as was done in this action."

In *Brooks v. Brooks, supra,* plaintiff brought an action in the Superior Court of Buncombe County for subsistence without divorce. It was, by consent, transferred to the General County Court. On 15 December 1933, judgment was entered ordering defendant to pay a certain amount twice each month for the benefit of plaintiff and her children. The judgment was docketed in the office of the Clerk of Superior Court on 18 December 1933. On 10 January 1936, order was entered *in the General County Court* reducing the monthly allowance. Up until 15 February 1941, defendant complied with the order but failed then and thereafter to comply. On 1 January 1941, the judge of the General County Court, after notice to the Bar, entered an order transferring all cases to the Superior Court, the county commissioners having theretofore adopted a resolution abolishing the General County Court. Plaintiff moved in the Superior Court for an order for defendant to appear and show cause why he should not be adjudged in contempt of orders theretofore entered in the General County Court. Defendant by special appearance demurred to the jurisdiction of the Superior Court for that the action of the judge of General County Court in transferring all pending civil actions to the Superior Court was without notice to or consent of the parties and not in compliance with provisions of law for transfer of cases from General County Court to Superior Court. Our Supreme Court held that the Superior Court had jurisdiction.

We do not think either case is applicable here. The *Investment Co.* case was a transcripted money judgment, and in the *Brooks* case the matter had been transferred as the result of the abolishing of the County Court.

[2, 3] It seems abundantly clear that by G.S. 7-296, the Legislature is providing the holder of a money judgment obtained in a general county court an alternate route for collection. He may have execution issue from the general county court, or he may have his judgment transcripted to superior court as is provided for judgments of justices of the peace. When this is done, it shall be a judgment of

the superior court in all respects for the purposes of lien and execution, subject to the same statutes of limitations and the statutes relating to the revival of judgments and executions thereon. We do not agree that by this statute the Legislature intended to oust the jurisdiction of the general county court in custody and child support matters where, as here, the judgment settling custody and support was docketed in the superior court as a matter of custom and convenience.

The 1965 amendment to G.S. 7-296 simply clarifies the question. It provides:

> "Notwithstanding the foregoing, the general county court shall retain jurisdiction to hear and determine all motions with respect to divorce, divorce a mensa et thoro, alimony without divorce, child custody and support in all cases wherein the general county court had rendered the initial order or judgment."

In *Becker v. Becker,* 273 N.C. 65, 159 S.E. 2d 569, it was reiterated that in suits for alimony without divorce and for the custody of children, the court acquires jurisdiction of the children as well as the parents, and that jurisdiction remains in the court wherein the action is brought.

This assignment of error is overruled.

[4] Plaintiff respondent also strenuously contends that the General County Court had no jurisdiction to enter its judgment for that the evidence disclosed that plaintiff respondent had a living wife from whom he was not divorced at the time of the purported marriage between the parties in 1946; that the purported marriage was void *ab initio* and defendant petitioner acquired no civil rights thereunder. Under our view of the case, this question is not presented. The record before us contains the original order of the General County Court providing for payments to the defendant petitioner, her motion in the cause filed 4 May 1965 reciting that plaintiff respondent was given custody of Charles Patrick Rehm in the order of 22 September 1961; that plaintiff respondent had, on four hours' notice, sent the child to her and promised to send $100.00 per month for his support; that he had not done so; and asking that she be awarded sole custody of the child and be awarded reasonable child support for him from the date he was placed in her care by plaintiff respondent. The record before us contains no motion for an order directing plaintiff respondent to show cause why he should not be adjudged in contempt for failure to comply with the 22 September 1961 order of the County Court. The judgment of the County Court en-

tered after hearing recites "the above-entitled cause coming on for a hearing before the undersigned Judge of the General County Court of Buncombe County upon Petitioner's petition for child support and custody, the Court finds the following facts:". The facts found amply supported the court's order that the care and custody of Charles Patrick Rehm be transferred to defendant petitioner and that plaintiff respondent pay her $60.00 per month for his exclusive care and support. No exception is taken to the findings of fact.

G.S. 50-11.1 provides: "A child born of voidable marriage or a bigamous marriage is legitimate notwithstanding the annulment of the marriage." Certainly no question can arise as to the plaintiff respondent's obligation to support his children. On this record and for the reasons given herein the judgment of the Superior Court is

Affirmed.

CAMPBELL and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. THOMAS EARL COTTEN (ALIAS "SKEETS" COTTEN)

No. 68SC163

(Filed 18 September 1968)

1. **Criminal Law § 105— motions for nonsuit — consideration on appeal**

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. **Criminal Law § 161— appeal — necessity for assignments of error**

The Court of Appeals ordinarily will not consider questions not properly presented by an exception and assignment of error in the record on appeal. Rule of the Court of Appeals No. 19(c).

3. **Larceny § 7; Indictment and Warrant § 17— variance — ownership of stolen property — person in possession**

There is no fatal variance where the indictment charges defendant with larceny of property from a specified person and the evidence discloses that such person was not the owner but was in lawful possession at the time of the offense, since the unlawful taking from the person in lawful custody and control of the property is sufficient to support the charge of larceny.

4. Larceny § 7; Indictment and Warrant § 17— automobile larceny — variance — record title in husband, wife in possession

In a prosecution for automobile larceny, there is no fatal variance between an indictment placing ownership of the automobile in the wife and evidence showing that although record title was in the husband, both the husband and wife contributed to the purchase price of the automobile, that payments were made from the wife's checking account, that both the husband and wife drove the automobile, and that at the time the automobile was stolen the husband was in the hospital and the wife was in possession of the vehicle, the wife having a special interest in the automobile and the evidence being sufficient to support a jury finding that the wife was a joint owner.

5. Criminal Law § 106— sufficiency of evidence to overrule nonsuit

The trial judge must submit the question of guilt to the jury if there is material evidence of each essential element of the offense charged and that defendant was the perpetrator of the offense; this rule applies whether the evidence is circumstantial, direct, or a combination of both, it being for the jury and not the court in passing upon circumstantial evidence to determine if it excludes every reasonable hypothesis of innocence.

6. Criminal Law § 106— sufficiency of evidence to overrule nonsuit

There must be substantial evidence of all material elements of the offense to withstand a motion for nonsuit.

7. Larceny § 7— evidence sufficient to overrule nonsuit

The trial court properly submitted to the jury the question of defendant's guilt of automobile larceny where the State's evidence tended to show that within two days after the theft defendant was seen driving an automobile which fit the description of the one stolen from the prosecuting witness, that the automobile stalled and defendant was unable to start it, and that the automobile stolen from the prosecuting witness was discovered the next day at the place where the automobile defendant was driving had stalled.

8. Larceny § 5— presumption from recent possession of stolen property

Recent possession of stolen property under circumstances excluding the intervening agency of others raises a presumption that the possessor is himself the thief, the presumption being stronger or weaker as the possession is nearer to or more distant from the time of the commission of the offense.

9. Evidence § 45— nonexpert opinion evidence as to value

A witness who has knowledge of value gained from experience, information and observation may give his opinion of the value of specific property or services, it not being necessary that the witness be an expert in order to give his opinion as to value.

10. Larceny § 3— meaning of "value"

"Value" as used in G.S. 14-72 means fair market value.

11. Larceny § 6; Evidence § 45— automobile larceny — owner's opinion as to trade-in value

In a prosecution for the larceny of an automobile having a value of more than $200, opinion testimony by the owner of the automobile that it has a trade-in value of $1,000 is properly admitted as competent upon the question of the vehicle's value.

12. Larceny § 8; Automobiles § 105— automobile larceny — ownership — G.S. 20-71.1 not applicable

In a prosecution for automobile larceny upon an indictment placing ownership of the vehicle in the wife, the court properly refused to instruct the jury that the fact the automobile is registered in the name of the husband creates a presumption that the vehicle is owned by him, G.S. 20-71.1 applying only in civil actions in which plaintiff seeks to hold an owner liable for the negligence of a non-owner operator under the doctrine of *respondeat superior.*

APPEAL by defendant from *Bailey, J.*, 27 November 1967 Session, DURHAM Superior Court.

Criminal action prosecuted on a bill of indictment charging that on 28 August 1967, defendant "unlawfully, wilfully and feloniously did steal, take and carry away a 1963 model Chevrolet Impala, License #EW-3192 N.C., of the value of $1000.00, of the goods and chattels of one Mrs. Charles T. Foster, contrary to the form of the statute . . ."

The jury returned a verdict of guilty as charged in the bill of indictment. The judgment of the court was that defendant "be confined in the custody of the North Carolina Department of Correction for a term of not less than three (3) years and not more than (5) years . . ." The court also directed that defendant be given credit for time spent in jail awaiting trial of his case.

From the judgment so entered, defendant appealed.

Attorney General Thomas Wade Bruton by Deputy Attorney General Harrison Lewis and Trial Attorney Eugene A. Smith for the State.

W. Paul Pulley, Jr. for defendant appellant.

MORRIS, J.

At the very outset we find it necessary to note that defendant has failed to comply with the rules of this Court. Defendant's appeal is submitted under Rule 19(d)(2) which permits the filing of the complete stenographic transcript of the evidence in the trial tribunal in lieu of setting out the evidence in narrative form. Defendant has

caused the stenographic transcript to be filed. However, he has failed to include in an appendix to his brief, "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." Rule 19(d)(2), Rules of Practice in the Court of Appeals of North Carolina.

Nevertheless, we have gone on a voyage of discovery through the record in an attempt to answer all pertinent questions and to assure defendant a proper determination of his case.

[1] Defendant assigns as error the failure to allow his motion for compulsory nonsuit made at the close of the State's evidence and renewed at the close of all evidence. Since 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. Brown,* 1 N.C.App. 145, 160 S.E. 2d 508.

[2] Defendant properly objected to the denial of his motion for nonsuit at the close of all the evidence. However, he failed to include the denial of his motion as one of his exceptions and assignments of error in the record on appeal. Our rules state that, "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." Rule 19(c), Rules of Practice in the Court of Appeals of North Carolina. Although we would not normally consider an assignment of error not properly presented, since the defendant, in his brief, has vigorously argued the failure to grant his motion for compulsory nonsuit, we feel constrained to discuss it here.

Defendant sets forth two arguments in assigning error for failure to grant his motion for compulsory nonsuit: first, that there is a fatal variance between the indictment and the proof; i.e., the indictment charges defendant with the larceny of an automobile, the property of Mrs. Charles T. Foster, and the evidence disclosed that record title is in the name of Mr. Charles T. Foster; and second, that the evidence linking defendant with the larceny is purely circumstantial and therefore the case should not have been submitted to the jury. We find both these arguments to be without merit.

[3] The fact that an indictment charges a defendant with larceny of property from a specified person and the evidence discloses that such person is not the owner but is in lawful possession at the time of the offense, does not render the indictment invalid. There is no

fatal variance, since the unlawful taking from the person in lawful custody and control of the property is sufficient to support the charge of larceny. *State v. Smith,* 266 N.C. 747, 147 S.E. 2d 165.

[4] The evidence in the instant case reveals that both Mr. and Mrs. Foster contributed to the purchase price of the automobile. Both signed the conditional sales contract. The monthly payments were made by Mrs. Foster from a checking account maintained in her name. Mr. Foster had no checking account. Both Mr. and Mrs. Foster drove the automobile to work regularly. At the time the automobile was stolen Mr. Foster was in the hospital, and Mrs. Foster had the car in her possession. The automobile was a family purpose vehicle. Although the title to the automobile was in the name of Mr. Foster, Mrs. Foster certainly had a special interest sufficient to obviate a fatal variance. *State v. Law,* 228 N.C. 443, 45 S.E. 2d 374; *State v. Powell,* 103 N.C. 424, 432, 9 S.E. 627; *State v. Hauser,* 183 N.C. 769, 111 S.E. 349; *State v. McRae,* 111 N.C. 665, 16 S.E. 173; *State v. Allen,* 103 N.C. 433, 9 S.E. 626, and cases cited. The evidence in this case is also sufficient to justify, but not compel, a finding by the jury that Mrs. Foster was a joint owner of the car. *Rushing v. Polk,* 258 N.C. 256, 128 S.E. 2d 675.

[5, 6] Although the evidence in this case is circumstantial, the trial judge was justified in submitting it to the jury for their determination. The trial court is under a duty to submit the question of guilt to the jury if there is substantial evidence of all material elements of the offense charged and that defendant was the perpetrator of the offense. This rule applies whether the evidence is circumstantial, direct, or a combination of both, it being for the jury and not the court, in passing upon circumstantial evidence, to determine if it excludes every reasonable hypothesis of innocence. *State v. Morgan,* 268 N.C. 214, 150 S.E. 2d 377. In like manner, there must be substantial evidence of all material elements of the offense to withstand a motion for nonsuit. To hold that the court must grant a motion for nonsuit 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 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." *State v. Burton,* 272 N.C. 687, 689, 158 S.E. 2d 883.

[7] The evidence for the State tends to show that Willie Green

Atwater saw the defendant on a Monday or Tuesday in August, 1967; that defendant was driving a white 1963 or 1964 Chevrolet Impala; that another male was riding with him; that defendant drove this automobile down a dirt road near Carrboro, N. C., where Atwater was feeding his dogs; that when defendant reached the end of the road the car stalled and defendant was unable to start it; that Atwater had known defendant since childhood; that the following day the Chevrolet was still at the end of the road.

Mrs. Charles T. Foster testified that she parked her 1963 white Chevrolet Impala in front of her residence in Durham, N. C., on Sunday, 27 August 1967 at approximately 6:00 p.m.; that the keys were removed; that the doors were locked; that at approximately 6:15 a.m. on the morning of 28 August 1967 (Monday) when she left her apartment to go to the hospital the Chevrolet was missing; that she did not see the car again until 30 August 1967 (Wednesday) when a police officer from Chapel Hill, N. C., took her to the road near Carrboro, N. C., where Atwater had seen defendant drive the automobile; that the automobile she found there was her 1963 white Chevrolet; that it had been damaged; that it was in good condition when she last drove it; that she did not know the defendant; that she had given no one permission to operate the automobile.

Sergeant William F. Hester of the Chapel Hill Police Department testified that on 30 August 1967, he took Mrs. Charles T. Foster to the dirt road near Carrboro, N. C., and there she identified the 1963 white Chevrolet as her missing automobile.

[7, 8] It was not, in our opinion, unreasonable for the trial judge to allow the jury to consider the evidence even though the evidence be circumstantial in nature. If the identity of the automobile be conceded as the stolen automobile, the fact of its being found in the same location as the automobile driven by defendant, with the other concurring evidence, tends strongly to establish the truth of the charge. The possession of stolen property recently after the theft, and under circumstances excluding the intervening agency of others, affords presumptive evidence that the person in possession is himself the thief, and the evidence is stronger or weaker, as the possession is nearer to or more distant from the time of the commission of the offense. So far as appears to us, the only explanation given by defendant is that he was at another place at the time. Such evidence as is here presented must be left to the jury to weigh and consider in determining the question of defendant's guilt. We deem the action of the trial judge in denying the motion for compulsory nonsuit to have been proper. *State v. Patterson*, 78 N.C. 470.

[9-11] Mr. Charles T. Foster testified for the State. He was questioned extensively concerning the 1963 Chevrolet. At one point, the solicitor asked Mr. Foster his opinion as to the value of the automobile. Mr. Foster replied: "I think on a trade-in I could get a thousand dollars for it . . ." It is evident here that the solicitor was attempting to fix the value of the 1963 Chevrolet in excess of $200.00. Defendant assigns as error the admission of this testimony.

It is not necessary that a witness be an expert in order to give his opinion as to value. "A witness who has knowledge of value gained from experience, information and observation may give his opinion of the value of specific real property, personal property, or services." Stansbury, N. C. Evidence, 2d, § 128, p. 300. "Value" as used in G.S. 14-72 means fair market value. *State v. Cook*, 263 N.C. 730, 140 S.E. 2d 305. An estimate has been held to be some evidence of value. *Ogburn v. Teague*, 67 N.C. 355. On the basis of what has already been stated, we feel that Mr. Foster's opinion as to the value of the 1963 Chevrolet was competent evidence to be considered by the jury. This assignment of error is overruled.

[12] Defendant's assignment of error No. 9 is taken to the action of the trial judge in refusing to submit a requested instruction to the jury. At the close of the court's charge to the jury, defense counsel requested the jury be instructed that, "The fact (sic) automobile was registered in name of Mr. Foster creates a presumption that the vehicle was owned by Mr. Foster." Defendant bases this requested instruction on G.S. 20-71.1, which reads as follows:

> "§ 20-71.1. *Registration evidence of ownership, ownership evidence of defendant's responsibility for conduct of operation.* — (a) In all actions to recover damages for injury to the person or to property or for the death of a person, arising out of an accident or collision involving a motor vehicle, proof of ownership of such motor vehicle at the time of such accident or collision shall be prima facie evidence that said motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which said injury or cause of action arose.
>
> (b) Proof of the registration of a motor vehicle in the name of any person, firm, or corporation, shall for the purpose of any such action, be prima facie evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment."

A careful consideration of the original Act, Chapter 494, S.L. 1951 (of which G.S. 20-71.1 is a codification), including its caption, leads us to the conclusion that it was designed and intended to apply, and does apply, only in those cases where the plaintiff seeks to hold an owner liable for the negligence of a non-owner operator under the doctrine of *respondeat superior*. Its purpose is to establish a ready means of proving agency in any case where it is charged that the negligence of a non-owner operator causes damage to the property or injury to the person of another or for the death of a person, arising out of an accident or collision involving a motor vehicle. *Travis v. Duckworth*, 237 N.C. 471, 75 S.E. 2d 309. *"It does not have, and was not intended to have, any other force or effect."* (Emphasis supplied.) *Hartley v. Smith*, 239 N.C. 170, 79 S.E. 2d 767. While the language used in subsection (a) is not as apt as that used in subsection (b), the intent and meaning of the two are the same. *Hartley v. Smith, supra.*

This case involves the larceny of an automobile — a criminal action. The statute was plainly meant to apply in a civil case. The trial judge was correct in refusing to give the requested instruction. The statute creates a presumption of ownership only in those specific instances enumerated. Defendant's assignment of error No. 9 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.

CAMPBELL and BRITT, JJ., concur.

HOWARD D. BLAKENEY v. STATE OF NORTH CAROLINA.

No. 6818SC336

(Filed 18 September 1968)

1. **Criminal Law § 13; Constitutional Law § 28— jurisdiction — valid warrant or indictment**

It is an essential of jurisdiction that a criminal offense be sufficiently charged in a warrant or indictment.

2. **Indictment and Warrant § 9; Constitutional Law § 28— purpose of indictment**

The primary purpose of an indictment is to furnish the accused a sufficient description of the charge against him to enable him to prepare his

defense and to protect him from further prosecution for the same criminal act.

3. Burglary and Unlawful Breakings § 3— use of disjunctive "or" in indictment for violation of G.S. 14-54

An indictment alleging that defendant "did break or enter" a certain building with intent to commit a felony therein is not fatally defective in the use of the disjunctive "or," but is sufficient to inform defendant of the charge against him and to protect him from future prosecution for the same incident.

4. Burglary and Unlawful Breakings §§ 4, 5— prosecution under G.S. 14-54 — absence of proof of breaking

While evidence of a breaking is always relevant in a prosecution under G.S. 14-54, absence of such evidence is not a fatal defect of proof to support a conviction under the statute where there is proof of an entry.

5. Burglary and Unlawful Breakings § 5— prosecution under G.S. 14-54 — proof of breaking — entry not necessary

Where there is proof of a breaking, proof of an entry is not necessary to support a conviction under G.S. 14-54.

6. Burglary and Unlawful Breakings § 3— indictment under G.S. 14-54 — description of premises

An indictment alleging that defendant broke or entered "a certain storehouse, shop, warehouse, dwelling house, bankinghouse, countinghouse and building" occupied by a named corporation at a specified address identifies the premises with sufficient certainty to enable defendant to prepare his defense and to afford him protection from another prosecution for the same incident.

7. Burglary and Unlawful Breakings § 3; Indictment and Warrant § 8— breaking or entering — waiver of duplicity in indictment — failure to move to quash

Where defendant goes to trial without moving to quash an indictment charging that he "did break or enter" a certain building, he waives any duplicity resulting from the use of the disjunctive "or" in the indictment.

CERTIORARI to review a final order of *Shaw, J.*, denying petitioner any relief entered in a post-conviction hearing held pursuant to the provisions of G.S. 15-217, *et seq.*, in chambers 17 April 1968.

Norman B. Smith for petitioner.

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

MORRIS, J.

On 1 January 1968, petitioner filed what he denominated a "Petition for a Post Conviction Writ of Review". Therein he alleged

that on 28 May 1967, he was arrested and charged with "breaking-enter the Dockery Lumber and Hardware Company, Inc."; that on 29 May 1967, he was given a preliminary hearing and "held over for Superior Court"; that about the middle of June, counsel was appointed for him; that about three days later, his court-appointed counsel, Mr. B. Gordon Gentry, came to see him; that on 10 July 1967, he was taken to trial; that the matter was continued until 11 July 1967, "where the defendant did enter a plea of guilty through his lawyer, Mr. Gordon Gentry"; that as a result of said plea, petitioner was given a four-year prison sentence. He further alleged: (1) that the arresting officers did not advise him of his constitutional rights, (2) that he was denied counsel at his preliminary hearing, (3) that "the bill of indictment was in error as the records will show the bill of indictment #5025 has charged petitioner with house breaking where the petitioner was tried and sentence (sic) for the offense of breaking and entering a certain Dockery Lumber and Hardware Company, Inc." He asked for the appointment of counsel. Answer to the petition was filed by the solicitor on 12 January 1968.

The matter was heard on 19 April 1968, and judgment denying the petition was filed 25 April 1968. The judgment recited that petitioner and his court-appointed counsel were present as was the solicitor. The judgment set out in *seriatim* the contentions of petitioner made either in his petition or by testimony at the hearing noting that petitioner had abandoned his contention that the Dockery Lumber Company was not within the city limits and his contention that he was denied counsel at his preliminary hearing. Included in the listed contentions was the following:

> "6. That the uncontradicted and unimpeached evidence in the post conviction hearing is that he did not read the indictment before his trial nor was it read to him and he did not consider whether it was defective or not; that he had no discussion with his lawyer or any thoughts to himself as to whether the indictment should be quashed or otherwise attacked and he did not give thought to pleading not guilty because he was not properly charged with a crime. The record shows that no motion to quash was made by the defendant-petitioner or his counsel at the trial of said case."

The judgment further included a statement that the trial court inquired of petitioner and his attorney whether there were any other contentions and both stated there were none.

The court's findings of fact included a finding that petitioner entered a plea of guilty as charged on a valid bill of indictment;

that the plea was freely and voluntarily made (setting out the questions touching the voluntariness of his plea asked by the court of petitioner after he was duly sworn in open court); that the sentence is not excessive; that petitioner was represented by competent counsel. Based upon the findings of fact the trial court concluded as a matter of law that (1) petitioner had a fair and impartial trial and none of his constitutional or other rights was violated; (2) that petition and motion for new trial should be dismissed; (3) that petitioner is imprisoned by virtue of a legal and final judgment of a court of competent jurisdiction; (4) that his plea of guilty was tendered to and accepted by the trial court after obtaining satisfactory answers to the ten questions propounded and that the trial court found that the plea was entered voluntarily, freely, knowingly, and understandingly; (5) that the bill of indictment follows precisely the language of the statute (G.S. 14-54) in the heading and content thereof.

Upon the entry of the final order of the court, petitioner excepted and gave notice of petition for writ of *certiorari* and requested appointment of counsel. Norman B. Smith was appointed to represent petitioner in proceedings before this Court and it was further ordered that Guilford County pay for a transcript of the proceedings at the post-conviction hearing for petitioner's use.

This Court, on 3 July 1968, allowed the petition for *certiorari*. He brings forward only one contention: That the indictment was fatally defective in two respects. First, the disjunctive "or" was used instead of the conjunctive "and" in joining the word "break" to the word "enter". Second, the indictment charged that the offense was committed at the place of a certain storehouse, shop, etc., occupied by Dockery Lumber and Hardware Company, Inc., but at no place does the indictment state what building or thing had actually been broken into or entered.

[1] It is, of course, an essential of jurisdiction that a criminal offense be sufficiently charged in a warrant or an indictment. *State v. Banks,* 263 N.C. 784, 140 S.E. 2d 318.

[2] The primary purpose of an indictment insofar as an accused person is concerned is to furnish the accused such a description of the charge against him as will enable him to prepare his defense and also protect him from a further or additional prosecution for the same criminal act. 27 Am. Jur., Indictments and Informations, § 2, p. 585; *State v. Williams,* 210 N.C. 159, 185 S.E. 661; *State v. Banks, supra.*

[3] Defendant-petitioner earnestly contends that the indictment

here does not meet the test and is fatally defective because it charges that the accused "did break *or* enter with intent to steal" etc., rather than "did break *and* enter with intent to steal" etc. We cannot agree.

The defendant-petitioner was, by his own statements, fully aware of the charges against him. At his post-conviction hearing, he testified that he was put under oath at his trial before being asked questions by the trial court and that he answered the questions in his own handwriting. This further testimony was elicited from him on cross-examination at his post-conviction hearing:

"MR. CLARK: And he asked you, 'Do you understand what you are charged with in this case?' and you answered, 'Yes.' Isn't that right?

WITNESS: Yes, sir.

MR. CLARK: In other words, you knew you were charged with breaking and entering Dockery Lumber Company, didn't you?

WITNESS: Yes, sir.

MR. CLARK: And you knew you were charged with breaking and entering the Dockery Lumber Company on the 28th of May, 1967, didn't you — isn't that right?

WITNESS: I knew that I was charged with attempt to break, what I read on the warrant.

MR. CLARK: I'm not talking about the warrant, I'm talking about the bill of indictment, you knew you were charged with breaking and entering that place with intent to commit a felony in it, didn't you?

WITNESS: Yes, sir."

And on redirect examination, the defendant-petitioner testified:

"MR. SMITH: You said something about not understanding what you were charged with earlier — you said you thought you were charged with 'intent'?

WITNESS: Attempt to break and enter.

MR. SMITH: You thought you were being charged with attempt to break and enter, is that right?

WITNESS: That's right.

MR. SMITH: Had you read and analyzed the bill of indictment very carefully? How closely did you look at it?

WITNESS: You mean before he asked me these questions?

MR. SMITH: Before your plea?

WITNESS: I hadn't ever 'seed' the bill of indictment.

MR. SMITH: All you had seen before was the warrant; is that right?

WITNESS: That's right. I hadn't ever 'seed' it until I went to prison and sent back for a copy.

MR. SMITH: What did the Judge tell you that you were charged with?

WITNESS: Well, I understood him to say the charge was what the warrant said.

MR. SMITH: Breaking and entering with intent to commit a felony?

WITNESS: That's right."

In his petition for a post-conviction hearing, defendant-petitioner stated that he was charged with "breaking-enter the Dockery Lumber and Hardware Company, Inc." He further alleged in the same petition: "Petitioner contends the bill of indictment was in error as the records will show the bill of indictment #5025 has charged petitioner with housebreaking where the *petitioner was tried and sentence (sic) for the offense of breaking and entering a certain Dockery Lumber and Hardware Company, Inc.*" (Emphasis supplied.)

Petitioner does not contend that he was not represented by competent counsel, and the trial court found as a fact that his counsel represented him "in an able and diligent manner at said trial after he had time to prepare adequately and properly said case for trial." No exception is taken to this finding of fact. It is noted that no motion to quash was made.

[3-5] Unquestionably petitioner was aware of the charges against him. He is also fully protected against prosecution for the same offense. Evidence of a breaking when available is relevant, but the absence of such evidence is not a fatal defect of proof to support a conviction of breaking and entering under G.S. 14-54 where there is proof of entry. *State v. Brown,* 266 N.C. 55, 145 S.E. 2d 297. Nor is proof of entry where there is proof of breaking necessary to support a conviction on a charge of breaking and entering under the statute. *State v. Nichols,* 268 N.C. 152, 150 S.E. 2d 21.

[6] The second alleged defect is totally without merit. The indictment specifically states that petitioner "on the 28th day of May,

A.D. 1967, with force and arms at and in the County aforesaid, a certain storehouse, shop, warehouse, dwelling house, bankinghouse, countinghouse and building occupied by one Dockery Lumber and Hardware Company, Inc., 3011 E. Market Street, Greensboro, N. C., . . . did break or enter with intent to steal . . ." This identifies the premises with sufficient certainty to enable the defendant-petitioner to prepare his defense and offer him protection from another prosecution for the same incident. *State v. Smith,* 267 N.C. 755, 148 S.E. 2d 844.

The record before us discloses that both the State and petitioner considered the criminal prosecution under indictment #5025 to be a prosecution for breaking and entering.

[7] In our opinion, the indictment is not fatally defective but, at most, contains duplicity. By failing to move to quash, petitioner waived any duplicity which might exist in the bill. *State v. Green,* 266 N.C. 785, 147 S.E. 2d 377. In *State v. Merritt,* 244 N.C. 687, 94 S.E. 2d 825, Rodman, J., speaking for the Court said:

> "Defendant moves this Court to quash the bill of indictment and in arrest of judgment. The bill follows the language of the statute and charges the operation of a motor vehicle 'while under the influence of intoxicating liquor, opiates or narcotic drugs.' The defendant insists that the use of the disjunctive 'or' instead of the conjunctive 'and' which might have been used renders his conviction void for uncertainty. Had the bill used the conjunctive word, no question could have been raised as to the sufficiency of the bill. The defendant could have required separate counts, one charging operation of a motor vehicle while under the influence of intoxicating liquor, the other charging the operation while under the influence of narcotics. By going to trial without making a motion to quash, he waived any duplicity which might exist in the bill. *S. v. Smith,* 240 N.C. 99, 81 S.E. 2d 263; *S. v. Puckett,* 211 N.C. 66, 189 S.E. 183; *S. v. Burnett,* 142 N.C. 577; *S. v. Hart,* 116 N.C. 976; *S. v. Mundy,* 182 N.C. 907, 110 S.E. 93; *S. v. Beal,* 199 N.C. 278, 154 S.E. 604."

Affirmed.

MALLARD, C.J., and CAMPBELL, J., concur.

SOUTHERN NATIONAL BANK OF NORTH CAROLINA v. UNIVERSAL ACCEPTANCE CORPORATION

No. 68DC73

(Filed 18 September 1968)

1. Banks and Banking § 9— collection of checks — whether bank of deposit is collecting agent or holder in due course

The mere crediting of the proceeds of a check to the account of its depositor will not make the bank a holder in due course of the check; if, however, the bank of deposit permits the depositor to withdraw completely the proceeds of the deposited check in advance of collection and prior to receipt of any notice that payment of the check has been stopped or that there is any defect in the check or in the title of the person negotiating it, the bank of deposit has given value for the check and is a holder in due course, in the absence of an agreement to the contrary.

2. Banks and Banking § 9— collection of checks — title passes to bank of deposit by agreement of parties

Regardless of formal statements on a deposit slip that deposits are accepted for collection only or are subject to final payment, if the facts and circumstances surrounding the making of the deposit indicate that at the time it was made it was the intention of the parties that the depositor might withdraw completely the deposit, and he does so, the title to the item deposited passes to the bank.

3. Banks and Banking § 9— collection of checks — bank as a holder in due course — sufficiency of evidence

A bank is properly found to be a holder in due course of a check deposited with it — despite statements on its deposit slip that the bank acts only as a collecting agent in receiving checks or that checks are subject to final payment in cash — where there is evidence that (1) the bank permitted its depositor to withdraw against the total amount of the deposited check prior to completion of the ultimate collection of the proceeds from the drawee bank and prior to the time the bank received its first notice that the defendant-drawer had stopped payment on the check and that (2) the bank had customarily permitted the depositor to withdraw proceeds in a similar manner against checks drawn by the defendant.

4. Banks and Banking § 9— waiver by bank of status as collecting agent

A bank may waive the provision on its deposit slip that it acts as a collecting agent for the depositor in receiving the check or that the check is subject to final payment in cash, and evidence of its intent to do so may be shown by evidence that it had customarily waived this protection in the past.

5. Bills and Notes § 19— defenses against holder in due course

A holder in due course of a check holds the check free of any defense the drawer may have against the payee.

6. Bills and Notes § 7— endorsement "for deposit only" — nonrestrictive

The endorsement of a check "for deposit only" does not constitute a restrictive endorsement.

7. Bills and Notes § 20— presumptions and burden of proof

A depositary bank is not required to prove the identity or the extent of the authority of the particular person who stamps an endorsement "for deposit only" on the back of a check, since the endorsement on its face is for the obvious benefit of the payee and it may be presumed that the person who placed it there acted with full authority of the payee.

8. Bills and Notes § 19— defenses against holder in due course — competency of evidence

Where plaintiff bank of deposit was properly found to be a holder in due course of the check deposited with it by defendant's payee, defendant's evidence that the payee procured the check by submitting to it fraudulently fabricated insurance contracts is irrelevant and is properly excluded in plaintiff's action to recover the amount of the check.

APPEAL by defendant from *Floyd, J.*, at the 27 November 1967 Civil Non-Jury Session of the District Court of ROBESON County.

This is a civil action to recover the amount of a negotiable check drawn by defendant and on which defendant had stopped payment. Plaintiff alleges it holds the check as a holder in due course. The parties waived trial by jury. Plaintiff's evidence showed substantially the following:

Plaintiff is a national banking association with its principal office in Lumberton, North Carolina. On 29 June 1966 defendant corporation drew a check negotiable in form on its account with First Citizens Bank and Trust Company, Fayetteville, N. C., in the amount of $2,510.08, payable to the order of L. H. Cox Insurance Agency (hereinafter called Insurance Agency). On 1 July 1966 the check was deposited with the plaintiff at plaintiff's branch bank in Laurinburg, N. C., endorsed with a stamp bearing the legend: "For deposit only, Leland H. Cox Insurance Co." The amount of the check was credited to the account of Insurance Agency in plaintiff's branch bank at Laurinburg and plaintiff routed said check for collection through normal banking channels to the drawee bank at Fayetteville. Immediately prior to the deposit, Insurance Agency had a balance on deposit in plaintiff's bank at Laurinburg of $6.12. Insurance Agency was permitted immediately to draw checks on its account and on 2 July 1966 had reduced its balance after the deposit of the aforesaid check to $614.12, and daily thereafter continued to draw checks on said account until 12 July 1966, when all funds had been completely withdrawn and the balance of Insurance Agency's account with plaintiff bank was zero. On 13 July 1966 plaintiff received its first notice that defendant had stopped payment on said check and at that time Insurance Agency had no funds on deposit with plaintiff. On several occasions previous to the deposit of 1 July 1966,

Insurance Agency had deposited checks to its credit drawn by the defendant and all of said checks had been honored when presented for collection. Plaintiff bank had customarily permitted Insurance Agency to withdraw the proceeds of said checks prior to collection of the same from the drawee bank. The signature card on record with the plaintiff bank for the account of Insurance Agency and the deposit slip used for making deposit of the check involved in this case both had printed thereon, in substance, that plaintiff bank acts only as depositor's collecting agent for checks deposited with it.

Defendant, which is engaged in the business of financing automobile insurance premiums, sought to introduce evidence as to its reason for stopping payment. On plaintiff's objection this evidence was excluded. Had it been admitted it would have tended to show that the Insurance Agency, payee of the check, had procured the check to be issued to it by the defendant by submitting to defendant fraudulently fabricated insurance contracts made either with nonexistent persons or with persons not solicited by Insurance Agency.

The court made findings of fact substantially as shown by plaintiff's evidence and concluded as a matter of law that the plaintiff could and did waive its right to be an agent for collection of the check in question; that plaintiff paid full value for said check in good faith and without notice of any infirmity and prior to notice that payment had been stopped; that plaintiff is a holder in due course of said check; and that defendant is liable to plaintiff for the full amount of the check with interest. From judgment that plaintiff recover of defendant the sum of $2,510.08 with interest and costs of this action, defendant appeals.

McLean and Stacy, by H. E. Stacy, Jr., for plaintiff appellee.

Braswell and Strickland, by Robert C. Braswell, for defendant appellant.

PARKER, J.

The transactions giving rise to this case all occurred prior to 30 June 1967, the effective date in North Carolina of the Uniform Commercial Code. G.S. 25-10-101. The rights of the parties are, therefore, controlled by the prior law.

Defendant assigns as error the court's refusal to grant its motions of nonsuit made at the close of plaintiff's evidence and again at the close of all evidence and the court's exclusion of evidence offered by defendant as to its reason for stopping payment on the check. Defendant contends that under the evidence in this case the court

erred in finding plaintiff to be a holder in due course of the check sued upon and that the court should have found that plaintiff acted only as a collecting agent for Insurance Agency, against whom defendant asserts it has a good defense. In support of its contention defendant points to the language on the signature card on file with plaintiff bank in connection with Insurance Agency's account and the similar language on the deposit slip used when the Insurance Agency deposited defendant's check to its account in plaintiff bank. This language is to the effect that in receiving items for deposit or collection, the bank acts only as depositor's collecting agent and all items are credited subject to final payment in cash or solvent credits.

[1] A similar contention was made in the case of *Bank v. Courtesy Motors,* 250 N.C. 466, 109 S.E. 2d 189. In that case, Parker, J. (now C.J.), speaking for the Court said:

> "Although the overwhelming majority of the courts have held that the mere crediting of the proceeds of a cheque to the account of its depositor will not, without more, make the bank a holder in due course of the cheque, it has been held or stated by a large majority of the courts that when the bank permits its depositor to withdraw completely or otherwise completely employ the proceeds of the cheque deposited in advance of collection and prior to receipt of any notice that payment of the cheque has been stopped or that there is any infirmity in the cheque or defect in the title of the person negotiating it, the bank of deposit, in the absence of an agreement to the contrary, has given value for the cheque, and is the owner of it and a holder in due course. (Citing cases and authorities.)"

[2] In *Bank v. Courtesy Motors, supra,* the defendant contended, as the defendant in the case before us now contends, that the language on the deposit slip reciting that the plaintiff bank acts as a collecting agent in receiving the check and that the check is credited to the payee's account subject to final payment in cash or solvent credits, prevents the passing of title to the check to the plaintiff bank. In answer to this contention, the Court said (p. 474):

> ". . . Regardless of formal statements on a deposit slip such as that deposits are accepted for collection only, or that items are credited conditionally, or are subject to final payment, if the facts and circumstances surrounding the making of the deposit indicate at the time it was made it was the actual agreement and intention of the parties that the depositor might withdraw completely the deposit, or otherwise completely employ it, and he does so, the title to the item deposited thereupon passes to the bank."

[3-5] Defendant seeks to distinguish *Bank v. Courtesy Motors, supra,* from the present case by pointing out that in that case there was evidence that the depositary bank, at the time it accepted the check for deposit, knew that payee had already drawn checks against its account and the bank had agreed to honor these outstanding checks out of the credit created by the deposited check. It is true that in the present case there is no evidence that Insurance Agency had already drawn checks against its account in plaintiff bank at the time defendant's check was deposited. However there was ample evidence that, despite the language on the signature card and the deposit slip, the plaintiff bank had customarily permitted its depositor, the Insurance Agency, to draw against credits created in its account by deposit of checks drawn by defendant prior to the time that the plaintiff had completed ultimate collection of the proceeds of those checks from the drawee bank. The language on its deposit slip was placed there by the plaintiff bank for its own protection. The bank may waive such a provision. *Ledwell v. Milling Co.,* 215 N.C. 371, 1 S.E. 2d 841. Evidence that it had customarily waived this protection was competent as tending to show that it also intended to do so with reference to the check here in suit. It was for the trier of the facts, in this case the district court judge, to determine what the actual agreement between the plaintiff bank and its depositor was when plaintiff accepted for deposit the check here in suit and whether the bank waived with reference to this check the protective provisions on its deposit slip. There was ample evidence to support the court's finding that the plaintiff did so waive those provisions and that in good faith it paid full value for the check without notice of any defenses the drawer might have had against the payee and prior to receiving any notice that payment had been stopped. This finding supports the court's conclusion that as a matter of law plaintiff was a holder in due course of the check. *See* § 52 of the N.I.L; G.S. 25-58, as the same was in effect prior to 30 June 1967. As a holder in due course the plaintiff holds the check free of any defenses defendant might have had against the payee. For other cases reaching a result consistent with our present holding, *see* Annotation in 59 A.L.R. 2d 1173.

[6] Nor does the fact that the check was endorsed with a stamp "For deposit only" change the situation. While the cases are in conflict as to whether such an endorsement is restrictive within the language of the N.I.L., the more reasonable construction would support the holding that such an endorsement is nonrestrictive. N.I.L., § 36 (old G.S. 25-42) provided:

"An indorsement is restrictive which either (1) prohibits the

further negotiation of the instrument; or (2) constitutes the indorsee the agent of the indorser; or (3) vests the title in the indorsee in trust for, or to the use of, some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive."

An endorsement "for deposit" does not prohibit further negotiation any more than would an endorsement to the order of a named person. In either case the parties generally intend the check to be further negotiated, in the one case by the further endorsement of the person to whose order it has been endorsed and in the other by sending the check forward through normal banking channels with bank endorsements thereon for ultimate collection from the drawee bank. Further, it is difficult to find in the words "for deposit" any disclosure of the creation of an agency or trust. *See* Britton, Bills and Notes 2d, § 70, p. 160; *Bank v. Niles,* 190 Iowa 752, 180 N.W. 880; *Bank v. Products Company,* 240 Iowa 547, 37 N.W. 2d 16; 9 A.L.R. 2d 459. Other authorities have held that while an endorsement "for deposit" should be regarded as restrictive and should be notice to any subsequent taker of rights in the instrument reserved by the endorser, nevertheless a bank taking such a check for deposit to the account of its customer acquires rights of ownership and holder in due course status if the proceeds are withdrawn before collection is completed. *See* Brady, Bank Checks, 1968 Supp., § 5.11. Still other authorities give protection to the bank by finding operation of an estoppel. See *Bank v. Lumber Co.,* 107 N.J. 492, 155 Atl. 762, 75 A.L.R. 1413. In the present case the plaintiff bank in good faith and without notice of any defenses of the drawer as against the payee paid to the payee full value for the check. "As between the purchaser for value of negotiable paper and the maker or acceptor who puts it in circulation, the loss, if any arises, should fall upon one who places it in circulation." *Bank v. Stirling,* 65 Idaho 123, 140 P. 2d 230, 149 A.L.R. 314.

[7] Nor do we think that it was necessary for plaintiff to come forward with specific evidence as to the identity or authority of the person who stamped "For deposit only" and the name of the payee on the check. On its face such an endorsement was for the sole benefit of the named payee and it may be presumed that the person who placed it there acted with full authority of the payee. The endorsement "for deposit only" to the payee's account is very extensively used in the business world in the handling of checks. Such an endorsement protects the payee against the hazards of loss or theft of the check prior to the time its proceeds are credited to his account. In many cases the depositary bank would not later be able and we

hold it is not required to prove the identity or the extent of authority of the particular clerk or other person who pressed the rubber stamp bearing such endorsement on the back of the check. Such an endorsement which is so obviously for the payee's benefit does, in effect, "prove itself" and the principle announced in *Mayers v. McRimmon,* 140 N.C. 640, 53 S.E. 447, does not apply.

While, as noted above, the Uniform Commercial Code became effective in this State only after the transactions here involved occurred, our present decision is consistent with the policy followed by the General Assembly when it adopted the Code. G.S. 25-4-208 gives to a depositary bank under the circumstances here involved a security interest in the deposited check and G.S. 25-4-209 provides that, for purposes of determining its status as a holder in due course, the bank has given value to the extent it has such a security interest.

[8] Holding as we do that the trial court was correct in according to the plaintiff the status of a holder in due course of the check here in suit, evidence concerning the defenses which defendant may have had as against the payee and concerning defendant's reasons for stopping payment on the check was not relevant, and appellant's assignments of error directed to the exclusion of such evidence are without merit. We have also reviewed all of appellant's remaining assignments of error and find them to be without merit.

The decision of the District Court is

Affirmed.

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

STENA LOUISE DUGGINS EDENS v. FRANK FOULKS, ROUTE 2, MADISON, N. C.

No. 68SC165

(Filed 18 September 1968)

1. **Estates § 5— action for waste and forfeiture of life estate — contingent remainderman**

A contingent remainderman has no standing to maintain an action for waste and forfeiture against the life tenant in possession.

2. **Wills §§ 44, 46— devise to "nearest of kin" — representation precluded**

The use of the term "nearest of kin" or "nearest blood relation" in a

deed or will, without more, does not permit the application of the principle of representation.

3. Wills § 35— devise to heirs or next of kin — when members of class are ascertained

As a general rule, where there is a devise to testator's heirs, next of kin, or other relatives, members of the class are ascertained at the time of testator's death unless the terms of the will manifest a different intent; where the gift is to the heirs or next of kin of another than the testator, members of the class are ordinarily ascertained at the death of such other person.

4. Wills § 35; Estates § 3— contingent remainder — person not ascertained

Where a remainder is limited to a person not *in esse* or not ascertained, it is contingent.

5. Estates § 3; Wills § 35— vested remainder — present capacity of taking possession

For a remainder to be vested, the remainderman must have the present capacity of taking possession if the possession were to become vacant.

6. Estates § 3; Wills § 35— definition of present capacity of taking possession

Present capacity to take in possession means the right to take in possession from the time of effectiveness of the instrument creating the estate should the preceding estate determine by any means.

7. Wills § 35; Estates § 5— remainder to life tenant's nearest kin — contingent remainderman — action for waste

Where property is devised to testator's grandson for life "and then to go to his nearest kin," a child of the grandson is merely a contingent remainderman during the life of the grandson since the grandson's nearest kin will not be ascertained until his death; therefore, the grandson's child may not maintain an action for waste and forfeiture of the estate against the grantee of the life tenant.

8. Estates § 5— injunction to prevent waste — contingent remainderman

A contingent remainderman is entitled to an injunction to prevent a person in possession from committing future waste, the action being maintainable for the protection of the inheritance, which is certain, although the persons on whom it may fall are uncertain.

APPEAL by plaintiff from *Copeland, S.J.*, 12 February 1968 Term, ROCKINGHAM Superior Court.

Plaintiff's complaint alleges that defendant is the owner of a life estate in the lands described in the complaint, having acquired his estate by deed of Albert L. Duggins in 1942; that by committing waste and cutting timber on said land on two different occasions he

has forfeited his life estate as provided by G.S. 1-533; "That, as the only child and sole nearest kin of Albert L. Duggins, the plaintiff Stena Louise Duggins Edens is the owner in fee of said lands under the provisions of the Will of A. M. Simpson, great-grandfather of the plaintiff, recorded in the Office of the Clerk of the Superior Court in Book of Wills 'F', page 496, which provides as follows: 'Third: I give and devise to my grandson, Albert L. Duggins, the south side of my home place as follows: (describing the land devised) to have the use of above described land during his life and then to go to his nearest kin.' "; that in 1951 defendant had caused some $750.00 worth of merchantable timber to be cut from the lands before plaintiff's grandmother applied for a restraining order; that in 1956, 1957, or 1958 defendant again wrongfully cut and sold some $750.00 worth of merchantable timber without the knowledge and consent of plaintiff. Plaintiff seeks judgment against defendant in the amount of $4500.00 and also asks for judgment declaring defendant has forfeited his life estate and evicting him from the lands.

Defendant demurred to the complaint for that from the face thereof it appears that plaintiff is a contingent remainderman and cannot sue for waste. Upon hearing, Judge Copeland sustained the demurrer and allowed plaintiff 30 days within which to amend. From the judgment sustaining the demurrer, plaintiff appealed.

McMichael & Griffin by Jule McMichael for plaintiff appellant.
W. F. McLeod for defendant appellee.

MORRIS, J.

The only question presented by plaintiff's appeal is whether her interest in the land is a contingent remainder or a vested remainder.

The record is completely devoid of any information as to whether Albert L. Duggins is living. Since the complaint is silent as to this, and the question here presented would be moot if he were deceased, we assume that he is living.

[1] If plaintiff's interest is a contingent remainder, she has no standing to maintain an action for waste and forfeiture under G.S. 1-533. The rule was clearly enunciated by Taylor, C.J., speaking for the Court in *Browne v. Blick,* 7 N.C. 511, 519: "No one shall have an action of waste unless he hath the immediate estate of inheritance." See *Latham v. Lumber Co.,* 139 N.C. 9, 51 S.E. 780. The sound reason for the rule was discussed in *Richardson v. Richardson,* 152 N.C. 705, 68 S.E. 217, where the action was for waste and forfeiture. The Court held that the action could not be maintained by

plaintiff a contingent remainderman because if allowed, "The life estate is destroyed by the forfeiture resulting from the waste under the statute, and yet the event upon which the plaintiff is to take his estate in remainder has not happened."

The general rule set out in 56 Am. Jur., Waste § 13, p. 459, was quoted with approval in *Strickland v. Jackson,* 261 N.C. 360, 361, 134 S.E. 2d 661:

> "It is well settled that one entitled to a contingent remainder cannot maintain an action at law against the tenant in possession to recover damages for waste, for the reason that it cannot be known in advance of the happening of the contingency whether the contingent remainderman would suffer damage or loss by the waste; and if the estate never became vested in him, he would be paid for that which he had not lost."

Plaintiff contends that she has a vested remainder in the lands described in the complaint and, therefore, the complaint is sufficient to withstand demurrer. We do not agree.

Plaintiff cites and relies on *Pinnell v. Dowtin,* 224 N.C. 493, 31 S.E. 2d 467, which is factually distinguishable from the case before us and is not applicable. Plaintiff quotes therefrom a discussion of the distinctions between vested and contingent remainders wherein the Court quotes Fearne on Remainders, Vol. 1, p. 216, as follows:

> ". . . The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent."

This passage, as was noted by Shepherd, C.J., speaking for the Court in *Starnes v. Hill,* 112 N.C. 1, 7, 16 S.E. 1011, and Walker, J., speaking for the Court in *Richardson v. Richardson, supra,* has often been quoted but seldom accompanied with the explanation of the learned author in its immediate connection.

Fearne (*supra,* 217) after giving examples says:

> "In short, upon a careful attention to this subject, we shall find, that wherever the preceding estate is limited, so as to determine on an event which certainly must happen; and the remainder is so limited to a person *in esse,* and ascertained, that the preceding estate may, *by any means,* determine before the expiration of the estate limited in remainder; such remainder is vested. On the contrary, wherever the preceding estate (except in the instances before noticed, as exceptions to the descriptions of a

contingent remainder) is limited, so as to determine only on an event which is uncertain, and may never happen; *or wherever the remainder is limited to a person not in esse or not ascertained;* or wherever it is limited so as to require the concurrence of some dubious uncertain event, independent of the determination of the preceding estate and duration of the estate limited in remainder, to give it a capacity of taking effect; then the remainder is contingent." (Emphasis supplied.)

In *Starnes v. Hill, supra,* the Court quoted Gray on Perpetuities as follows:

"A remainder is vested in A when *throughout its continuance* A, or A and his heirs, have the right to the immediate possession *whenever and however* the preceding estates determine; . . ." (Emphasis supplied.)

Tested by these rules, it is immediately obvious that plaintiff does not have a vested remainder. The devise is to Albert L. Duggins, "to have the use of the above lands during his life and then to go to his nearest of kin."

[2] The term "nearest of kin" or "nearest blood relation", nothing else appearing, restricts its meaning to a limited class of nearest blood relations and in the construction of wills and deeds, the use of these words, without more, does not permit the principle of representation. *Williams v. Johnson,* 228 N.C. 732, 47 S.E. 2d 24; *Trust Co. v. Bass,* 265 N.C. 218, 143 S.E. 2d 689.

[3] In the last cited case, Sharp, J., speaking for the Court, quoted with approval the following from *Witty v. Witty,* 184 N.C. 375, 379, 114 S.E. 482 (opinion by Stacy, J. later C.J.):

"As a general rule, the death of the testator is the time at which the members of a class are to be ascertained in case of a gift to the testator's heirs, next of kin, or other relatives, unless the context of the will indicates a clear intention that the property shall go to the heirs, next of kin, or other relatives at a different time, such as at the time of distribution, or at the death of the first taker, or at the date of the execution of the will . . . where the gift is to the heirs or next of kin of another than the testator, it ordinarily refers to the death of such other, unless the context of the will manifests that the class shall be determined at a different time, such as the time of distribution."

Here, we find no manifestation of intent that the roll is to be called at any time other than the death of the life tenant.

[4-7] We return to the rule as laid down by Fearne. Wherever the remainder is limited to a person not *in esse* or not ascertained, it is contingent. *Scales v. Barringer,* 192 N.C. 94, 133 S.E. 410; *Trust Co. v. Schneider,* 235 N.C. 446, 70 S.E. 2d 578. Here, the nearest kin of Albert L. Duggins, ascertained at his death, may or may not include the plaintiff. If she survives him, she may be his nearest kin. But since the remainder is limited to a person or persons not ascertained, there is no one with the present capacity of taking in possession, if the possession were to become vacant. By *present* capacity to take in possession is meant the right to take in possession from the time of effectiveness of the instrument creating the estate should the preceding estate determine by any means. The rationale of the rule is pointed out in *Starnes v. Hill, supra,* where the Court said: ". . . at common law the particular estate may be determined during the lifetime of its tenant (as by forfeiture or surrender, Fearne, *supra,* 217; Tiedeman Real Prop., 401; 4 Kent Com., 254), . . ." in which case plaintiff could not take because the nearest of kin of Albert L. Duggins are not to be ascertained until his death, and if the remainder is vested the remainderman must be able to take in possession during the continuance of the particular estate or *eo instanti* it determines. This is succinctly stated in *Richardson v. Richardson, supra,* at 709:

> "Where an estate is limited to A for life, with remainder to B for life, and there is a forfeiture or surrender of the first life estate, it determines and the estate in remainder becomes immediately vested, as there is nothing in the limitation to prevent its vesting at once. But in our case, if the first life estate is determined by forfeiture, surrender, or otherwise, and the life tenant survives its determination, the remainder cannot take effect, by the express words of the will, until the death of the widow, whereas the imperative rule of the law requires that the remainder must vest, that is, the contingency must happen, during the continuance of the particular estate or *eo instanti* it determines. The life estate is destroyed by the forfeiture resulting from the waste under the statute, and yet the event upon which the plaintiff is to take his estate in remainder has not happened."

This case is quite similar factually to *McCain v. Womble,* 265 N.C. 640, 144 S.E. 2d 857. There, testator devised property to his daughter for life, and at her death to be given to her next of kin. The daughter died in 1962. She was survived by two of her daughters and the children of a deceased son. The Court held that the children of the life tenant surviving at her death took to the ex-

clusion of the children of the son who had predeceased her. The Court again recognized the principle that without the expression of a contrary intent in the will, the words "next of kin", without more, do not recognize or permit the principle of representation.

[8] Application of rules of law in property sometimes, as here, culminate in seemingly harsh results. It is well settled in this State, as in other states, that a contingent remainderman is entitled to an injunction to prevent a person in possession from committing future waste, Am. Jur., Waste, § 13, p. 459; *Gordon v. Lowther,* 75 N.C. 193; *Latham v. Lumber Co., supra; Richardson v. Richardson, supra;* the action being maintainable for the protection of the inheritance, which is certain, although the persons on whom it may fall are uncertain.

Judge Copeland ruled in accordance with the views expressed herein. We find no error in the judgment, and, therefore, we must affirm it.

Affirmed.

MALLARD, C.J., and CAMPBELL, J., concur.

ERNEST PAUL PRIDDY v. BLUE BIRD CAB COMPANY, INC., AETNA CASUALTY AND SURETY COMPANY

No. 6821SC322

(Filed 18 September 1968)

1. Master and Servant § 99— Workmen's Compensation — attorneys' fees — discretion of Superior Court

The rule that the determination of attorneys' fees by the Industrial Commission is conclusive and binding on appeal when supported by competent evidence has been changed by G.S. 97-90(c) which now allows the Superior Court, upon appeal from action of the Commission with respect to attorneys' fees, to determine in its discretion the matter of such fees.

2. Master and Servant § 99— Workmen's Compensation — attorneys' fees — review

Judgment of Superior Court awarding fee of $800 to discharged attorney who had negotiated on behalf of claimant a $30,000 offer of settlement with compensation insurer, which offer was rejected by the claimant, ***is held*** fully supported by the findings of fact and the evidence.

APPEAL from *Gambill, J.,* in Chambers at FORSYTH County, North Carolina, 13 June 1968.

This matter arose in the North Carolina Industrial Commission (Commission) by virtue of the fact that the plaintiff, Ernest Paul Priddy, sustained an injury by accident arising out of and in the course of his employment on 2 February 1963. Employer's report of accident to employee was duly filed by the employer 19 February 1963; thereafter, agreement for compensation for disability was filed 21 February 1963 and the employer, Blue Bird Cab Company, and its insurance carrier, Aetna Casualty and Surety Company (Aetna), began making payments of compensation at the rate of $33.55 per week from 2 February 1963 until the total sum of $5,209.60 had been paid, and then the defendant stopped payment of compensation benefits sometime prior to 15 July 1966. Subsequent to the cessation of the weekly compensation payments, plaintiff consulted an attorney. This attorney negotiated with counsel representing Aetna and procured an offer of a final and complete settlement for the sum of $4,500. The plaintiff refused to accept this settlement and this attorney withdrew from further representation of the plaintiff. On 15 July 1966 plaintiff conferred with Mr. W. Scott Buck, an attorney of the Forsyth County Bar, and engaged the services of Mr. Buck to represent him in his claim. There was no agreement for fee or compensation of Mr. Buck. The case was set for hearing before the Commission in Forsyth County on 29 November 1966 but was continued by consent and rescheduled for hearing on 14 February 1967. At this time, the case was again continued for cause upon motion of counsel for Aetna. No hearing has been held before the Commission. On 17 July 1967 plaintiff advised Mr. Buck that he was discharging him as his attorney and did not expect to pay Mr. Buck for any services rendered. During the time of his representation of the plaintiff, Mr. Buck procured numerous medical reports and other data and conferred on numerous times with counsel for Aetna to the end that he procured an offer of settlement wherein Aetna would pay all accrued weekly benefits to the time of final settlement, and in addition thereto, would pay the sum of $30,000 for a complete determination of the claim. Plaintiff still refuses to accept settlement.

On 17 July 1967 Mr. Buck wrote the Commission outlining in detail services rendered to plaintiff and the fact that he had been discharged from further representation and requesting compensation for the services rendered by him at the time the case was disposed of.

Under date of 6 November 1967, William F. Marshall, Jr., Commissioner, entered an order finding that the plaintiff had no counsel and in order to be properly and fairly represented, appointed a next friend for the plaintiff. From this order, the plaintiff in apt time appealed for a review before the full Commission. The full Commis-

sion on 22 January 1968 filed an order which, among other things, found that since there had been no hearing in the case, compensation would be reinstated with all accrued compensation to be paid in a lump sum and "(t)hat the plaintiff's attorney, W. Scott Buck, the attorney whom the plaintiff employed and later discharged, is awarded a token fee in the amount of $200.00, said amount to be deducted from the compensation due plaintiff and paid in a lump sum."

Under date of 25 January 1968, Mr. Buck filed notice of appeal to the Superior Court of Forsyth County, together with assignments of error, including the fact that the fee "is entirely and completely unreasonable and inadequate."

The matter came on to be heard before Judge Gambill, judge presiding over the 10 June 1968 Civil Session of the Superior Court of Forsyth County. Judge Gambill under date of 13 June 1968 entered a judgment finding facts, including:

"8. That as a result of the efforts made and services performed by the said W. Scott Buck, Attorney, the defendants have offered to settle this case with the plaintiff upon payment of a lump sum of $30,000.00, which has been refused by the plaintiff; that, as a result of the efforts made and services rendered by said attorney, the defendants have also offered to bring the plaintiff's weekly compensation payments up-to-date and continue weekly compensation payments until this case was finally disposed of as provided by law; that said offers have been refused by the plaintiff; that the accrued weekly benefits through June 9, 1968, which have been offered to the plaintiff and which he has refused amount to $4,193.75.

9. That said attorney, W. Scott Buck, has rendered valuable services to the plaintiff and is entitled to be compensated for the total services rendered by him upon a final disposition of this case before the North Carolina Industrial Commission. That the award of the North Carolina Industrial Commission of a token fee in the amount of $200.00 is wholly inadequate.

10. That said attorney, W. Scott Buck, is entitled to an interim portion of the total fee to be allowed upon the final determination of this case; and that the sum of $800.00 is a reasonable interim portion of said fee which ought to be deducted from the accrued compensation due the plaintiff and paid direct to said attorney forthwith."

Judge Gambill then ordered and adjudged that the order of the Commission of 22 January 1968 awarding "a token fee in the amount of $200.00" be reversed.

Judge Gambill further ordered that upon a final determination of this cause, the Commission award said attorney a fee for total services rendered in a sum commensurate with the services and further provided:

> "IT IS FURTHER ORDERED, in the discretion of the Court, that the North Carolina Industrial Commission enter an appropriate order allowing said attorney an interim portion of said total fee in the sum of $800.00 and direct the defendants to deduct such sum from the accrued compensation due the plaintiff and pay the same direct to said attorney forthwith.
>
> IT IS FURTHER ORDERED that this cause be, and the same is hereby remanded to the North Carolina Industrial Commission, with a copy of this judgment certified by the Clerk of this Court and that the North Carolina Industrial Commission, within thirty days following the receipt thereof, enter an appropriate order not inconsistent herewith."

From the judgment of Judge Gambill, the plaintiff appealed to this Court.

Robert M. Bryant, Attorney for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice by Grady Barnhill, Jr., Attorneys for defendant appellees.

W. Scott Buck, in propria persona.

CAMPBELL, J.

The defendant appellees are merely stakeholders in this proceeding and they state in the brief filed in the Court:

> "The defendants have been attempting to settle this case for many months but have been unsuccessful because Mr. Priddy refuses to let the defendants bring the temporary total compensation payments up to date or to accept a lump sum settlement."

The controversy is solely between the plaintiff and his former counsel, Mr. Buck.

The plaintiff has two assignments of error.

The plaintiff assigns as error in the first place that the trial court did not have sufficient evidence to support its findings of fact. The plaintiff takes the position that it was error on the part of the trial court to hear the matter on affidavits and that there should have been a hearing before the Commission first.

For his second assignment of error, the plaintiff asserts that the

trial court erred in signing the judgment where there had been no hearing before the Commission and no transmission of the Commission's findings and reasons as to its actions.

[1] Prior to 1959, the Commission was the administrative agency of the State charged with the duty of administering the provisions of the Workmen's Compensation Act, including the determination of fees for attorneys and its findings of fact were conclusive and binding on appeal when supported by competent evidence "even though there is evidence that would have supported a finding to the contrary." *Brice v. Salvage Co.*, 249 N.C. 74, 105 S.E. 2d 439.

Subsequent to that decision, in 1959 the Legislature amended the Workmen's Compensation Act and G.S. 97-90(c) now provides:

> "In all other cases where there is no agreement for fee or compensation, the attorney or claimant may, by filing written notice of appeal within five (5) days after receipt of notice of action of the full Commission with respect to attorneys' fees, appeal to the resident judge of the superior court or the judge holding the courts of the district of the county in which the cause arose or in which the claimant resides; and upon such appeal said judge shall consider the matter of such fee and determine in his discretion the attorneys' fees to be allowed in the cause. The Commission shall, within twenty (20) days after notice of appeal has been filed, transmit its findings and reasons as to its action concerning such fee or compensation to the judge of the superior court designated in the notice of appeal. . . ."

[2] In this case the Commission entered a judgment fixing an attorney's fee for Mr. Buck and in conformity with the statute, Mr. Buck gave notice of appeal to the superior court. After receiving the notice of appeal, the Commission through its secretary filed its certificate setting out:

> "An appeal having been taken as to amount of attorney fee by plaintiff's former counsel, Mr. W. Scott Buck, from the Order of the Full Commission filed January 22, 1968, to the Superior Court of Forsyth County under the provision of G.S. 97-90(c) . . . the exhibits described below contain a true and correct copy of the record of this Commission as appears from and as the same are taken from and compared with the originals on file in this office."

There was, thus, filed and Judge Gambill had before him the complete record before the Commission. Pursuant to the statute, as it

now exists, Judge Gambill proceeded to "determine in his discretion the attorneys' fees to be allowed in this cause."

The appellant does not show and does not claim that Judge Gambill in any way abused his discretion. The record does not show that the plaintiff requested the opportunity to cross-examine any witness before Judge Gambill or in any way objected to hearing the matter before Judge Gambill on affidavits. The evidence before Judge Gambill fully supports his findings and his findings fully support his judgment.

Affirmed.

MALLARD, C.J. and MORRIS, J., concur.

MARTHA HUGHES PETREE, PLAINTIFF, v. ALEXANDER JOHNSON, ORIGINAL DEFENDANT ADV. DONALD GRAY PETREE, ADDITIONAL DEFENDANT

No. 6818SC265

(Filed 18 September 1968)

1. Automobiles § 58— action for negligent operation — turning across opposite lane — nonsuit

In plaintiff's action for damages arising out of an automobile accident, defendant's counterclaim for property damage is properly nonsuited on the ground he failed to see that a turning movement could be made in safety when his own evidence discloses that he saw plaintiff's car approaching him from a distance of 310 feet away, that he stopped his vehicle, gave a signal, thought "he had plenty of time to make it," and made a left turn into his driveway across the plaintiff's lane of travel, and that a collision resulted between the two vehicles. G.S. 20-154(a).

2. Automobiles § 9— rules of the road — turning movement

While G.S. 20-154(a) does not mean that a motorist may not make a left turn on a highway unless the circumstances be absolutely free from danger, the motorist is required to exercise reasonable care in determining that his intended movement can be made in safety.

3. Automobiles § 58— action for negligent operation — turning across opposite lane — nonsuit

There is sufficient evidence to be submitted to the jury of defendant's negligence in failing to see that he could safely make a left turn across the highway to enter his driveway in the path of plaintiff's approaching automobile, where the evidence tends to show that (1) plaintiff was traveling in a northerly direction in her lane of travel at a speed of 45 to 50 m.p.h. in a 55 m.p.h. zone, (2) when plaintiff was 70 feet away the

defendant, who was traveling in a southerly direction, suddenly and without signal, turned across her lane of travel, and (3) she immediately applied her brakes, skidded some 50 feet and that the right rear of her vehicle collided with the right rear of defendant's vehicle while the latter was still partially on the paved portion of the highway.

4. Automobiles § 17— rules of the road — passing vehicle traveling in opposite direction

A motorist has the right to assume, and to act on the assumption, that the driver of a vehicle approaching from the opposite direction will comply with statutory requirements before making a left turn across his path.

5. Automobiles § 46— actions for negligence — opinion evidence

Although it would have been permissible for the defendant to testify that "if plaintiff had stayed on the highway, there wasn't a thing in the world in her way, not a thing," its exclusion is not prejudicial where it appears that the testimony was merely cumulative of other testimony offered by defendant and would not have altered the verdict.

APPEAL by original defendant from *Crissman, J.*, 25 March 1968 Civil Session GUILFORD Superior Court, High Point Division.

This action results from an automobile collision which occurred on 25 December 1965 on Flint Hill Road near Archdale in Randolph County. Flint Hill Road is a two-lane highway running generally north and south. The two lanes are separated by a double yellow line with a broken white line between the yellow lines. The posted speed limit where the collision occurred is 55 miles per hour. Plaintiff, Martha Hughes Petree, was driving a 1965 Mustang, owned by additional defendant Donald Gray Petree and stipulated to be a family purpose car. She was proceeding in a northerly direction in her right lane of traffic at a speed of 45 to 50 miles per hour. The original defendant was operating a 1964 Chevrolet truck in a southerly direction meeting plaintiff. The accident occurred at approximately 5:00 in the afternoon. It was still daylight. Each driver saw the vehicle of the other before the collision occurred. The original defendant Johnson made a left turn into his driveway and was struck by plaintiff. The right rear of plaintiff's car collided with the right rear of original defendant's truck and, after this collision, struck a 1954 Ford then being operated in a southerly direction on Flint Hill Road by original defendant's son. Plaintiff instituted this action against Johnson seeking to recover for personal injuries and alleging that the collision was caused solely by Johnson's negligence in that, among other things, he turned from a direct line without first seeing that the movement could be made in safety, thereby violating the provisions of G.S. 20-154(a); he failed to give a signal of his intention to make a left turn; failed to keep, exercise and maintain a care-

ful, proper and effective lookout for other vehicles upon and along the highway; and failed to keep his 1964 Chevrolet pickup truck under careful and proper control.

The original defendant answered, denied negligence on his part, pled the negligence of plaintiff as the proximate cause of the collision, asserted a counterclaim for property damage, and cross claimed against Donald Petree, husband of plaintiff. The negligence of plaintiff as alleged by original defendant consisted in excessive speed under the circumstances, failure to keep, exercise and maintain a proper lookout, and failure to keep her car under proper control.

The additional defendant answered, denying negligence on the part of plaintiff and counterclaiming against original defendant for his own property damage.

At the close of all the evidence, the trial court allowed the motions of plaintiff and additional defendant for nonsuit of original defendant's counterclaim and denied original defendant's motion for nonsuit.

The jury returned its verdict in favor of plaintiff and additional defendant. From judgment entered thereon, original defendant appealed.

Armistead W. Sapp, Jr. for original defendant appellant.

Smith, Moore, Smith, Schell and Hunter and Haworth, Riggs, Kuhn and Haworth by John Haworth for plaintiff and additional defendant appellees.

MORRIS, J.

[1] Original defendant's first assignment of error challenges the trial court's granting the motions for involuntary nonsuit of his counterclaim.

Original defendant testified that he saw the plaintiff's car when it was 310 feet away, by measurements made by him; that there was nothing to prevent his seeing her car; that he saw her and then stopped (on cross-examination) or saw her "just about the time I come to a stop" (on redirect examination); that he put on his signal lights and made a "square turn" into his driveway and was hit by plaintiff. He testified that he did not know how fast plaintiff was driving. The plaintiff's evidence was that she saw Johnson when she was about 70 feet away; that she was driving 45 to 50 miles per hour; immediately applied her brakes, but could not avoid the collision. Original defendant testified his truck was completely off the high-

way at the time of the collision. Plaintiff testified a portion was still on the highway. In either event, it appears that from his own evidence original defendant saw the plaintiff approaching in her proper lane of traffic, that he signaled, stopped and then made his left turn in front of the approaching vehicle the speed of which he did not know. Though he may have thought, as he testified, that "he had plenty of time to make it", the conclusion is inescapable that he misjudged his timing and failed to recognize that after he saw plaintiff's car and while he was stopping and preparing to make his turn, plaintiff's vehicle continued to approach. He, therefore, failed to see that his intended movement could be made in safety, as he is required to do by G.S. 20-154(a) which 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 . . ."

[2] While it is true that G.S. 20-154(a) does not mean that a motorist may not make a left turn on a highway unless the circumstances be absolutely free from danger, he is required to exercise reasonable care in determining that his intended movement can be made in safety. *Tart v. Register* and *Flowers v. Register,* 257 N.C. 161, 125 S.E. 2d 754.

Original defendant's first assignment of error is overruled.

[3] Appellant's second assignment of error is to the overruling of his motion for judgment of involuntary nonsuit as to plaintiff's action. He contends that the evidence compels the single conclusion that the sole proximate cause of the collision was the negligent operation of the Petree automobile by plaintiff. We do not agree.

Considering the evidence presented in the light most favorable to plaintiff, as we are bound to do, on motion to nonsuit, *Galloway v. Hartman,* 271 N.C. 372, 156 S.E. 2d 727, it tends to show that plaintiff was traveling at a speed of 45 to 50 miles per hour in a 55 mile-per-hour zone; that she was traveling in a northerly direction in her proper lane of travel; that when she was 70 feet away, the original defendant, suddenly and without signal, turned across her lane of travel; that she immediately applied her brakes, skidded some 50 feet, and the right rear of her vehicle collided with the right rear of original defendant's vehicle while it was partially on the paved portion of the highway.

[4] Plaintiff had the right to assume, and to act on that assumption, that the driver of a vehicle approaching from the opposite direction would comply with statutory requirements before making a

left turn across her path. *Jernigan v. Jernigan,* 236 N.C. 430, 72 S.E. 2d 912. When she was 70 feet away she realized that he was turning in front of her and applied her brakes.

This case is strikingly similar to *Dolan v. Simpson,* 269 N.C. 438, 152 S.E. 2d 523. There plaintiff was a passenger in the vehicle operated by defendant Simpson, traveling in an easterly direction approaching an intersection. At the same time, defendant McCarley was approaching the intersection traveling in a westerly direction. As the front of the Simpson car entered the intersection, there was a collision between the two cars in the McCarley lane of travel, the McCarley vehicle having hit the right side of the Simpson car. Defendant Simpson's version of the accident was that before she made the left turn she came to a complete stop and looked in front and to the rear. She saw nothing approaching, and, with her signal lights on, made "a curved turn". As she started to turn, she saw the lights of the approaching vehicle for the first time. She stated that she thought the car was far enough away for her to make the turn and the car appeared to be traveling at a higher rate of speed than she had figured. McCarley's version of the accident was that he was traveling at a speed of 45 to 50 miles per hour in the westbound lane, saw the headlights of the Simpson car in a group of approaching headlights, first saw the automobile itself when it started a long sweeping turn in front of him when the two cars were about 75 feet apart. He applied his brakes, blew his horn and pulled to the right getting two wheels off the pavement onto the shoulder. Notwithstanding this, he hit the Simpson vehicle in the right side when the front end of the car was in the intersection and its rear end was in his lane of travel. The Supreme Court affirmed the trial court in sustaining defendant McCarley's motion for nonsuit as to him.

We think the trial judge properly allowed plaintiff to go to the jury. Original defendant's second assignment of error is overruled.

[5] Appellant's remaining assignment of error is to the exclusion of certain evidence. Counsel for original defendant asked him "If she had stayed on the road, would she have passed safely behind you?" Plaintiff objected and the objection was sustained. If permitted to answer, the witness would have testified "If she had stayed on the highway, there wasn't a thing in the world in her way, not a thing." Conceding that, under the authority of *Tarkington v. Printing Co.,* 230 N.C. 354, 53 S.E. 2d 269, and cases cited therein, and *Maddox v. Brown,* 233 N.C. 519, 64 S.E. 2d 864, the answer may have been admissible, we do not think its exclusion was prejudicial error. The witness testified, without objection, that he made the turn,

"got plumb in my driveway, three foot", that none of his truck was sticking out in the highway. It appears abundantly clear that had the evidence been admitted, it would have been merely cumulative and would not, in our opinion, have altered the verdict.

In the trial below we find no prejudicial error.

No error.

MALLARD, C.J., and CAMPBELL, J., concur.

GREENSBORO-HIGH POINT AIRPORT AUTHORITY v. JOHN L. IRVIN AND WIFE, HELEN A. IRVIN; CHARLES W. IRVIN, JR., AND WIFE, MARY S. IRVIN; DORIS L. EGERTON AND HUSBAND, GEORGE C. EGERTON; AND PEARL T. IRVIN

No. 68SC235

(Filed 18 September 1968)

1. Eminent Domain § 7; Injunctions §§ 7, 11— airport authority — air rights easement — payment into court of assessed damages — appeal to Superior Court — injunction preventing removal of trees

While the payment into court of the damages assessed by the commissioners in proceedings by a municipal airport authority to condemn an air rights easement for the purpose of removing trees and other growth from the property entitles the condemnor to "enter, take possession of, and hold" the property pending final adjudication of an appeal, G.S. 40-19, the Superior Court may properly grant a restraining order preventing the condemnor from cutting trees on the property pending an appeal by the landowners to the Superior Court where not only the amount of compensation but the right and necessity of the airport authority to condemn the property are at issue.

2. Eminent Domain § 1— laws strictly construed

The exercise of the power of eminent domain is in derogation of common right, and all laws conferring such power must be strictly construed.

APPEAL by petitioner from *Crissman, J.*, at the 19 February 1968 Session GUILFORD Superior Court, Greensboro Division.

This special proceeding was instituted on 9 March 1966. Answer was filed on 2 May 1966, commissioners' report was filed 16 September 1966, and confirmation was made by the clerk on 26 January 1968.

In its petition, petitioner pled the public local laws which brought it into existence as a body politic and corporate, and which gave it

all rights or powers given to counties or municipalities by the statutes of North Carolina relating to the development, regulation and control of municipal airports and the regulation of aircraft. The petitioner further alleged that the public interest and necessity required that it acquire and take an air rights easement and right-of-way over certain lands of the respondents for the purpose of removing trees and other growth or structure within the approach surface zone and horizontal surface zone of the petitioner as designated in the zoning regulations of the petitioner.

The respondents answered, denying the authority of the petitioner to take the air easement or to interfere with natural growth within the area and also denying the necessity therefor.

Commissioners were appointed and reported their findings of damage amounting to $11,368.75. The lower limits of the easement ranged upward from 48 feet from the ground. Both parties excepted to the findings of the commissioners which were, however, confirmed by the Clerk of Superior Court. Respondents gave notice of appeal to the Superior Court on 26 January 1968 and on the same day obtained a temporary restraining order from Lupton, J., restraining petitioner from interfering with the trees on the subject lands pending the appeal to Superior Court.

Petitioner then asked that the restraining order be dissolved and the request for a permanent injunction be denied. After a hearing, Judge Crissman ordered that the temporary restraining order continue until further order of the court. Petitioner appeals from this order.

Booth, Osteen, Fish, Adams & Dameron by William L. Osteen for petitioner appellant.

Turner, Rollins, Rollins & Suggs by Thomas Turner and Clyde T. Rollins for respondent appellees.

BRITT, J.

[1] The question presented by this appeal is: Was the petitioner entitled to the use of the property which it seeks to take to the extent of cutting and trimming trees thereon pending the appeal by respondents to the Superior Court on the issues of necessity, authority to condemn, and adequacy of compensation?

The answer to the question depends upon the construction of the following portions of G.S. 40-19:

If the said corporation, at the time of the appraisal, shall pay

into court the sum appraised by the commissioners, then and in that event the said corporation may enter, take possession of, and hold said lands, notwithstanding the pendency of the appeal, and until the final judgment rendered on said appeal. And if there shall be no appeal, or if the final judgment rendered upon said petition and proceedings shall be in favor of the corporation, and upon the payment by said corporation of the sum adjudged, together with the costs and counsel fees allowed by the court, into the office of the clerk of the superior court, then and in that event all persons who have been made parties to the proceedings shall be divested and barred of all right, estate and interest in such easement in such real estate during the corporate existence of the corporation aforesaid or if the proceedings have been instituted by such corporation to acquire a fee simple title to such real estate, then all persons who have been made parties to the proceedings shall be divested and barred of all right, title and interest in such real estate. * * * But if the court shall refuse to condemn the land, or any portion thereof, to the use of such corporation, then, and in that event, the money paid into court, or so much thereof as shall be adjudged, shall be refunded to the corporation. And the corporation shall have no right to hold said land not condemned, but shall surrender the possession of the same, on demand, to the owner or owners, or his or their agent or attorney. * * *

Authorities make a distinction between cases in which adequacy of compensation is the only issue on appeal and cases in which other serious issues such as right to condemn are raised.

Prior North Carolina cases are not particularly helpful in this case. In *Topping v. Board of Education*, 249 N.C. 291, 106 S.E. 2d 502, one superior court judge had restrained construction of a high school building on a three-acre site, while the remaining twelve acres were still in process of acquisition, since the adequacy of the site is one of the considerations of the State Board of Education in appropriating construction funds. A second superior court judge ruled that payment of the money for the twelve acres into court under G.S. 40-19, and subsequent possession, was substantial compliance with the requirement of the first judge that title to all fifteen acres be obtained before beginning construction. The Supreme Court held that this was not substantial compliance, saying: "Temporary possession, *pendente lite*, subject to removal by final adverse judgment, is quite different from a final judicial determination that the condemnor is entitled as a matter of right to permanent possession. The title of the landowner is not divested unless and until the condemnor

obtains *a final judgment* in his favor *and* pays to the landowner *the amount of the damages fixed by such final judgment.*"

A review of select cases from other jurisdictions which have faced a similar problem under a similar statute is helpful. In *Electric Power Board v. Thoni,* 184 Tenn. 459, 201 S.W. 2d 649, it was held that "where protection is fully provided against loss or damage, as may be finally awarded, condemnor is entitled to immediate entry, where neither a want of power to exercise the right nor immunity from appropriation of particular property is involved." In the present case, the right to exercise the power is challenged and there would not be full protection for the condemnees, since the cutting of the trees amounts to irreparable harm.

In *Chicago v. Cohn,* 326 Ill. 372, 158 N.E. 118, 55 A.L.R. 196, the court held that the possession allowed by a statute permitting one seeking to condemn property for public use to take possession after judgment in his favor upon deposit of the amount of the award notwithstanding appeal is permanent and not merely temporary. However, in that case, there was no question as to the right of the condemnor to take the property, the issue relating, instead, to damages. Other jurisdictions have held that there is no right of possession by the condemnor until damages and the right to take are settled, *Kessler v. Thompson,* 75 N.W. 2d 172; or that possession is only temporary even where the only issue is damage, *Schnull v. Indianapolis Union Ry.,* 190 Ind. 572, 131 N.E. 51, *Lake Erie & Western Ry. v. Kinsey,* 87 Ind. 514; or that it is discretionary with the court, *Utah Copper Co. v. Montana-Bingham Consol. Mining Co.,* 69 Utah 423, 255 P. 672.

In *Town of Ames v. Wybrandt,* 203 Okla. 307, 220 P. 2d 693, the court held that "establishment of the right to condemn is a prerequisite to any right of possession by the condemnor"; and the "condemnation statute permitting a corporation, upon payment of damages assessed, to enter upon the premises, applies where the right to condemn the premises is not in question, and the sole question is the measure of damages." See also 30 C.J.S., Eminent Domain, § 329; 29A C.J.S., Eminent Domain, § 221; 27 Am. Jur. 2d, Eminent Domain, § 469, and Nichols on Eminent Domain, §§ 26.131 and 24.5.

A considerable number of agencies and corporations are given the right of eminent domain by our statutes. It is noteworthy that the General Assembly has enacted additional legislation pertaining to two of these agencies or corporations, namely, the State Highway Commission and duly constituted redevelopment commissions.

By what is now codified as Art. 9 of c. 136 of the General Stat-

utes, the General Assembly rewrote the law regulating the procedure which the Highway Commission should use in condemning property subsequent to 1 July 1960. See *Highway Commission v. Industrial Center,* 263 N.C. 230, 139 S.E. 2d 253. The 1965 General Assembly rewrote G.S. 160-465 relating to eminent domain procedure for redevelopment commissions. We are not called upon here to construe those statutes but merely refer to them to indicate that the General Assembly, with respect to the vesting of title in and unfettered possession of property, has attempted to place the State Highway Commission and redevelopment commissions in a different category from other agencies and corporations having the right of eminent domain.

[2] 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. Abeyounis,* 1 N.C.App. 270, 161 S.E. 2d 191; *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.

[1] We hold that in the instant case plaintiff "may enter, take possession of, and hold" the subject property pending final adjudication; however, since respondents challenge petitioner's right to condemn and the cutting or trimming of trees on the subject property would cause irreparable damage to respondents should they ultimately prevail, the Superior Court was fully empowered to grant the restraining orders appealed from.

No error.

BROCK and PARKER, JJ., concur.

MINNIE BELL NANCE, EXECUTRIX OF THE ESTATE OF FRANK MEBANE NANCE, DECEASED, v. JAMES DAVID WILLIAMS AND JAMES MILTON WILLIAMS

No. 6817SC323

(Filed 18 September 1968)

1. Trial § 33— instruction must be supported by allegation and evidence

It is error for the court to charge upon an abstract principle of law which is not presented by the allegations and evidence.

2. Trial § 32— purpose of the charge

A prime purpose of the charge is to eliminate irrelevant matter or al-

legations not supported by evidence so that the jury may understand and appreciate the precise facts that are material and determinative.

3. Automobiles §§ 43, 118— reckless driving — sufficiency of pleadings

To plead reckless driving effectively, a party must allege facts showing a violation of specific rules of the road in a criminally negligent manner, it being insufficient merely to allege reckless driving in the language of G.S. 20-140.

4. Automobiles §§ 43, 118— reckless driving — sufficiency of pleadings

In an action for wrongful death, allegations that defendant driver failed to keep a proper lookout, failed to keep his vehicle under proper control and operated it along a wet highway at an excessive speed, together with an allegation of reckless driving in the language of G.S. 20-140, *are held* insufficient to present the question of defendant's violation of the reckless driving statute.

5. Automobiles §§ 8, 90, 118— evidence insufficient for instruction on reckless driving

In a wrongful death action growing out of a rear-end collision, evidence that defendant was a quarter mile away when deceased drove his vehicle into the highway, that deceased traveled 90 feet down the highway before being struck from the rear by defendant's vehicle, and that defendant did not change his speed or direction before striking deceased although the left side was clear, while sufficient to make out a case of actionable negligence, *is held* insufficient to show culpable negligence justifying an instruction relating to a violation of G.S. 20-140.

6. Automobiles § 90— negligence — reckless driving — instructions

An instruction on the issue of negligence which incorporates the provisions of G.S. 20-140 without further instructions upon what facts the jury might find from the evidence that would constitute reckless driving fails to comply with G.S. 1-180 and is erroneous.

APPEAL by defendants from *Godwin, S.J.*, at the March 1968 Civil Session of ROCKINGHAM Superior Court.

This is a civil action instituted by plaintiff executrix against the defendants to recover for the wrongful death of plaintiff's testate who was killed in a collision between a tractor operated by the deceased and an automobile operated by the defendant son and owned by the defendant father.

In her complaint, plaintiff alleges that the defendant son was operating the 1962 Chevrolet owned by his father about 7:30 a.m. on 10 December 1966 in a westerly direction along county road No. 1360 in Rockingham County; that at the time, the deceased was lawfully operating a farm tractor along the same road in the same direction; that the defendant son operated the family purpose automobile with-

out keeping a proper lookout, without keeping said car under proper control, and in a careless and reckless manner, in violation of G.S. 20-140; and that the defendant son drove into the back of the tractor, proximately causing the instant death of the deceased.

The defendants answered, denying negligence or violation of a statute in the operation of the car. As a further answer, the defendants alleged that the defendant son was operating the vehicle at a reasonable and prudent speed nearing the crest of a hill on Anglin Mill Road when plaintiff's testate pulled out from a driveway on the defendant's left side, slightly beyond the crest of the hill, into the path of said defendant; that the defendant son attempted to stop and drove to the left but hit the turn plow on the rear of the tractor with the front of his automobile; that the deceased was not visible to defendant driver prior to nearing the crest of the hill; and that if defendant was negligent, deceased was contributorily negligent in entering the road under those conditions.

The evidence favorable to the plaintiff tended to show that when the plaintiff's testate entered the highway, the defendants' car was then about a quarter of a mile away; that after entering the highway, the plaintiff's testate proceeded westerly down the road some 90 feet before being struck by the defendants' car; that the defendant driver "had his speed up" and "came on and . . . ran right into him"; that the speed of the defendant driver did not change, nor did his direction, though the left side was clear.

The evidence favorable to the defendants tended to show that the defendant son was traveling 40 to 45 miles per hour on a road familiar to him; that one was unable to see the driveway until nearly to the crest of the hill; that when he first saw the plaintiff's testate, his tractor was in both lanes of the road; that defendant driver left skid marks of 24 feet moving toward the center line, and that the automobile stopped almost immediately after hitting the turn plow.

The defendants' motion for judgment as of nonsuit was denied, the jury answered issues in favor of plaintiff, and defendants appealed from judgment on the verdict.

Price, Osbourne & Johnson and Gwyn & Gwyn by Julius J. Gwyn for plaintiff appellee.

Jordan, Wright, Nichols, Caffrey & Hill by Karl N. Hill, Jr., for defendant appellants.

BRITT, J.

The principal question presented is whether the pleadings and

evidence were sufficient to permit a charge to the jury on the violation of G.S. 20-140, the reckless driving statute.

[1, 2] G.S. 1-180 requires the judge, in charging a petit jury in a civil or criminal action, to declare and explain the law arising on the evidence given in the case. It is error for the court to charge upon an abstract principle of law which is not presented by the allegations and evidence. *Motor Freight v. DuBose,* 260 N.C. 497, 113 S.E. 2d 129; *Carswell v. Lackey,* 253 N.C. 387, 117 S.E. 2d 51; *Andrews v. Sprott,* 249 N.C. 729, 107 S.E. 2d 560. A prime purpose of the charge is to eliminate irrelevant matter or allegations not supported by evidence so that the jury may understand and appreciate the precise facts that are material and determinative. *Dunlap v. Lee,* 257 N.C. 447, 126 S.E. 2d 62.

[3] In *Roberts v. Freight Carriers,* 273 N.C. 600, 160 S.E. 2d 712, in an opinion by Sharp, J., we find the following:

> As we pointed out in *Ingle v. Transfer Corp.,* 271 N.C. 276, 283-284, 156 S.E. 2d 265, 271, allegations of reckless driving in the words of G.S. 20-140, without more, do not justify a charge on reckless driving. To plead reckless driving effectively, a party must allege facts which show that the other was violating specific rules of the road in a *criminally* negligent manner.

[4] In her complaint, plaintiff's allegations of negligence declare (a) that defendant driver did not keep a proper lookout, (b) that he did not have his automobile under proper control and operated it along a wet highway at an excessive rate of speed, and (c) and (d) that he operated the car in violation of G.S. 20-140 (setting forth substantially the provisions of the statute).

[5] The evidence in the instant case did not justify instructions relating to a violation of G.S. 20-140. Plaintiff's evidence, considered in the light most favorable to her, was sufficient to make out a case of actionable negligence but not one of culpable negligence. *State v. Cope,* 204 N.C. 28, 167 S.E. 456.

In *Dunlap v. Lee, supra,* the defendant ran into the rear of the plaintiff's car as plaintiff had stopped to allow a vehicle in front of plaintiff to turn off the road. Plaintiff offered no evidence as to the speed of the defendant, while the defendant testified to a speed of 40 miles per hour. The court held that while the fact of a rear-end collision offers some evidence of negligence, it is not sufficient to present the question of defendant's violation of G.S. 20-140, when the fact of accident is combined only with the failure to keep a proper lookout, and not with excessive speed or following too closely.

The evidence of recklessness in the instant case was no stronger than the evidence in *Dunlap.*

[6] Even if the charge on G.S. 20-140 had been justified by the allegations and evidence, the instructions were improperly administered in this case. In his charge, the trial judge stated that plaintiff alleged and contended that the defendant driver violated the statute prohibiting reckless driving and then proceeded to give the substance of the statute. He then stated plaintiff's contentions regarding speed greater than was reasonable and prudent under the circumstances and failure of defendant driver to maintain a reasonable and proper lookout and to keep his car under proper control.

The charge then contains the following:

> Finally, as to the first issue, I instruct you that if the plaintiff has fulfilled the responsibility cast upon her by the law to the extent that the evidence by its quality and convincing power has satisfied you by its greater weight that at the time and place complained of, the defendant James David Williams was negligent in that he unlawfully or negligently operated a motor vehicle upon a public highway in Rockingham County, North Carolina, carelessly and heedlessly in willful and wanton disregard for the rights and safety of others or in that he drove any vehicle upon a highway in this county without due caution and circumspection and at a speed or in a manner as to endanger or be likely to endanger any person or property or in that he operated said vehicle at the time and place complained of and at a speed which was greater than was reasonable and prudent under the circumstances then and there existing or in that he failed to keep a reasonable lookout or in that he failed to have and keep said automobile under proper control at the time and place complained of; I say that if the plaintiff has proved any of those things and proven it by the greater weight of the evidence and has further proved by the greater weight of the evidence that the negligence of the defendant James David Williams in any one or more of those regards not only existed but that such negligence of the defendant James David Williams was one of the proximate causes of the collision between the automobile then and there operated by him and the farm tractor then and there operated by Frank Mebane Nance, it would be your duty to answer this first issue in the plaintiff's favor or "yes."

In *Roberts v. Freight Carriers, supra,* it is said:

If, however, a party has properly pleaded reckless driving and the judge undertakes to charge upon it, G.S. 1-180 requires him to tell the jury what facts they might find from the evidence would constitute reckless driving. It is not sufficient for the judge to read the statute and then (as he did here) leave it to the jury to apply the law to the facts and to decide for themselves what defendant's driver did, if anything, which constituted reckless driving.

We hold that neither the pleadings nor the evidence in this case justified instructions on reckless driving. *Roberts v. Freight Carriers, supra; Ingle v. Transfer Corp., supra; Electric Company v. Dennis,* 259 N.C. 354, 130 S.E. 2d 547.

Because of prejudicial errors in the charge, there must be a New trial.

BROCK and PARKER, JJ., concur.

WILLIE JORDAN MATTHEWS v. VIRGINIA COOK HILL AND MARVIN WOODROW CHILDRESS

No. 6819SC344

(Filed 18 September 1968)

1. Torts § 7— release from liability — proof of matter in avoidance

Where plaintiff admits the execution of a release, he then has the burden to prove any matter in avoidance.

2. Torts § 7— release — matter in avoidance — inadequate consideration

Inadequacy of consideration alone is not sufficient to set aside a release, unless it be so gross and palpable as to shock the moral sense.

3. Torts § 7; Cancellation and Rescission of Instruments § 10— fraud in obtaining release — sufficiency of evidence

In plaintiff's action to recover damages for personal injuries arising out of an automobile accident, the issue of an insurance agent's fraud in procuring a release from the plaintiff is properly nonsuited (1) when there is no evidence that the payments actually made under the terms of the release were, when compared to plaintiff's injuries, so grossly and palpably inadequate "as to shock the moral sense" and (2) when the evidence shows that the plaintiff was a mature woman with a grown daughter and grandchildren and that on the day she signed the release she had been to business school, had become ill and returned home, that she gave the insurance agent her version of the accident and thereafter signed, but did not

read, the release because she did not want to be bothered, with no evidence that plaintiff was under the influence of drugs when she signed the release.

4. Torts § 7— execution of release — duty of injured party to read

An injured person who can read is under a duty to read a release from liability for damages for a personal injury before signing it; hence, where such a person signs a release without reading it he is charged with knowledge of its contents and may not thereafter attack it upon the ground that at the time of signing he did not know its purport, unless his failure to read it was due to some artifice or fraud chargeable to the party released.

APPEAL by plaintiff from *Seay, J.*, at the 4 March 1968 Civil Session of CABARRUS Superior Court.

This is a civil action to recover damages for personal injuries sustained in an automobile collision which occurred on 16 January 1966 between cars operated by defendants. Plaintiff was riding as a passenger in one of the cars and alleged her injuries resulted from the actionable negligence of the defendants. Each defendant answered, denying his own negligence and alleging execution by plaintiff of a written release of all claims. Plaintiff replied, admitting signing an instrument on 19 January 1966 for a representative of one of the defendants, but alleging "that because of plaintiff's physical and mental condition resulting from the taking of medicine prescribed for her injuries, plaintiff did not know or understand the instrument which she signed," and that her signature was obtained by misrepresentation and fraud. Prior to trial plaintiff moved to amend her reply by striking therefrom the words "resulting from the taking of medicine prescribed for her injuries," which motion was allowed. In a pretrial conference the court, without objection, directed that the question or questions concerning the release be tried separately and in advance of the trial of the issues of negligence and damages. The case came on for trial before the court and jury upon the issue concerning the release and the validity thereof. At the conclusion of all the evidence each defendant moved for judgment on the plea in bar and for judgment of nonsuit of the entire action. The court allowed these motions and entered judgment, finding as a fact that plaintiff admitted signing the release and holding that there was no evidence sufficient to submit to the jury to show any fraud or fraudulent misrepresentations in its procurement or that plaintiff was lacking in mental capacity when she signed it. On these findings the court sustained the pleas in bar and dismissed the action. Plaintiff excepted and appealed.

Williams, Willeford & Boger, by John R. Boger, Jr., for plaintiff appellant.

Helms, Mulliss & Johnston, by E. Osborne Ayscue, Jr., for defendant appellant Hill.

Hartsell, Hartsell & Mills, by William L. Mills, Jr., and Michael Koontz, for defendant appellee Childress.

PARKER, J.

[1] At the trial plaintiff admitted from the witness stand that the instrument which she signed on 19 January 1966 was the release as pleaded by defendants and that she had received certain monies therefor. By the terms of this instrument plaintiff released all claims resulting from the automobile accident referred to in her complaint. The execution of the release being admitted, the burden was then cast on plaintiff to prove any matter in avoidance. *Watkins v. Grier,* 224 N.C. 339, 30 S.E. 2d 223.

[2, 3] There was no evidence that the agent who obtained plaintiff's signature on the release made any misrepresentations whatsoever. Plaintiff admits on this appeal that the only evidence of fraud in obtaining the release is the inadequacy, as plaintiff contends, of the consideration. Inadequacy of consideration alone is not sufficient to set aside a release, unless it be "so gross and palpable as to shock the moral sense." *Cowart v. Honeycutt,* 257 N.C. 136, 125 S.E. 2d 382. In the present case plaintiff did not allege in her reply inadequacy of consideration so gross as to amount to fraud. Even had she done so, the evidence would not support such an allegation. The consideration stated in the release was the sum of $30.00 and the promise to pay all of plaintiff's reasonable medical, surgical, nursing, and hospital expenses incurred within one year following the accident and caused by it, not exceeding a total of $2000.00. The uncontradicted evidence is that plaintiff received during the period from 19 January to 13 June 1966 ten different checks totaling $171.45, of which $141.45 was in reimbursement of her medical expenses. Each of these checks was made payable to plaintiff and was endorsed and negotiated by her. In addition, plaintiff was tendered a check dated 27 July 1967 made payable jointly to her, to the hospital, and to the clinic, in the amount of $991.90, in reimbursement of hospital and surgical expenses, which check was refused by her. There was evidence that as a result of the collision plaintiff received bruises to her knees, to her right arm, and a sore neck. Some six months after the collision, plaintiff also had surgery to one knee, giving rise to the tendered check in the amount of $991.90. However,

there was no evidence that plaintiff's injuries were so severe that the payments actually made under the terms of the release were, when compared with her injuries, so grossly and palpably inadequate "as to shock the moral sense." The trial court correctly held that the evidence was insufficient to permit submission to the jury of an issue as to fraud in procurement of the release.

[3] We are also of the opinion that there was no evidence sufficient to submit to the jury an issue as to plaintiff's mental capacity at the time she signed the release. On this issue, the evidence when considered in the light most favorable to the plaintiff would tend to show the following: On Wednesday, 19 January 1966, three days after the accident, plaintiff had attended North State Business School in the morning. She began feeling real bad and left school about noon. She had pain in her legs, an earache, and an excruciating pain in the back of her head. She was coughing, feeling nauseated, and had a cold. From the school, she went to the hospital, where she saw the doctor, and then went to visit her friend, the defendant Virginia Hill, with whom she had been riding at the time of the accident and who was still in the hospital. She then went home, arriving about 2:00 p.m., and went immediately to bed. She was taking cough medicine and anacin and a prescription obtained from the hospital. She was in bed when the agent for the insurance company came by late in the afternoon. She answered the door when he knocked, thinking that he was the delivery boy from the drugstore from which she had ordered additional medicine. The plaintiff and the agent then went to plaintiff's bedroom where she returned to bed and he sat on a chair beside her bed. They talked about the accident which had occurred three days earlier. The agent wrote out a statement of what plaintiff told him about the accident and about her injuries, and she signed the papers at the agent's request. While the agent was there, plaintiff's daughter and son-in-law and their two small children came by for a visit and were introduced to the agent. Plaintiff admitted she signed the papers given to her by the agent but testified that she had not read them and did not know what she had signed. In explanation of her action, she testified: "Well, I could have cared less. I just didn't want to be bothered. I was so ill I just thought he would never leave." She also testified that she did not understand what she was signing. The doctor who treated plaintiff on the date of the accident on 16 January 1966 testified that on that date he found she had injuries to both knees, pain in the back and shoulders, but no broken bones, and that plaintiff was emotionally upset and nervous.

[4] Even considering all of this evidence in the light most favorable to the plaintiff, it is not sufficient to permit submission to a jury of an issue as to her mental capacity at the time she signed the release. Plaintiff is a mature woman with a grown daughter and grandchildren. She attended business school. On the day in question she had been to school in the morning, had gone by the hospital to see the doctor and visit her friend, and had then gone home. Se was feeling bad and went to bed. There is no evidence that she was under the influence of any drug, and by her own motion she has deleted from her pleadings any allegation that her mental condition at the time resulted from the taking of medicine. She talked with the agent of the insurance company and gave him a coherent statement. She talked with her daughter and son-in-law. Her own statement that she signed the papers because she didn't want to be bothered, while certainly evidence of gross negligence on her part, falls far short of being evidence of mental incapacity. Her own affirmative answer in response to a leading question from her attorney as to whether she had sufficient ability to know the nature and extent of the papers she was signing is not sufficient, even when considered with all other evidence, to carry the issue to the jury. If that were so, then every person who could show that at the time he signed a legal document he had a headache, was suffering from a bad cold, and didn't want to be bothered, might avoid the consequences of his own act. An injured person, who can read, is under the duty to read a release from liability for damages for a personal injury before signing it. Hence, where such a person signs a release without reading it, he is charged with knowledge of its contents, and he may not thereafter attack it upon the ground that at the time of signing he did not know its purport, unless his failure to read it was due to some artifice or fraud chargeable to the party released. *Watkins v. Grier, supra.* In the present case there was no evidence of any fraud or artifice used to obtain plaintiff's signature on the release, and she is bound by her act in signing it.

It is desirable that potential tort liabilities be settled only when all parties concerned have had reasonable opportunity to ascertain the true extent of the injuries involved. It is also desirable that settlements be made promptly and with finality. These sometimes conflicting considerations confront the parties, and at times the courts, with certain dilemmas. *See* "Conclusiveness of Personal Injury Settlements: Basic Problems," 41 N.C.L. Rev. 665. The facts

in the case before us present insufficient grounds for disturbing the finality of the release.

The judgment appealed from is
Affirmed.

BROCK and BRITT, JJ., concur.

R. A. CHAMBERS v. REDEVELOPMENT COMMISSION OF HIGH POINT
No. 68SC201

(Filed 18 September 1968)

1. Appeal and Error §§ 42, 45— questions in brief not presented by record

Questions set forth in appellant's brief which are not presented by the record will not be decided by the Court of Appeals.

2. Eminent Domain § 9; Pleadings § 26— demurrer — failure to allege ultimate facts

Demurrer of defendant municipal redevelopment commission is properly sustained where the complaint merely alleges that under the applicable laws and regulations of the Department of Housing and Urban Development plaintiff is entitled to a displacement payment of $2,500 from defendant, the material, essential and ultimate facts upon which plaintiff's cause of action is based not being properly alleged.

APPEAL by plaintiff from *Crissman, J.*, 25 March 1968 Session of GUILFORD Superior Court, High Point Division.

The allegations in plaintiff's complaint are:

"1. That the Plaintiff is a citizen and resident of the State of Florida.

2. That the Defendant is a body corporate and politic, a Redevelopment Commission duly created, organized, existing and having the rights, powers, and authorities conferred by Article 37, Chapter 160 of the General Statutes of North Carolina, including the power of eminent domain, and has its principal office in the City of High Point, North Carolina.

3. That pursuant to and in compliance with applicable law, it has been heretofore determined that a certain area within the City of High Point was a blighted area, a redevelopment plan for said area was adopted by the City Council of High Point

and the Defendant is now engaged in carrying out and effecting said redevelopment plan within the said area; that included within the said area is the property known as the Elwood Hotel property located at the Southeast corner of South Main Street and East High Street.

4. That the Plaintiff was the Lessee of the said Elwood Hotel property, having entered into a Lease for the same dated November 8, 1949, and expiring February 28, 1980; that under the terms of the said Lease, he operated the Elwood Hotel on the said premises until the 30th day of March, 1966, at which time he was displaced.

5. That under the applicable laws and the regulations of the Department of Housing and Urban Development, the Plaintiff is entitled to a displacement payment of Twenty-five Hundred Dollars ($2,500.00); that he has applied to the Defendant for the said payment but the same has been denied and refused.

WHEREFORE, your Plaintiff prays the Court that he have and recover of the Defendant, the sum of Twenty-five Hundred Dollars ($2,500) together with the costs of this action, including reasonable attorneys' fees to be set and allowed by the Court in its discretion and for such other relief as may be just and proper."

Defendant filed a demurrer to the complaint in which it is asserted:

"(1) The plaintiff's purported cause of action is based upon the provisions of 42 U.S.C. 1465 (b), which provides in pertinent part as follows:

'A local public agency may pay to any displaced business concern or nonprofit organization —

. . .

(2) an additional $2,500 in the case of a private business concern with average annual net earnings of less than $10,000 per year which (A) was doing business in a location in the urban renewal area on the date of local approval of the urban renewal plan (or of acquisition of real property under the third sentence of section 1452 (a) of this title), (B) is displaced on or after January 27, 1964, and (C) is not part of an enterprise having establishments outside the urban renewal area.'

(2) Determination of eligibility for the payment permitted under 42 U.S.C. 1465 (b) (2) is made under and pursuant to

regulations established by the Secretary of Housing and Urban Development (formerly known as 'Housing and Home Finance Administrator') as authorized by the provisions of 42 U.S.C. 1465 (e), which provides in pertinent part as follows:

'The Administrator is authorized to establish such rules and regulations as he may deem appropriate in carrying out the provisions of this section and may provide in any contract with a local public agency, or in regulations promulgated by the Administrator, that determinations of any duly designated officer or agency as to eligibility for and the amount of relocation assistance authorized by this section shall be final and conclusive for any purposes and not subject to redetermination by any court or any other officer.'

(3) Under and pursuant to the foregoing authority of 42 U.S.C. 1465 (e), regulations were promulgated and adopted as to the way and manner whereby eligibility for displacement payments shall be determined, which regulations provide in pertinent part as follows (Relocation Payment Regulations Sect. 3.104 (c)):

'Action on claim — finality. The Agency is initially responsible for determining the eligibility of a claim for, and the amount of, a relocation payment and shall maintain in its files complete and proper documentation supporting the determination. The determination on each claim shall be made or approved either by the governing body of the Agency or by the principal executive officer of the Agency or his duly authorized designee. The determination, or any redetermination by any duly designated officer or agency, shall be final and conclusive for any purposes and not subject to redetermination by any court or any other officer.'

(4) The Complaint fails to state facts sufficient to establish or from which an inference arises that plaintiff's eligibility for a displacement payment has been affirmatively determined by the Revelopment (sic) Commission of High Point, the Agency to which reference is made in the foregoing regulations. Therefore the Complaint fails to establish plaintiff's right to or eligibility for the payment claimed and fails to state facts sufficient to constitute a cause of action."

Upon the hearing on the demurrer, the judge sustained the demurrer and ordered "that the plaintiff shall have thirty (30) days after the rendition of this judgment within which to move for leave to amend the Complaint." The defendant did not object or except to

this order of the Court dated 4 April 1968. The plaintiff in apt time objected and excepted thereto and appealed to the Court of Appeals.

Morgan, Byerly, Post & Keziah by David M. Watkins for plaintiff appellant.

Haworth, Riggs, Kuhn & Haworth by John Haworth for defendant appellee.

MALLARD, C.J.

In the record on appeal plaintiff makes only two assignments of error on two exceptions; (1) the action of the trial court in sustaining the demurrer of the defendant, and (2) the action of the trial court in the signing of the order in this matter sustaining the demurrer of the defendant.

In plaintiff's brief he asserts that the questions presented are:

> "I. Does plaintiff's displaced business, by meeting all requirements set forth in 42 U.S.C. 1465(b), have a right to receive the displacement benefits provided for in said section without having previously been declared eligible to receive same by the Redevelopment Commission of High Point?
>
> II. Has Congress made an unconstitutional delegation of the judicial function in 42 U.S.C. 1465(e) to an administrative body, i.e., Redevelopment Commission of the City of High Point?"

The plaintiff argues the foregoing questions in his brief and cites authority for his position. However, neither of these questions are presented on this record, and they are not decided.

Plaintiff in his brief also refers to the exceptions upon which he bases the assignments of error set out in the record on appeal. The only question presented on this appeal is whether the demurrer of the defendant should have been sustained on the grounds set out therein that the complaint does not state facts sufficient to constitute a cause of action. G.S. 1-127.

In the case of *Gillispie v. Service Stores,* 258 N.C. 487, 128 S.E. 2d 762, Bobbitt, J., speaking for the Court, said:

> "A complaint must contain '(a) plain and concise statement of the facts constituting a cause of action . . .' G.S. 1-122. 'The cardinal requirement of this statute . . . is that the facts constituting a cause of action, rather than the conclusions of the pleader, must be set out in the complaint, so as to disclose the issuable facts determinative of the plaintiff's right to relief.'

Shives v. Sample, 238 N.C. 724, 79 S.E. 2d 193. The cause of action consists of the facts alleged. *Lassiter v. R. R.,* 136 N.C. 89, 48 S.E. 642; *Skipper v. Cheatham,* 249 N.C. 706, 709, 107 S.E. 2d 625; *Wyatt v. Equipment Co.,* 253 N.C. 355, 361, 117 S.E. 2d 21. The statutory requirement is that a complaint must allege the material, essential and ultimate facts upon which plaintiff's right of action is based. *Chason v. Marley,* 223 N.C. 738, 28 S.E. 2d 223, and cases cited. 'The law is presumed to be known, but the facts to which the law is to be applied are not known until properly presented by the pleading and established by evidence.' McIntosh, North Carolina Practice and Procedure, § 379.

. . .

When a complaint alleges defendant is indebted to plaintiff in a certain amount and such debt is due, but does not allege in what manner or for what cause defendant became indebted to plaintiff, it is demurrable for failure to state facts sufficient to constitute a cause of action. *Moore v. Hobbs,* 79 N.C. 535; *Griggs v. Griggs,* 213 N.C. 624, 627, 197 S.E. 165."

Applying the above principles of law to this case, we hold that the complaint does not state facts sufficient to constitute a cause of action, and the trial court acted properly in sustaining the demurrer.

The order sustaining the demurrer gave the plaintiff thirty days "within which to move for leave to amend the complaint." The defendant does not except to the order and does not complain thereof but on the contrary, asserts in its brief that it was proper and should be affirmed. The plaintiff has not moved to amend the complaint and is not at this time aggrieved by the order.

With commendable frankness, the plaintiff's attorney on the oral argument admits in substance that the material, essential and ultimate facts upon which the plaintiff's cause of action is based are not properly alleged.

The judgment sustaining the demurrer is affirmed. If so advised, the plaintiff may move to amend. G.S. 1-131.

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

SUMMEY *v.* MCDOWELL

DENNIS RAY SUMMEY, BY HIS NEXT FRIEND, JOHN LESPIE SUMMEY, AND RHONDA S. HUGHES, BY HER NEXT FRIEND, JERRY HUGHES, PLAINTIFFS, v. HERMAN McDOWELL AND WIFE, OPAL McDOWELL, DEFENDANTS AND VONZELLE WOOD SUMMEY NEWSOME AND HUSBAND, ROBERT JOE NEWSOME, SHIRLEY SUMMEY PARKS AND HUSBAND, ODELL PARKS, LEWIS WOOD AND WIFE, LEONA WOOD, HOMER WOOD (DIVORCED), BERNICE WOOD SKEEN AND HUSBAND, WAN SKEEN, AND ANY UNBORN CHILDREN OF VONZELLE WOOD SUMMEY NEWSOME AND J. HOWARD REDDING, GUARDIAN AD LITEM FOR ANY UNBORN CHILDREN OF VONZELLE WOOD SUMMEY NEWSOME, ADDITIONAL DEFENDANTS

No. 6819SC291

(Filed 18 September 1968)

Wills § 33— rule in Shelley's case

A devise to testator's daughter for life, and at her death "to the children of her body," but if she should die without leaving a child or children, then to the named brothers and sisters of the life tenant, *is held* to convey only a life estate to the daughter, the rule in *Shelley's* case not being applicable since the words "children of her body" are words of purchase and not of limitation.

APPEAL from *Martin, Robert M., S.J.*, 10 May 1968 Session, RANDOLPH County Superior Court.

Plaintiffs seek a permanent injunction restraining the original defendants from cutting timber on certain lands in Randolph County. Plaintiffs claim to be the owners of a two-thirds undivided interest subject to the life estate of their mother, Vonzelle Wood Summey Newsome (Vonzelle), in a tract of land containing some 75 acres. Plaintiffs further assert that Vonzelle and her husband had executed a timber deed to the original defendants conveying the timber on said lands, that the original defendants were preparing to cut said timber, that the plaintiff would thereby be irreparably damaged and that they were entitled to a permanent injunction restraining the original defendants from cutting and removing the timber. The original defendants filed a motion to make Vonzelle and the other defendants additional defendants in the cause for that the original defendants were claiming title to the timber by virtue of a timber deed from Vonzelle and that the other defendants were necessary parties for a complete determination as to the title of the land in question.

J. Howard Redding, guardian ad litem for the unborn children of Vonzelle, adopted the complaint filed in the cause. Vonzelle and her husband, Robert Joe Newsome, additional defendants, filed an answer claiming to own the land in question in fee simple pursuant to the last will and testament of her father, R. J. Wood; that they

had conveyed the timber on said land to the original defendants and, pursuant thereto, the original defendants were entitled to the timber. The other additional defendants were properly served with process but filed no pleadings.

The matter was heard without a jury. The question involved depended upon the interpretation of the last will and testament of R. J. Wood, which will bears date, 27 February 1946, and, among other things, provided with regard to the 75 acres of land in question:

> ". . . seventy five acres, to my daughter, Vonzelle Wood Summey, for her natural life and after her death to the children of her body, but in the event she should die without leaving a child or children, then and in that event, the said lands are to go to Lewis Wood, Homer Wood, Bernice Wood Skeen in fee simple, share and share alike."

The will further provided:

> "I give, divise (sic) and bequeath all of the residue of my property, both real and personal, to my beloved children, Lewis Wood, Homer Wood, Bernice Wood Skeen and Vonzelle Wood Summey, share and share alike."

Judge Martin found that Vonzelle had only a life estate in the property, and upon her death, the property should go to the children of her body in fee simple, providing she left a child or children, and if not, then it was to go to Lewis Wood, Homer Wood, and Bernice Wood Skeen in fee simple, share and share alike. The injunction against the original defendants was made permanent. From this judgment, this appeal was taken.

Walker, Bell & Ogburn by John N. Ogburn, Jr., Attorneys for original defendant appellants.

Ottway Burton, Attorney for Vonzelle Wood Summey Newsome and Robert Joe Newsome, additional defendants.

L. T. Hammond, Sr., Attorney for plaintiff appellee.

CAMPBELL, J.

The appellants assert that Vonzelle is the owner in fee of the land in question, together with the timber thereon, by virtue of the application of the rule in *Shelley's case.*

> "The rule in *Shelley's Case* was first stated, 1 Coke, 104, in 1581, and is as follows: 'When an ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or

> conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the words *heirs* is a word of limitation of the estate, and not a word of purchase.' " *Crisp v. Biggs,* 176 N.C. 1-2, 96 S.E. 662.

The application of the rule in *Shelley's case* always presents a puzzling question, and much law has been written pertaining thereto. As Chief Justice Stacy stated in *Welch v. Gibson,* 193 N.C. 684, 138 S.E. 25:

> "Or forsooth did the student answer with a correct guess, when, on being asked the meaning of the rule, he said: 'The rule in *Shelley's case* is very simple if you understand it. It means that the same law which was applied in that case applies equally to every other case just like it.'? And so it does. But when is a case 'just like it', or so nearly so as to come within the operation of the rule?"

As stated by Sharp, J., in *Wright v. Vaden,* 266 N.C. 299, 146 S.E. 2d 31:

> "In considering the applicability of the rule in *Shelley's Case,* it is important to draw and constantly keep in mind the difference between words of purchase and words of limitation. When used with reference to the Rule, words of purchase give the remainder to designated persons who thus take in their own right under the will or conveyance, and not by descent as heirs of the first taker. A purchaser, therefore, is one who acquires property in any manner other than by descent."

In the instant case, the will provides that in the event Vonzelle should die without leaving a child or children, then in that event, the lands are to go to "Lewis Wood, Homer Wood, Bernice Wood Skeen in fee simple, share and share alike." These persons are the brothers and sister of Vonzelle and, therefore, this case falls in the line of cases similar to *Puckett v. Morgan,* 158 N.C. 344, 74 S.E. 15, where the provision was:

> "I leave Martha Morgan, the wife of James Morgan, 48½ acres of land, known as the Rachel tract, on the east side, during her life, then to her bodily heirs, if any; but if she have none, back to her brothers and sisters."

In that case, it was held that the rule in *Shelley's case* did not apply. In commenting on that case in *Hampton v. Griggs,* 184 N.C. 13, at page 18, (113 S.E. 503) Mr. Justice Stacy (later Chief Justice) stated:

"Here, it will be observed, the ulterior devise, upon the happening of the given contingency, provided that the estate should be taken out of the first line of descent and then put back into the same line, in a restricted manner, by giving it to some, but not to all, of those who presumptively would have shared in the estate as being potentially among the heirs general of the first taker. Looking at the instrument from its four corners, and using this provision, among others, as one of the guides for ascertaining the paramount intent or the dominant purpose of the testator, it was held that the words 'then to her bodily heirs, if any,' were not used in their technical sense as importing a class of persons to take indefinitely in succession, generation after generation, but as meaning issue or children living at her death."

For a similar application and answer to the question, see *Taylor v. Honeycutt,* 240 N.C. 105, 81 S.E. 2d 203.

Reviewing the numerous excellent expositions of when the rule applies and when it does not apply would be an act of supererogation. Suffice it to say in the instant case, the words "children of her body" are words of purchase and not of limitation.

Affirmed.

MALLARD, C.J. and MORRIS, J., concur.

DIXIE P. EATON, EMPLOYEE, v. KLOPMAN MILLS, INC., EMPLOYER; AND TRAVELERS INSURANCE COMPANY, CARRIER

No. 6819IC274

(Filed 18 September 1968)

1. Witnesses § 7— direct examination — refreshing memory — reading from report

Technical error in permitting a witness to read from a statement or report made by him without the witness testifying either (1) that the report refreshed his memory or (2) that he did not recollect the facts but recalled having written it correctly when the facts were fresh in his memory, *is held* not sufficiently prejudicial in this case to warrant a new trial.

2. Appeal and Error § 30— review of admission of evidence — failure to object in apt time

Exception and assignment of error with respect to incompetent testimony not objected to present no question for review on appeal since the

failure to object in apt time is regarded as waiver of objection unless the evidence is forbidden by statute.

3. Appeal and Error § 30; Trial § 15— "apt time" defined

Apt time is considered to be as soon as the opportunity is presented to learn that the evidence is objectionable or that it is desirable to interpose an objection.

4. Witnesses § 8— examination — "badgering" the witness

Plaintiff's contention that the hearing commissioner committed error in permitting "the badgering of his witness" by opposing counsel *is held* not supported by the record in this Workmen's Compensation proceeding, since the examination excepted to fails to show that the witness was persistently harassed or bedeviled in a manner likely to confuse or wear down.

5. Master and Servant § 93— Workmen's Compensation proceeding — motion to hear additional evdence

A plaintiff does not have a substantial right to require the full Commission to hear additional testimony, and the Commission's duty to do so applies only if good ground therefor is shown. G.S. 97-85.

6. Master and Servant § 56— Workmen's Compensation — causal relation between employment and injury

Unless the injury can be fairly traced to the employment as a contributing proximate cause, it does not arise out of the employment.

7. Master and Servant §§ 65, 96— Workmen's Compensation—hernia — review of findings

Findings by the Industrial Commission that the plaintiff's hernia was not an injury arising out of and in the course of employment *are held* supported by competent evidence and are therefore binding on the Court of Appeals, even though there is evidence that would support a finding to the contrary.

APPEAL by plaintiff employee from an opinion and order of the North Carolina Industrial Commission of 8 January 1968.

This is a proceeding under the North Carolina Workmen's Compensation Act. The plaintiff seeks to recover for personal injuries allegedly arising out of and in the course of her employment as a spinner at Klopman Mills, Inc.

From an opinion and order of Deputy Commissioner Dandelake denying compensation filed 31 October 1967, the plaintiff gave notice of appeal to the full Commission. From the opinion and order of the full Commission of 8 January 1968 affirming the opinion and order of Deputy Commissioner Dandelake, plaintiff gave notice of appeal to the Court of Appeals.

John Randolph Ingram for plaintiff appellant.

Miller, Beck & O'Briant by Adam W. Beck for defendant appellees.

MALLARD, C.J.

[1] Plaintiff contends that the hearing commissioner committed error in admission of and exclusion of some of the testimony and exhibits offered. However, in plaintiff's brief there is citation of authority to support only one of these contentions. As to this one, plaintiff contends, and we agree, that it was technical error to permit the witness to read from the statement or report made by him, offered as defendant's exhibit #2, without the witness testifying in substance that it refreshed his memory or that he still did not recollect the facts but recalled having written it correctly when the facts were fresh in his memory. Stansbury, N. C. Evidence 2d, § 23. However, we hold that this error was not sufficiently prejudicial to warrant a new trial.

[2, 3] Defendant's exception and assignment of error with respect to the witness Bridges reading a letter from Dr. Weir, who did not testify, is not based on an objection and therefore is not properly presented. "Ordinarily, failure to object in apt time to incompetent testimony will be regarded as waiver of objection and its admission is not assignable as error unless the evidence is forbidden by statute." *State v. McKethan*, 269 N.C. 81, 152 S.E. 2d 341. Apt time is considered to be as soon as the opportunity is presented to learn that the evidence is objectionable or that it is desirable to interpose an objection. Stansbury, N. C. Evidence 2d, § 27.

[4] Plaintiff contends that the hearing commissioner committed error "in permitting the badgering of the Burgess witness," and in support thereof refers to the assignments of error six and seven which are based on exceptions six and seven. Exception six appears in the record when the witness Mrs. Burgess was testifying on cross-examination by Mr. Beck, and the following occurred:

"Q. And it was at that time you said you couldn't say whether or not she said she slipped?

A. I guess I did if he said I did.

MR. INGRAM: Well I object to that.

THE COURT: He is here, he can corroborate.

A. I don't remember telling him that or don't—I don't remember what was said or done." (EXCEPTION No. 6)

Exception seven appears in the record when the witness Mrs. Burgess was questioned on redirect examination by Mr. Ingram, and the following occurred:

"Q. Mrs. Burgess isn't the truth of the matter though as you

have testified on direct examination that in the washroom on the evening she strained herself, she told you she slipped?

MR. BECK: I object.

THE COURT: She has already answered the question.

(Witness excused.)" (EXCEPTION No. 7)

The word "badger" as defined in Webster's Third New International Dictionary (1968) means "to harass, pester, or bedevil persistently especially in a manner likely or designed to confuse, annoy, or wear down."

Applying this definition to the above factual situation, we are of the opinion that the witness Mrs. Burgess was not badgered by anyone.

[5] Plaintiff also contends that the full Commission was in error "in failing to consider plaintiff's motion to take further evidence." There is nothing in the record to show that the Commission did not consider the motion; however, there is no specific ruling by the Commission on this purported motion. None was required. Under the provisions of G.S. 97-85, *good ground* must be shown for such a motion. The plaintiff did not state *any* grounds for the motion, which reads as follows:

"CLAIMANT, DIXIE EATON, through counsel, moves the Full Commission that the attached Affidavit of Dr. George B. Johnston be received as further evidence or that his further testimony be taken pursuant to G.S. 97-85.

This 28th day of December 1967.

/s/ JOHN RANDOLPH INGRAM
Counsel for Dixie Eaton"

The plaintiff does not have a substantial right to require the Commission to hear additional testimony, and the duty to do so applies only if *good ground* therefor is shown. *Tindall v. Furniture Co.*, 216 N.C. 306, 4 S.E. 2d 894. Under the circumstances of this case, the failure of the Commission to rule on the motion is in effect a denial thereof and is not prejudicial error.

[7] The plaintiff contends that the hearing commissioner erred in making findings of fact numbered five, six, seven, eight, nine and ten and the conclusions of law and that the full Commission was in error in affirming them.

The findings of fact by the hearing commissioner, adopted by the full Commission, upon which the denial of compensation was based, are as follows:

"1. That on or about July, 1965, and for about two years prior thereto, plaintiff was employed by the defendant employer and was doing the work as a spinner.

2. That plaintiff dropped her pick which was approximately less than a half pound and claims that this is when she felt a sharp sting in her left groin which caused her hernia.

3. That the plaintiff did not inform her supervisor or employer about any accident at this time.

4. That the plaintiff saw Dr. G. B. Johnston and Dr. R. E. Williford on or about August 9, 1965; that Dr. Williford referred the plaintiff to Dr. G. B. Johnston, surgeon and that Dr. Johnston was unaware that this case was an on the job injury until the plaintiff returned for her check-up after hernia operation on August 30, 1965.

5. That the plaintiff advised her doctor on August 30, 1965, that she dropped her pick and leaned over to pick it up and felt something tear.

6. That on plaintiff's hospital insurance report bearing her signature, question #7 which reads as follows: 'Has claim been filed or will be filed under workmen's compensation,' was answered 'No'; that this said paper is dated August 22, 1965, and signed by the plaintiff Dixie P. Eaton.

7. Plaintiff had a hernia in 1963 on her right side; that the hernia she was operated on for August 15, 1965, was on her left side.

8. That on August 9, 1965, plaintiff reported to her supervisor, Don Morgan, on her return from the doctor at 6:00 p.m. that she had a hernia and that her supervisor asked her at this time if she knew how she did it and her answer was no; and that he further asked her if it occurred in the mill and she advised him no that she didn't know where it happened and a copy of this report was presented at the hearing as evidence for the defendant.

9. That the plaintiff testified at the hearing that she received her hernia when she dropped her pick; and leaned over to pick it up and slipped; that the plaintiff put on a demonstration in the court room with her pick how she leaned over and picked up her pick and did not show any slip.

10. That the plaintiff did not sustain an injury by accident arising out of and in the course of her employment with the defendant employer on or about the last week of July, 1965."

Based upon the foregoing findings of fact affirmed by the full Commission, the hearing commissioner concluded that "plaintiff did not during the last week of July 1965, sustain an injury by accident arising out of and in the course of her employment with the defendant employer and her claim must therefore be denied."

In the case of *Blalock v. Durham,* 244 N.C. 208, 92 S.E. 2d 758, Justice Higgins said for the Court:

> "This Court has held that if there is any competent evidence to support a finding of fact of the Industrial Commission, such finding is conclusive on appeal, even though there is evidence that would support a finding to the contrary. (citations omitted) The introduction of incompetent evidence cannot be held prejudicial where the record contains sufficient competent evidence to support the findings." (citations omitted) See also *Hollman v. City of Raleigh,* 273 N.C. 240, 159 S.E. 2d 874.

[6] It is well settled that unless the injury can be fairly traced to the employment as a contributing proximate cause, it does not arise out of the employment. *Bryan v. Church,* 267 N.C. 111, 147 S.E. 2d 633.

[7] Applying these principles of law and after a careful examination of all the evidence herein, we conclude that the findings of fact numbered five, six, seven, eight and ten are supported by competent evidence of sufficient probative force, and the Court is bound by them, even though there is evidence that would support a finding to the contrary. These findings of fact fully and fairly support the conclusions of law and denial of compensation herein. Finding of fact numbered nine is immaterial to a decision in this matter.

We have carefully considered all of the assignments of error and find no prejudicial error.

The opinion and order of the Industrial Commission denying compensation is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

WILLIAM ROGER PAYNE v. MATILDA LEE LOWE AND ROY JAMES LOWE

No. 6823SC354

(Filed 18 September 1968)

1. **Appeal and Error § 49— exclusion of testimony — record fails to show intended answer**

The exclusion of testimony cannot be held prejudicial when the record fails to show what the answer of the witness would have been had she been permitted to testify.

2. **Appeal and Error § 31; Trial § 33— failure to charge on substantial features**

Failure of the court to charge the law on the substantial features of the case arising on the evidence is prejudicial error.

3. **Appeal and Error § 31; Trial § 38— substantial compliance with G.S. 1-180**

When the charge is in substantial compliance with the requirements of G.S. 1-180, a party who desires further elaboration or explanation must tender specific prayers for instruction.

4. **Trial § 33; Automobiles §§ 19, 90— failure to define non-technical terms**

"Highway" and "intersection" are non-technical terms which the court is not required to define in the absence of a specific request for instructions.

5. **Automobiles §§ 19, 90— intersection accident — instructions — private road — right of way**

In an action arising from an intersection accident, the court did not err in failing to charge upon defendant's contention that the highway on which plaintiff was traveling was a private road in that it was under construction and barricaded, giving defendant the right of way under G.S. 20-156(a) although there was a stop sign for traffic on the road defendant was traveling, where all the evidence showed that the lane of travel used by plaintiff was not barricaded and was open to public use, the court properly charging that the right of way at the intersection was governed by G.S. 20-158(a).

6. **Automobiles § 19— purpose of stop signs**

Under G.S. 20-158(a) the erection of stop signs on an intersecting highway is a method of giving the public notice that traffic on one is favored over the other and that a motorist facing a stop sign must yield.

APPEAL by defendants from *Gambill, J.*, at the April 1968 Regular Civil Session of WILKES Superior Court.

Plaintiff alleged and his evidence tended to show that at about 7:00 p.m. on 23 September 1967 he was traveling north on N. C. Highway 16 between Taylorsville and North Wilkesboro, near the town or community of Moravian Falls; that as he approached the intersection of Highway 16 with a rural paved road known as Country Club Road, the feme defendant, driving west on Country Club

Road, drove onto Highway 16 in front of plaintiff, causing a collision resulting in personal injury to plaintiff and damage to his automobile. He alleged that the collision was caused by the feme defendant's negligence in failing to keep a proper lookout and to yield the right-of-way, contending that Highway 16 was the dominant highway and Country Club Road was the servient highway.

The defendants answered, admitting that the feme defendant, daughter of the male defendant, was operating their vehicle as a family-purpose automobile. Defendants denied negligence on their part, pleaded contributory negligence on the part of plaintiff, and in their further answer and counterclaim alleged that the portion of Highway 16 involved was under construction, with barricades north and south of the intersection, that plaintiff was illegally using Highway 16 and that the feme defendant had the right-of-way. In their counterclaim, the feme defendant asked for damages for personal injuries and the male defendant sought to recover for damage to his vehicle.

Plaintiff's evidence tended to show that he was traveling about 40 mph, that the defendants' vehicle approached the intersection, slowed down and then drove into the intersection. Plaintiff's evidence also tended to show that the lane for northbound traffic on Highway 16 was not barricaded.

The feme defendant testified that she observed the stop sign on Country Club Road as she approached Highway 16, that she stopped before entering Highway 16, and that as she entered the intersection the plaintiff drove into the left side of her vehicle.

Issues as to negligence, contributory negligence and damages in plaintiff's action and issues of negligence and damages as to defendants' counterclaims were submitted and answered by the jury in favor of plaintiff. From judgment entered thereon, defendants appealed.

Whicker, Whicker & Vannoy by J. Gary Vannoy for plaintiff appellee.

Hayes & Hayes by Kyle Hayes and Ferree & Brewer by Max Ferree for defendant appellants.

BRITT, J.

[1] Defendants' first assignment of error relates to the refusal of the trial judge to permit the feme defendant to state her opinion as

to the speed of plaintiff's automobile. The record fails to disclose what her answer would have been if allowed to testify.

The exclusion of testimony cannot be held prejudicial when the record fails to show what the answer of the witness would have been had she been permitted to testify. 1 Strong, N. C. Index 2d, Appeal and Error, § 49. The assignment of error is overruled.

Defendants' second major assignment of error relates to the charge of the trial judge to the jury. They contend that G.S. 1-180 was violated in that the trial judge failed to define the terms "highway" and "intersection," and treating the accident as if it had occurred at the intersection of a dominant highway and a servient highway. They further contend that the trial judge failed to charge on their contention that plaintiff was traveling on a private road and the legal effect of so doing.

G.S. 1-180 requires the trial judge to declare and explain the law arising on the evidence given in the case, but further provides that he shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto.

[2, 3] It is noted that defendants tendered no request for special instructions. Even so, a failure to charge the law on the substantive features of the case arising on the evidence is prejudicial error. *Howard v. Carman,* 235 N.C. 289, 69 S.E. 2d 522. On the other hand, when the charge is in substantial compliance with the requirements of G.S. 1-180, if a party desires further elaboration or explanation, he must tender specific prayers for instruction. *Barnes v. Caulbourne,* 240 N.C. 721, 83 S.E. 2d 898.

[4] Since the terms "highway" and "intersection" are not technical terms and are commonly understood, if additional instructions as to those terms were desired by defendants, a request should have been made. *Equipment Co. v. Hertz Corp. and Contractors, Inc. v. Hertz Corp.,* 256 N.C. 277, 123 S.E. 2d 802.

[5] The evidence in the instant case did not support defendants' contention that the road upon which plaintiff was traveling was a private road. The evidence was clear that the lane of travel used by plaintiff was not barricaded. Furthermore, witnesses for both plaintiff and defendants testified to the use of the highway by the public. C. K. Smith, resident engineer of the State Highway Commission and called as a witness by defendants, testified that on the date of the accident Country Club Road on which the feme defendant was traveling was a "subservient" road to Highway 16 on which plaintiff was traveling. G.S. 136-26 permits the Highway Com-

mission to close a part or all of a highway during maintenance or construction, as is deemed necessary to be excluded from public travel. Here, the new highway had been paved, and although shoulder construction and erection of guard rails had not been completed, the northbound lane on which plaintiff was traveling was not being excluded from public travel.

Defendants contend that this case is governed by G.S. 20-156(a) on the question of right-of-way and that the jury should have been instructed accordingly. This statute provides that "[t]he driver of a vehicle entering a public highway from a private road or drive shall yield the right-of-way to all vehicles approaching on such public highway." They argue that at the time of the accident the feme defendant was traveling on a public highway and that plaintiff, in effect, was traveling on a private road. As stated above, evidence tending to show that the road on which plaintiff was traveling was a private road is not sufficient to amount to a substantial feature of the case requiring an instruction.

Right-of-way in this case is governed by G.S. 20-158(a), the pertinent portion of which provides as follows:

> "The State Highway Commission, with reference to State highways, and local authorities, with reference to highways under their jurisdiction, are hereby authorized to designate main traveled or through highways by erecting at the entrance thereto from intersecting highways signs notifying drivers of vehicles to come to full stop before entering or crossing such designated highway, and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto and yield the right-of-way to vehicles operating on the designated main traveled or through highway and approaching said intersection."

[6] By the terms of the statute, the erection of stop signs on an intersecting highway is a method of giving the public notice that traffic on one is favored over the other and that a motorist facing a stop sign must yield. *Kelly v. Ashburn,* 256 N.C. 338, 123 S.E. 2d 775. Evidence presented by plaintiff and defendants, even by the feme defendant herself, was to the effect that there was a stop sign on Country Club Road immediately east of the highway on which plaintiff was traveling.

We hold that the trial judge fairly stated the contentions of the parties supported by the evidence and that he substantially complied with G.S. 1-180.

We have carefully considered all assignments of error asserted by defendants and they are overruled.

Affirmed.

BROCK and PARKER, JJ., concur.

FORSYTH COUNTY AND CITY OF WINSTON-SALEM v. J. R. PLEMMONS AND WIFE, HATTIE B. PLEMMONS

No. 6821SC237

(Filed 18 September 1968)

1. **Husband and Wife §§ 14, 17— proceeds from sale of entirety property**

When land held by the entirety is sold by the voluntary act of the parties, the funds derived from the sale become personalty and are held by the parties as tenants in common, there being no estate by entirety in personal property.

2. **Insurance § 113— fire insurance policy — personal contract**

A fire insurance policy is a personal contract appertaining to the parties to the contract and not to the thing which is subject to the risk insured against.

3. **Insurance § 134— proceeds under fire insurance policy**

Proceeds payable under a fire insurance policy take the place of the building destroyed only in the sense of being a thing of like value, not necessarily of like ownership.

4. **Insurance § 134; Husband and Wife § 17— proceeds from fire policy on entirety property — personalty — held as tenants in common**

The proceeds of a fire insurance policy insuring the interests of the husband and wife as tenants by the entirety do not retain the status of the real property destroyed but become personalty held by the husband and wife as tenants in common, the insurance proceeds resulting from a personal contract and not from an "involuntary conversion" of the property.

APPEAL by defendant, J. R. Plemmons, from *Martin, Robert M., S.J.*, 11 December 1967 Civil Session of FORSYTH Superior Court.

This case commenced 24 May 1967 as a tax foreclosure proceeding to collect unpaid *ad valorem* taxes on real property owned by defendants as tenants by the entirety. Defendants do not contest the amount or lien of such taxes, and the rights of the plaintiffs are not involved on this appeal.

Defendant husband filed answer seeking affirmative relief against his codefendant wife based on the following facts: The real property which is the subject of this action is owned by defendants as tenants by the entirety. The defendants are separated and a suit for absolute divorce is pending but no decree of divorce has been entered. In February 1967 a building on one of the lots described in the complaint was destroyed by fire. The husband has received and has in his possession a draft from the insurance company payable to the husband and wife in settlement of the fire loss, but the wife has refused to endorse the draft. On these facts the husband requested an order of the court that the proceeds of the fire insurance draft be applied first to payment of the past due taxes and that the balance be deposited in a joint savings account to the credit of the husband and wife with right of survivorship but with interest payable to the husband. The wife filed no pleadings but appeared through counsel and opposed the husband's motion. Both defendants through counsel in open court agreed that the court might hear and determine their respective rights in the fire insurance proceeds. The plaintiffs have not objected to the adjudication in this proceeding as to the rights and liabilities of the two defendants *inter se.*

The court entered an order finding the facts essentially as above set forth and concluded as a matter of law that the proceeds of the policy of fire insurance were personal property owned one-half by the husband and one-half by the wife, subject to the lien of the unpaid city-county taxes on the property on which the fire-damaged building had been located. On these findings and conclusions, the court ordered that the funds received from the insurance company be applied first to the payment of such taxes and that the balance be equally divided between the two defendants. To the entry of this order the defendant husband excepted and appealed.

Buford T. Henderson, for defendant appellant, J. R. Plemmons.

W. Scott Buck, Randolph and Drum, by Clyde C. Randolph, Jr., for defendant appellee, Hattie B. Plemmons.

PARKER, J.

Carter v. Insurance Co., 242 N.C. 578, 89 S.E. 2d 122, held that the husband's interest in real property owned by himself and wife as tenants by the entirety is not insurable for his benefit alone as a separate moiety apart from the estate owned by him and his wife and that the proceeds of a policy so taken inured to the benefit of the entire estate. Therefore, upon absolute divorce the wife was held

entitled to one-half of the proceeds, even though she was not named as insured or beneficiary in the policy and had not contributed to the payment of premiums. The case now before us presents the question as to the respective rights of the husband and wife in such insurance proceeds prior to a divorce.

[1] In this State it is established that there is no estate by entirety in personal property and when land held by the entirety is sold by the voluntary act of the parties the funds derived from the sale become personalty and are held by the parties as tenants in common. *Turlington v. Lucas,* 186 N.C. 283, 119 S.E. 366. The husband in the present case contends that the insurance proceeds here in dispute are the result of an involuntary conversion of the property and therefore retain the status of real property owned by the husband and wife as tenants by the entirety just as does the compensation paid when real property so owned is taken by condemnation, citing *Highway Commission v. Myers,* 270 N.C. 258, 154 S.E. 2d 87. That case held that unless otherwise provided by the joint and voluntary agreement of the husband and wife, and in the absence of an absolute divorce, an involuntary transfer of title resulting from the taking of land by condemnation does not destroy or dissolve the estate by the entirety, and that the compensation paid has the status of real property owned by husband and wife as tenants by the entirety. We do not consider the analogy sought to be drawn determinative of the question presently before us.

[2-4] In the present case the insurance proceeds do not result from any transfer of title, voluntary or involuntary. The land is still owned by the husband and wife in exactly the same manner as before the fire. The disputed funds result solely from the terms of the contract of insurance. Under this contract the insurance company, in consideration of the premium paid to it, has assumed specified risks and has agreed to pay money to the parties insured upon the happening of certain events. Such a policy is a personal contract, appertaining to the parties to the contract and not to the thing which is subject to the risk insured against. 29 Am. Jur., Insurance, § 183, p. 575. Proceeds payable thereunder when an insured loss occurs take the place of the building destroyed only in the sense of being a thing of like value, not necessarily of like ownership. For example, a life tenant may retain as his own and the remaindermen are held to have no interest in the proceeds of a fire insurance policy covering the interests of the life tenant, even though the insurance be for the full value and the building be totally destroyed. *In re Will of Wilson,* 224 N.C. 505, 31 S.E. 2d 543; *Stockton v. Maney,* 212 N.C. 231, 193 S.E. 137.

[4] The identical question with which we are here concerned was decided by the New York Court of Appeals in *Hawthorne v. Hawthorne,* 13 N.Y. 2d 82, 192 N.E. 2d 20, in which the Court said:

> ". . . (W)e believe that the insurance proceeds in dispute here are not the result of an involuntary conversion within the meaning of the cases relied upon by respondent. Unlike those cases neither these proceeds nor the right thereto are the result of an operation of law upon the extinguishment or diminution of an estate in real property. These proceeds have been paid pursuant to a personal contract of insurance entered into between these parties and the insurance company. Although it is quite true that this case is similar to the condemnation cases in respect to the involuntary character of the loss of the realty held by the entirety, mere involuntary loss is but one side of the coin and does not suffice to support the analogy suggested by respondent. In the condemnation cases the *forced conversion* from realty to personalty was fully involuntary. The involuntary loss was also the legal source of the new *res.* Here, while the loss was the occasion of the issuance of the now disputed draft, neither the draft nor the right thereto springs from the involuntary loss. It is not a substituted *res* as in the condemnation cases. It is not involuntary *conversion.* If the insurance proceeds are the logical substitute of anything they are the fruit of the insurance contract and the premiums paid under it. In sum, while the *loss* was involuntary, the draft is not a substitute forced on the parties equally involuntarily; it is the product of their voluntary contractual act and is held by them in the same way as any personal property voluntarily acquired."

We think the reasoning in *Hawthorne v. Hawthorne, supra,* is persuasive and we adopt it as controlling the proper disposition of the case before us.

The wife has not appealed and neither party has raised any question as to that portion of the trial court's order directing payment of taxes out of the insurance proceeds before making division of the balance between the husband and the wife. Therefore we express no opinion as to the correctness of that portion of the order or as to whether the obligation for taxes accruing on property held by the entirety should be borne equally as between the husband and wife.

The order appealed from is

Affirmed.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. JERRY KELLY RUSS

No. 6821SC325

(Filed 18 September 1968)

1. Criminal Law § 79— statements of accomplice during perpetration of robbery

In a prosecution for armed robbery, the court properly admitted testimony by the prosecuting witness as to statements made by defendant's accomplice during the course of the robbery, the declarations made by one defendant in the presence of another in perpetrating a common offense being competent against the other defendant.

2. Criminal Law § 43— photographs of crime scene — illustration of testimony

In a prosecution for armed robbery, the admission of photographs of the scene of the crime was proper where the court instructed the jury that the photographs were to be considered only for the purpose of illustrating the testimony of the witness and should not be considered as substantive evidence.

3. Criminal Law § 42— admissibility of weapons used in robbery

In a prosecution for armed robbery, the court properly admitted into evidence two pistols taken from the person and the suitcase of defendant at the time of his arrest which corresponded to pistols described by the prosecuting witness as having been used in the robbery, articles which the evidence shows were used in connection with the commission of the crime being admissible into evidence.

4. Robbery § 4— sufficiency of evidence

Evidence *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of armed robbery.

APPEAL from *Cowper, J.*, 29 April 1968, Criminal Session of FORSYTH Superior Court.

The defendant together with Arthur T. Mankins, alias Tim Mankins, was charged in a proper bill of indictment with the offense of robbery with firearms on 27 November 1967, wherein by means of a pistol, the life of James William Edwards was endangered and threatened and $400 obtained from Forsyth Pharmacies, Inc., trading as Medical Park Pharmacy.

The defendant was represented by court-appointed counsel and entered a plea of not guilty. From a jury verdict of guilty and judgment of imprisonment for a term of not less than twenty-five nor more than thirty years, the defendant appealed.

The defendant offered no evidence and the evidence on behalf of the State tends to show:

On Monday evening, 27 November 1967, about 10:00 p.m. James

William Edwards, a vice-president of Forsyth Pharmacies, Inc., trading as Medical Park Pharmacy, located in the Forsyth Medical Park on Hawthorne Road in Forsyth County, North Carolina, was working on the company books. The place of business had been closed for the night since about 7:00 p.m. Some of the lights were on. Mr. Edwards was in a back room working when he heard a knock at the door. Mr. Edwards went to the side door where he heard the knock and saw the defendant standing at the window. The defendant stated that he had a prescription he desired to have filled. Mr. Edwards did not observe anyone with the defendant at that time. Mr. Edwards turned the door knob and just as he did, the door flew open and Mankins came in with a pistol in his hand and said: "This is a stickup." The defendant came in immediately behind Mankins and, likewise, had a pistol in his hand. Both pistols were 38-caliber, one was dark and the other one had some silver on it. The defendant and Mankins obtained a bank deposit bag which contained $408 in cash and something over $200 in checks and, before leaving, tied Mr. Edwards to a chair by means of adhesive tape obtained in the drug store.

The defendant was arrested in a room at the Holiday Inn in Charlotte, North Carolina, on 18 December 1967. Mankins was arrested on the same occasion in the parking lot of the Holiday Inn, just prior to the arrest of the defendant. At the time of the arrest of the defendant, he had in his hand a 38-caliber pistol and in a suitcase in the room was found a similar pistol except that it was silver with a black cylinder.

Bradley J. Cameron, Attorney for defendant appellant.

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

CAMPBELL, J.

The defendant brings forward four assignments of error.

[1] One, the defendant asserts error in the admission of the testimony by the witness James William Edwards who testified as to statements made by Mankins during the course of the robbery.

The record discloses that the witness testified that Mankins and the defendant came through the door, each with a pistol in his hand, and then the solicitor on behalf of the State asked the witness Edwards:

> "All right, sir. Now, go ahead and tell us just what happened and what you did."

The witness then answered:

"Well, he said, 'This is a stickup. We don't want to hurt you, we just want your money.' And so they proceeded to go back towards the back room where I had come from, and Russ went ahead and said, 'Is anybody back here?' and I said, 'No, I'm here by myself,' and so he went down — he went almost to the back with Mr. Mankins, and they found out that I was telling the truth, that no one else was there but me, and so they came around front and wanted to know where the money was, and he asked if it was in the drawer, which it happened to be the petty cash box, and touched it, and I said that there was no money there, which there wasn't, so I took them over to where I had the cash — the silver tray — and — under a box, and brought that out and showed it to them, and Mr. Mankins says, 'No, we want the big green.' "

At this point, the defendant Russ entered an objection. This objection was overruled and constitutes the defendant's first assignment of error. The witness then continued:

"Well, he didn't say — Russ didn't say anything then and Mankins said he just wanted the big green, and I said, 'Well, if that is what you want I'll get it for you,' and so I started to go to the — through a restroom which adjoins that side of the pharmacy, to go to the back room where the storage room is, and Mr. Russ says, 'Wait a minute. Let me go first,' and so he preceded me, and then they found out that I wasn't hiding anything or anything and so I unlocked the back door to the stock room, which was closed, and whenever I went in there Mankins said, 'Let me.' I said, 'I'm not going to try anything funny,' and I went and got the bank bag which had all of the money and checks in it."

This testimony was clearly competent and this assignment of error is overruled.

"A declaration made by one defendant in the presence of the others in perpetrating the common offense is competent as against the other defendants." 2 Strong, N. C. Index 2d, Criminal Law, § 79, p. 593; *State v. Hines*, 266 N.C. 1, 145 S.E. 2d 363.

[2] The defendant's second assignment of error was to the admission in evidence of certain photographs. The record discloses that each of the photographs objected to was admitted by the court under proper instructions to the jury that such photograph was to be con-

sidered only for the purpose of illustrating the testimony of the witness and should not be considered as substantive evidence.

> "The trial court has discretionary power to permit the introduction in evidence of properly identified diagrams or maps, and photographs, of the scene of the crime for the purpose of illustrating the testimony of the witnesses." 2 Strong, N. C. Index 2d, Criminal Law, § 43, pp. 548-549.

This assignment of error is overruled.

[3] The third assignment of error brought forward by the defendant was to the admission of the two pistols in evidence, the one taken from the defendant at the time of his arrest and which he had in his hand, and the other taken from the suitcase found in the room of the defendant at the time of his arrest.

The State's witness, Edwards, testified that at the time of the robbery each of the robbers had a 38-caliber pistol in his hand, that one of the pistols was "all dark" in color and the other had some silver on it. The pistols which were introduced in evidence corresponded to the pistols described by the witness Edwards. It was not error to admit the pistols in evidence.

> "Articles which the evidence shows were used in connection with the commission of the crime charged are properly admitted in evidence." 2 Strong, N. C. Index 2d, Criminal Law, § 42, p. 547.

[4] The fourth assignment of error brought forward by the defendant is the refusal of the trial court to sustain the defendant's motion for nonsuit at the close of the evidence. The defendant assigns no authority to sustain this assignment of error and states: "(T)his assignment of error and exception is brought forward in this brief for such consideration as the Court of Appeals may deem proper in order to protect fully all rights which the defendant may have."

We have reviewed the record in this case and there was substantial evidence to support a finding that the offense charged in the bill of indictment had been committed and that the defendant committed it. The record discloses that the defendant had a fair trial before a jury and we find

No error.

MALLARD, C.J., and MORRIS, J., concur.

CITY OF RANDLEMAN v. MYRTLE HINSHAW

No. 6819SC267

(Filed 18 September 1968)

1. **Evidence § 28; Eminent Domain § 6— failure to authenticate written evidence in condemnation proceeding**

In a special proceeding by a municipality to condemn an easement for water and sewer lines outside the city limits, it was prejudicial error for the court to admit in evidence without proper identification and authentication a written offer by the municipality to give respondent landowner access to the water and sewer lines upon payment of a tap-on fee, it not appearing that respondent had accepted the offer and witnesses for the municipality having testified as to benefits to respondent's property from access to the water and sewer lines.

2. **Evidence § 29— authentication of writings**

Before any writing may be admitted into evidence it must be authenticated in some manner — i.e., its genuiness or execution must be proved.

3. **Evidence § 28— authentication of public records or documents**

A competent public record or document must be properly identified, verified or authenticated by some recognized method before it may be introduced in evidence.

4. **Municipal Corporations § 4— furnishing water and sewer service to nonresidents**

A municipality which operates its own water and sewer system is under no duty to furnish water or sewer service to persons outside its limits but has the discretionary power to do so.

APPEAL by respondent from *Exum, J.*, 26 February 1968 Civil Session of RANDOLPH Superior Court.

This is a special proceeding in which petitioner seeks to condemn an easement for water and sewer lines along a State maintained road running through the property of respondent.

In its petition, petitioner alleges the necessity for it to construct a sewage disposal plant and, in connection therewith, to condemn a 40-foot easement across respondent's lands. The lands of respondent consist of some 86 acres and are located outside of petitioner's limits but between said limits and the site of the sewage disposal plant.

The case was heretofore appealed to the Supreme Court and, in an opinion reported in 267 N.C. 136, 147 S.E. 2d 902, was remanded to the Superior Court. Thereafter, there were further proceedings before the clerk and ultimately an appeal from the clerk to the Superior Court.

When the case came on for trial at the February 1968 Civil Session, the parties stipulated all questions except the issue of damages.

After presentation of evidence by both parties and a jury view of the premises, the jury returned a verdict in favor of respondent for $275.00. Respondent appealed from judgment predicated thereon.

L. T. Hammond, Sr., for petitioner appellee.

Ottway Burton for respondent appellant.

BRITT, J.

[1] Respondent assigns as error the admission in evidence, at the request of petitioner and over respondent's objection, a paper writing in words and form as follows:

"THIS OFFER, Made this the 28th day of February, 1968, by the City of Randleman, a municipal corporation in Randolph County, North Carolina, (hereinafter referred to as the City), the [sic] Myrtle Hinshaw, of Randolph County, North Carolina, (hereinafter referred to as Landowner);

WITNESSETH:

WHEREAS, there is now pending in the Superior Court of Randolph County a certain condemnation action instituted by the City against the Landowner, in which the Landowner is seeking to recover certain damages from the City for an easement and right-of-way the City has acquired over, across and under the lands of the Landowner; and whereas, the question has arisen as to whether the Landowner does and will have a right, both now and in the future to tap on the sewer line and water line as the same now exist and which run along said easement, and the City wishes to make plain its position in this regard;

NOW, THEREFORE, in consideration of the premises, and in connection with the litigation now pending between the parties, the City does hereby make to the Landowner the following offer;

At any time in the future that the Landowner, or her successors in title to the lands involved in this litigation and described in the official map filed in the case, desires to tap on either the water or sewer lines as the same now exist and which run along, through or under the lands of the Landowner, she or they may do so by paying the regular tap-on fees for outside City Limit users in effect at the time such tap-on is made, paying for the use of the water and sewer as billed by the City at the regular rates charged outside City Limits users from time to time, and otherwise complying with all the usual and normal requirements of the City relative to tapping on and using the water and sewer services of the City.

IN TESTIMONY WHEREOF, the City of Randleman has caused this Offer to be executed in its name by its Mayor, duly attested by its City Secretary, and the City Seal to be hereto affixed, all as of the day and year first above written.

CITY OF RANDLEMAN

By: PAUL BELL
MAYOR

ATTEST:

C. D. Kistler
City Secretary"

[Acknowledgment by Paul Bell and C. D. Kistler before a notary public].

Said paper writing was introduced without any identification and read to the jury before petitioner presented oral testimony. The admission of the document constituted prejudicial error.

[2, 3] "Before any writing will be admitted in evidence, it must be *authenticated* in some manner — i.e., its genuineness or execution must be proved." Stansbury, N. C. Evidence 2d, § 195, citing numerous authorities, including *Sledge v. Wagoner,* 250 N.C. 559, 109 S.E. 2d 180, and *Perkins v. Brinkley,* 133 N.C. 348, 45 S.E. 652. Even a competent public record or document must be properly identified, verified or authenticated by some recognized method before it may be introduced in evidence. *Hughes v. Vestal,* 264 N.C. 500, 142 S.E. 2d 361.

The paper writing complained of raises many questions; we suggest only a few: Were the signatures of Mayor Paul Bell and City Secretary C. D. Kistler genuine? If so, was the execution of said document by the Mayor and City Secretary duly authorized by the governing board of the City of Randleman?

An equally serious question arises as to what the document is. It is designated and takes the form of an "offer" from petitioner to respondent, but nowhere in the record do we find that respondent accepted the offer, expressly or otherwise. The document does not take the form of a municipal ordinance which unequivocally does something but appears to be only an offer without any acceptance.

Its introduction was clearly prejudicial to the respondent. The petitioner presented seven witnesses who gave testimony as to the value of respondent's property before and after the taking. Six of the witnesses were questioned by petitioner's counsel as to the value of land considering the beneficial effects afforded by access

to water and sewer lines. Each of petitioner's witnesses opined that respondent's land was more valuable after the taking than before the taking. In His Honor's charge to the jury, he stated that petitioner had offered evidence tending to show that respondent's land had been increased rather than decreased in value because of the water and sewer lines installed by petitioner.

[4] A municipality which operates its own water and sewer system is under no duty to furnish water or sewer services to persons outside its limits. It has the discretionary power, however, to engage in this undertaking. *Fulghum v. Selma,* 238 N.C. 100, 76 S.E. 2d 368. Granting that petitioner in the case before us had the authority to provide that respondent's property would have access to the water and sewer lines installed, the paper writing introduced did not unequivocally extend those benefits. Furthermore, the judgment entered contained no provision that respondent's property would derive any benefits from the water and sewer lines.

We deem it unnecessary to discuss the other assignments of error brought forward by respondent, as they might not arise upon a retrial of this action.

New trial.

BROCK and PARKER, JJ., concur.

W. D. WARNER v. ROBERT TORRENCE
No. 6820SC343

(Filed 18 September 1968)

1. Husband and Wife §§ 24, 27— alienation of affections — criminal conversation — pleadings — joinder of causes in complaint

In an action for actual and punitive damages for the alienation of the affections of plaintiff's wife by the defendant and for his criminal conversation with her, there is no error in the fact that the original complaint joined the two causes of action together in one paragraph and requested damage in a lump sum without differentiating the amount sought to be recovered in each.

2. Husband and Wife § 24— alienation of affections — elements of proof

In an action for alienation of affections, the plaintiff husband must show that (1) he and his wife were happily married and that a genuine love and affection existed between them, (2) the love and affection so

existing was alienated and destroyed, and (3) the wrongful and malicious acts of defendant produced and brought about the loss and alienation of such love and affection.

3. Husband and Wife § 25— alienation — sufficiency of evidence

In an action by the husband to recover damages for the alleged alienation of the affections of his wife, the evidence is insufficient to justify submission of the issue to the jury, the plaintiff having failed to show the existence of any genuine love and affection which was alienated and destroyed by the defendant.

4. Husband and Wife § 28— criminal conversation — sufficiency of evidence

Evidence in the husband's action for criminal conversation *is held* sufficient to justify submission of the issue to the jury.

5. Husband and Wife § 28— criminal conversation — proof by circumstantial evidence

In an action for criminal conversation it is not necessary to show the adultery by direct proof if the jury can reasonably infer from the circumstances the guilt of the parties.

APPEAL from *McConnell, J.*, May 1968 Session, STANLY County Superior Court.

Action to recover damages, both actual and punitive, for the alienation of the affections of plaintiff's wife by the defendant and for his criminal conversation with her.

At the close of all of the evidence, the trial court sustained a motion to nonsuit each cause of action. The plaintiff appealed.

Brown, Brown & Brown by Richard L. Brown, Jr., and James E. Roberts, Attorneys for defendant appellee.

Coble, Tanner & Grigg by Eugene S. Tanner, Jr., Attorneys for plaintiff appellant.

CAMPBELL, J.

The facts alleged in the complaint are sufficient to constitute two causes of action, on either of which, if proven, the plaintiff is entitled to recover of the defendant damages, both actual and punitive. In *Chestnut v. Sutton*, 207 N.C. 256, 176 S.E. 743, it is stated:

"(T)hat the gravamen of the cause of action for the alienation of the affections of plaintiff's wife is the deprivation of the plaintiff of his conjugal rights to the society, affection and assistance of his wife, and that the gravamen of the cause of action for criminal conversation is the defilement of plaintiff's wife by

the defendant. In neither case is the consent of the wife a defense to a recovery by the plaintiff of the damages which he has sustained as the result of the wrongful conduct of the defendant. On each of these causes of action the plaintiff is entitled to recover of the defendant his actual damages, and in a proper case the jury may award plaintiff, in addition to his actual damages, punitive damages."

[1] In that case, as in the instant case, it is interesting to note that the original complaint joined the two causes of action together in one paragraph and damages are requested in a lump sum without differentiating the amount sought to be recovered in each.

[2, 3] In order to sustain the cause of action for alienation of affections, the law imposes upon the plaintiff the duty of showing by proper evidence the following facts: (1) that he and his wife were happily married, and that a genuine love and affection existed between them; (2) that the love and affection so existing was alienated and destroyed; (3) that the wrongful and malicious acts of defendant produced and brought about the loss and alienation of such love and affection. *Hankins v. Hankins,* 202 N.C. 358, 162 S.E. 766. This case points out that if the love and affection of the wife was alienated or destroyed without interference or wrongful procurement of a third party, then such third party would not be liable in damages. The plaintiff has the burden of proving that the loss of his wife's affections was occasioned and brought about by the wrongful and malicious counsel, advice and procurement of the defendant. The plaintiff fails to carry this burden of proof. The record discloses a marriage in 1933; in 1953 they "began to drift apart" and "things just gradually got worse and worse." Nothing would be gained by setting forth the constant bickering and actual fighting which occurred in this household between the plaintiff and his wife until the final separation in 1966. Suffice it to say, that the plaintiff fails to show the existence of any genuine love and affection which was alienated and destroyed by the defendant. We think the judgment of the trial court in sustaining the motion to nonsuit the cause of action for alienation of affections correct.

[4, 5] We are, however, constrained to agree with the plaintiff that the evidence is sufficient to support submission to the jury of an issue on the cause of action for criminal conversation. Sheriff McSwain of Stanly County testified that on the night of 29 June 1966 he went to the Pine View Motel in Stanly County about 1:00 a.m. and went to a room at the motel registered in the name of the defendant. There were no lights on in the room. He knocked at the door.

In something like a minute, the door was opened and the bedroom light was on. The defendant was there dressed "(i)n his shorts and a tee-shirt, undershorts." The plaintiff's wife was in one of the two beds in the room. "She was covered up with a blanket or bedspread up to her shoulders" and the sheriff could not tell how she was dressed. The sheriff informed the defendant: "I told him that I had several complaints about him keeping company with Mrs. Warner in this motel and other places in this county, and that it was time to stop, he was going to have to clear out of the motel, and he said that he would."

> "It is not necessary to show the adultery by direct proof, but circumstances are sufficient for that purpose, if therefrom the jury can reasonably infer the guilt of the parties." *Powell v. Strickland,* 163 N.C. 393, 79 S.E. 872. See also *Hardison v. Gregory,* 242 N.C. 324, 88 S.E. 2d 96.

Neither the defendant nor the plaintiff's wife testified in the case. This makes relevant the statement in *Walker v. Walker,* 201 N.C. 183, 159 S.E. 363:

> "Plaintiff's charge against defendant was adultery, if the evidence of so serious a charge was not true, the defendant had the opportunity to refute it. Whether the charge was true or not, the falsity of it was peculiarly within defendant's knowledge. The fact that she did not refute the damaging charge made by plaintiff, it may be that this was a silent admission of the charge made against her."

[1] The fact that both causes of action were intermingled and intertwined with one allegation of damages brings this case under the rationale of *Barker v. Dowdy,* 224 N.C. 742, 32 S.E. 2d 265, where the complaint was couched in the same manner. In that case the court held that the cause of action for alienation of affections was properly submitted to the jury, but that the cause of action for criminal conversation should have been nonsuited. In that case both causes of action were submitted to the jury; whereas, in this case neither cause of action was submitted to the jury. In that case a new trial on the first cause of action (alienation of affections) was ordered so that the damage issues could be reconsidered after elimination of the second cause of action. In this case we are ordering a new trial on the second cause of action (criminal conversation). In that case there was nothing wrong about joining the two causes of action together and entwining the damages for both causes; and we

hold that there is nothing wrong in pleading the same way in this case.

Affirmed on cause of action for alienation of affections.

On cause of action for criminal conversation,

New trial.

MALLARD, C.J., and MORRIS, J., concur.

J. A. CLARK, TRADING AND DOING BUSINESS AS J. A. CLARK PLUMBING COMPANY v. WILLIAM J. MORRIS AND WIFE, ERLENE S. MORRIS, W. T. EMMART, TRUSTEE, FIRST CITIZENS BANK AND TRUST COMPANY

No. 685SC252

(Filed 18 September 1968)

1. Husband and Wife § 3; Laborers' and Materialmen's Liens § 2— entirety property — enforcement of lien — contract with husband and wife

In a contractor's action to recover the value of labor and materials furnished in the building of a house and to enforce a lien against real estate held by the individual defendants as tenants by the entirety, the evidence is insufficient to permit a jury finding that the defendants, husband and wife, were acting as partners in the building of the house where plaintiff's evidence tended to show only that (1) title to some of the lots and houses were in the names of both defendants, (2) the wife signed notes and mortgages for loans to build houses because the bank required her signature, (3) the wife answered telephone calls at home and transmitted messages to her husband, and (4) they filed a joint personal income tax return, and where plaintiff testified that he knew the land against which he sought to perfect a lien was owned by defendants by the entirety but offered no evidence that the wife entered into the contract with him.

2. Husband and Wife § 3— agency of one spouse for the other

A husband is not *jure mariti* the agent of his wife, and if such agency is relied upon it must be proven.

3. Laborers' and Materialmen's Liens § 1— nature and grounds of lien

A laborers' and materialmen's lien arises out of the relationship of debtor and creditor, and it is for the debt that the lien is created by statute; without a contract the lien does not exist.

4. Laborers' and Materialmen's Liens § 1— grounds for lien — knowledge by owner

Mere knowledge that work is being done or material furnished on one's

property does not enable the person furnishing the labor or material to obtain a lien.

APPEAL by plaintiff from *Hubbard, J.,* 20 May 1968 Session, NEW HANOVER Superior Court.

This is a civil action to recover the value of labor and materials furnished and to enforce a lien against real estate held in the name of the individual defendants as tenants by the entirety.

The complaint alleges that this contract was with both William J. Morris and his wife, Erlene S. Morris, and the amount claimed for these services and materials is $1,978.00; that the defendants contracted with the plaintiff to install plumbing, and contracted to pay plaintiff the above sum for the materials and labor.

The complaint further alleges that in accordance with the contract the plaintiff furnished the materials and performed the work from 7 June 1966 through 10 September 1966, and that the defendants have failed to pay the $1,978.00 due.

The complaint also alleges that the plaintiff filed notice of lien in the Office of the Clerk of Superior Court of New Hanover County on 21 September 1966. Plaintiff seeks judgment against the defendants and asks that this judgment be declared a lien against the entirety property.

Defendants admit that plaintiff installed the plumbing and performed the labor, but expressly deny that the defendant Erlene S. Morris contracted with the plaintiff for any labor or materials.

As a further answer and defense, defendants allege that all labor and materials furnished by the plaintiff were furnished solely to the defendant William J. Morris, trading as Bill Morris Building and Realty Company; that the property in question was owned jointly by the defendants as tenants by the entirety; that the plaintiff is not entitled to a lien on the property of the defendants; and that the notice of lien wrongfully filed is a cloud on the title to the property and should be removed.

At the close of plaintiff's evidence, defendant Erlene S. Morris moved for a judgment of nonsuit as to her; this motion was allowed. Judgment was entered against defendant William J. Morris for the sum of $1,978.00, plus interest from 7 June 1966.

From the entry of judgment of nonsuit in the case against Erlene S. Morris, the plaintiff appealed.

Addison Hewlett, Jr., and Jerry L. Spivey, by Addison Hewlett, Jr., Attorneys for plaintiff appellant.

Burnett and Burnett, by Gilbert H. Burnett, Attorneys for defendant appellees.

BROCK, J.

Plaintiff assigns as error the entry of nonsuit as to Erlene S. Morris.

[1] Plaintiff argued in his brief that he contracted with both the defendants who were engaged in the business of building and selling houses. He offered the testimony of William J. Morris on direct examination which tended to show that title to some of the lots purchased, and upon which houses were built, were placed in the names of both defendants; that Erlene S. Morris signed notes and mortgages for loans made to build houses on a speculative basis because the bank required her signature; that when second mortgages were taken to secure a part of the purchase price, the notes were made payable to both defendants; that the wife answered telephone calls at home and if there was a message for her husband she transmitted it to him; that defendants filed a joint personal income tax return. On cross-examination William J. Morris stated he operated as a sole proprietorship, and that his wife was not his business partner. In our opinion such evidence was not sufficient to permit submitting to the jury an issue of whether the defendants were acting as partners in the building of the house for which plaintiff furnished labor and materials.

[1, 2] Plaintiff offered no evidence that Erlene S. Morris entered into a contract with the plaintiff. Yet he testified that he knew that the land against which he sought to perfect a lien was owned by Mr. and Mrs. Morris by the entirety. A husband is not *jure mariti* the agent of his wife, and if such agency is relied upon it must be proven. *Pitt v. Speight,* 222 N.C. 585, 24 S.E. 2d 350.

We are of the opinion that the question has been put to rest in *Air Conditioning Co. v. Douglass,* 241 N.C. 170, 84 S.E. 2d 828. In that case defendant Douglass was engaged in the business of building and selling houses. The real estate was owned by him and his wife by the entirety. Mr. Douglass made all the arrangements for the heating system which was installed by the plaintiff. The Superior Court held in the *Douglass* case, *supra,* and the Supreme Court affirmed, that the contract was with Mr. Douglass and Mrs. Douglass was not a party to it and did not affirm or ratify it; thus, the Court

did not give judgment against her and there was no lien against the property.

[3, 4] In *Douglass* the Court said: "A laborers' and materialmen's lien arises out of the relationship of debtor and creditor, and it is for the debt that the lien is created by Statute. Without a contract the lien does not exist . . . Mere knowledge that work is being done or material furnished on one's property does not enable the person furnishing the labor or material to obtain a lien."

Counsel for plaintiff, with considerable fervor, urges that nonsuit of the case against the wife creates an easy method by which unscrupulous husbands can defraud creditors who furnish labor and material for entirety property. However, there seems to be no danger of such catastrophe so long as the creditor exercises reasonable judgment in determining with whom he is dealing and upon whose property he is furnishing labor and materials. A contract with the owners is the simple expedient. In this case the plaintiff knew the property was owned by husband and wife, but he chose not to secure the wife's concurrence or signature; he chose to rely solely upon the husband's promise to pay.

We hold that the defendant Erlene S. Morris was not a party to the contract with plaintiff; thus, he was not entitled to a lien against the entirety property. Judgment of nonsuit was properly entered in the case against Erlene S. Morris.

Affirmed.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. ARTHUR LEE GREEN

No. 6817SC311

(Filed 18 September 1968)

1. Criminal Law § 13— right to try person brought within jurisdiction illegally

The fact that a person accused of a crime is improperly or illegally brought to this State after being apprehended in another jurisdiction does not affect the right of the State to try and imprison him for the crime.

2. Habeas Corpus § 2— necessary allegations — no prior adjudication

A petition for a writ of habeas corpus must allege that to the knowledge

or belief of the applicant the legality of his imprisonment or restraint has not been already adjudged upon a prior writ of habeas corpus. G.S. 17-7.

3. Habeas Corpus § 4— no appeal from habeas corpus judgment — certiorari

No appeal lies from an order made in a habeas corpus proceeding except in cases involving the custody of children, review being available only upon application for a writ of certiorari.

4. Criminal Law § 181— necessary allegations for post-conviction petition

A petition under the Post-Conviction Hearing Act must allege that the questions raised have not theretofore been raised or passed upon by any court of competent jurisdiction. G.S. 15-218.

5. Criminal Law § 181— no appeal from post-conviction judgment — certiorari

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.

6. Habeas Corpus § 4; Criminal Law §§ 156, 181— attempted appeal from habeas corpus and post-conviction proceeding — treated as certiorari

An attempted appeal by petitioner from an adverse judgment in a habeas corpus and post-conviction proceeding is dismissed as improper by the Court of Appeals, but the record docketed in the Court is considered as a petition for a writ of certiorari, and the trial judge having found upon competent evidence that petitioner had a fair trial and that no constitutional rights had been denied him, the petition is denied.

ATTEMPTED appeal by defendant from *Gwyn, J.*, May 1968 Session of Superior Court of SURRY County.

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

Charles L. Folger for defendant appellant.

MALLARD, C.J.

In August 1967 in the Superior Court of Surry County the defendant, represented by counsel, pleaded guilty in case number 67-263 to the felony of attempted armed robbery in violation of G.S. 14-87 and was sentenced to imprisonment in the State Prison for a term of not less than nine years nor more than twelve years. At the same session of court the defendant entered a plea of guilty in case number 67-264 to felonious assault and was sentenced to imprisonment in the

State Prison for a term of not less than eight years nor more than ten years to run concurrently with the sentence in case number 67-263.

[1] Defendant filed a petition which he called "A petition for a Writ of Habeas Corpus In Forma Pauperis Under G.S. 15-217, 15-222." The allegations in the petition are that defendant is illegally detained in the North Carolina State Prison, that his civil rights were violated, and that he was denied due process and equal protection of the laws. He also asserts in his petition that he is entitled to have the charges against him vacated and to be released from prison. He was given a hearing on the petition after an attorney was appointed to represent him. At the hearing the defendant testified that with his consent, his attorney entered a plea of guilty at his original trial. After hearing the evidence offered at the hearing on the petition, the presiding judge, upon competent evidence, found as a fact that the defendant voluntarily entered a plea of guilty and that his only complaint then was that he was improperly brought from the State of Virginia to the State of North Carolina.

In 21 Am. Jur. 2d, Criminal Law, § 381, we find the following:

"Where a person accused of a crime is found within the territorial jurisdiction wherein he is charged, and is held under process legally issued from a court of that jurisdiction, neither the jurisdiction of the court nor the right to put him on trial for the offense charged is impaired by the manner in which he was brought from another jurisdiction, whether by kidnapping, illegal arrest, abduction, or irregular extradition proceedings. The basic principle supporting this general rule is that when a person accused of crime is held under valid process in the proper forum, such detention is not rendered invalid by the illegality of the events which preceded, or which made the detention physically possible. His wrong against the state holding him is not excused by the illegality of the means employed in obtaining custody, and the means used to bring him there will not be a subject of inquiry.

The general rule is frequently applied where the accused has been arrested by officers in another state and brought into the state where he is charged with crime without the formality of extradition proceedings. . . ."

Even if the defendant was improperly or illegally brought to North Carolina after being apprehended in Virginia, this would not affect the right of the State of North Carolina to try him and imprison him on the felony charges to which he voluntarily pleaded guilty.

[2] The petition contains some but not all of the necessary allegations of an application for a writ of habeas corpus under G.S. 17-7. This statute requires that a petition for a writ of habeas corpus must state in substance that the legality of the imprisonment or restraint has not been already adjudged, upon a prior writ of habeas corpus, to the knowledge or belief of the applicant. This petition does not contain such an allegation.

[3] In the case of *In re Palmer,* 265 N.C. 485, 144 S.E. 2d 413, the Supreme Court said:

> "No appeal lies from an order made in a *habeas corpus* proceeding (except in cases involving custody of children) but such order may be reviewed on *certiorari. State v. Edwards,* 192 N.C. 321, 135 S.E. 37. Whether *certiorari* will be granted rests in the sound discretion of the Court. *In re McCade,* 183 N.C. 242, 111 S.E. 3; *In re Croom,* supra."

[4] The petition contains some but not all of the necessary allegations required in a petition for a review of a criminal trial as provided by Article 22 of Chapter 15 of the General Statutes of North Carolina which is known as the North Carolina Post-Conviction Hearing Act.

G.S. 15-218 requires that a petition for review of a criminal trial shall state that the questions raised have not theretofore been raised or passed upon by any court of competent jurisdiction. This petition does not contain such a statement. From the affirmative findings by the court, it is apparent that this deficiency in the petition was ignored and the case heard on its merits or an amendment allowed which did not get into the record.

[5] In the case of *Nolan v. State,* 1 N.C.App. 618, Judge Frank Parker writing the opinion for the Court of Appeals said:

> "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."

[6] The defendant requested that his petition be considered both as an application for a writ of habeas corpus and as a petition for a review of a criminal trial. After a hearing the trial judge found, upon competent evidence, that the defendant had a fair trial, that no constitutional rights had been denied him, and entered an order dismissing the petition and remanding the defendant to the custody

of the proper authorities to be incarcerated in conformity with the original judgment.

No appeal lies from the order of Judge Gwyn in this case, review being available only through *certiorari.*

The attempted appeal is dismissed. The record docketed here is considered as a petition for the issuance of a writ of *certiorari* and is denied.

CAMPBELL and MORRIS, JJ., concur.

RONALD WAYNE STRICKLAND, BY HIS NEXT FRIEND W. H. STEED v. LESLIE HUGHES
No. 6822SC351

(Filed 18 September 1968)

1. Automobiles § 94— contributory negligence of owner-passenger — sufficiency of evidence

Whether or not the owner-passenger of an automobile was contributorily negligent in riding with defendant who had been driving at reasonable speeds but who suddenly accelerated to a speed of 70 or 80 miles per hour about one quarter of a mile before the accident took place, the passenger-owner testifying that he did not have time to ask defendant to "slow down or anything", is a question for the jury.

2. Automobiles § 94— contributory negligence of passenger — issue for determination

In determining a passenger's contributory negligence in failing to admonish a negligent driver, the question is not how quickly the passenger could react and admonish the driver to slow down but is whether the passenger exercised that degree of care for his own safety a reasonably prudent person would employ under the same or similar circumstances.

3. Automobiles § 95— negligence of driver imputed to owner-passenger — when owner sues

A driver's negligence is not imputed to an owner-passenger of an automobile when the owner-passenger sues the driver for injuries resulting from the driver's negligence; like any other passenger, however, the owner-passenger must take reasonable precautions to protect himself from injury.

4. Automobiles § 94— duty of owner-passenger to control driver

An owner-passenger ordinarily has the right and the duty to control and direct the manner in which his vehicle is to be operated; he cannot fail to exercise this right and duty and, when injured by negligent operation, escape the consequences of his lack of due care.

5. Negligence § 1— due care defined

What is due care or reasonable precaution depends upon the existing circumstances and conditions; whether a person has exercised due care is ordinarily a question for jury determination.

APPEAL by plaintiff from *Collier, J.*, 6 May 1968 Civil Session, DAVIDSON Superior Court.

Plaintiff, as owner-passenger, brings this action against the driver of plaintiff's automobile to recover damages for personal injuries received in a one-car collision. Plaintiff alleges defendant was negligent with respect to speed, control and lookout. Defendant denies negligence, but in the alternative alleges contributory negligence of the plaintiff-owner in failing to remonstrate with defendant concerning the negligent operation of plaintiff's vehicle.

At the close of plaintiff's evidence the trial judge entered a judgment of nonsuit after dictating the following into the record:

> "At the conclusion of the plaintiff's testimony, counsel for defendant made a motion for nonsuit, which motion is allowed, the Court finding as a matter of law that plaintiff by his own testimony is guilty of contributory negligence in that, as the owner-passenger of the automobile being operated on the occasion in question, he failed to exercise any control of the operation of the automobile, on his testimony, for a distance of approximately a quarter of a mile while same was being operated at a speed from 70 to 80 miles an hour; that said failure on behalf of the plaintiff to attempt to exercise any degree of control over the speed of the automobile is held to be contributory negligence as a matter of law and nonsuit is allowed."

Plaintiff appealed from the entry of judgment of nonsuit.

Charles F. Lambeth, Jr. for plaintiff appellant.

Frank P. Holton, Jr. for defendant appellee.

BROCK, J.

[1] The plaintiff's evidence when viewed in the light most favorable to him tends to show the following: Plaintiff was the owner of the 1963 Chevrolet being driven by the defendant on the occasion in question. On 13 August 1965, plaintiff was tried in Thomasville Recorder's Court upon a charge of reckless driving, and upon conviction the Court had required him to surrender his driver's license. Plaintiff's cousin, Jimmy Honeycutt, drove plaintiff's car from the courthouse to defendant's place of business. Defendant then began

driving plaintiff's car, and, after completing several errands around Thomasville, defendant drove to the community of Silver Valley looking for someone who had previously done some work for defendant. They had started back to Thomasville at the time of the accident. Defendant had been driving at reasonable speeds, but about one quarter of a mile before the accident defendant accelerated to a speed of 70 or 80 miles per hour. As the vehicle was going into a curve in the road it skidded on loose gravel, overturned, and injured plaintiff. Plaintiff did not say anything to defendant about the speed. He testified: "I didn't have time to make objection then to the way he was driving. I didn't ask him to slow down or anything."

[2] At a speed of 70 miles per hour a car will travel one quarter of a mile in about 12.8 seconds. Therefore, the negligence of the defendant existed for only 12.8 seconds according to plaintiff's evidence. Obviously, even this short span of time would be sufficient to allow a person to say "slow down" or some similar brief phrase. But the question is not how quickly a passenger *could* react and admonish the driver to slow down. The question is whether the passenger exercised that degree of care for his own safety that a reasonably prudent person would employ under the same or similar circumstances.

[3] A driver's negligence *is not imputed* to an owner-passenger of an automobile, as that word is ordinarily used in the law of negligence, when the owner-passenger sues the driver for injuries resulting from the driver's negligence. However, in actions between the owner and parties other than the driver, the rule is that the negligence of the driver acting within the scope of his authority *is imputed* to the owner. *Sorrell v. Moore,* 251 N.C. 852, 112 S.E. 2d 254.

[3-5] An owner-passenger ordinarily has the right and the duty to control and direct the manner in which his vehicle is to be operated. He cannot fail to exercise this right and duty and, when injured by negligent operation, escape the consequences of his lack of due care. And although an owner-passenger is not chargeable with the negligence of the driver so as to prevent the owner from recovering from the driver for the driver's negligence, the owner-passenger, like any other passenger, must take reasonable precautions to protect himself from injury. *Sorrell v. Moore, supra.* What is due care, or reasonable precaution, depends upon the existing circumstances and conditions; and whether a person has exercised due care, that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances, is ordinarily a question for jury determination.

[1] It may be that plaintiff's evidence in this case contains inconsistencies, but it is for the jury to determine the weight and credit to be given the testimony, and to resolve the inconsistencies. We hold that the evidence, when considered in the light most favorable to the plaintiff, does not show contributory negligence as a matter of law. It follows, therefore, that we disagree with the ruling of the trial judge, and that the judgment appealed from is

Reversed.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. HAROLD LEAK WHITE AND DEXTER EUGENE LONG

No. 6820SC362

(Filed 18 September 1968)

1. Criminal Law § 138— single sentence for convictions upon more than one count — maximum

A single sentence covering a number of counts on which an accused is convicted or to which he pleads guilty is valid if the punishment thereby imposed does not exceed the maximum that could have been imposed for any single sufficient count.

2. Burglary and Unlawful Breakings § 8; Larceny § 10— sentence for felonious breaking and entering and larceny

Sentence of not less than five nor more than ten years upon defendant's plea of guilty of felonious breaking and entering and larceny of property of a value of more than $200 is within the statutory limits and valid.

APPEAL by defendants from *Bowman, S.J.*, 8 July 1968 Session of STANLY Superior Court.

Defendants were jointly indicted in a three-count bill of indictment charging them with (1) felonious breaking and entering, (2) larceny of personal property of the value of more than $200.00, and (3) receiving. Upon arraignment both defendants, through their court-appointed attorney, entered pleas of guilty to the first and second counts, and the State took a *nol pros* on the third count in each case. Based on the pleas of guilty to the first two counts in the bill of indictment, the court entered a judgment as to each defendant imposing a prison sentence of not less than five nor more than

ten years on each. Defendants excepted to the entry of these judgments and appealed.

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

Charles P. Brown for defendant appellants.

PARKER, J.

Both in the proceedings in the trial court and on this appeal the defendants, being indigent, were provided with the services of able legal counsel without any expense to them. Furthermore, the costs of preparing the transcript of proceedings in the trial court, the record on this appeal, the brief filed on their behalf, and all other costs incidental to the preparation and handling of this case on appeal have been borne at public expense.

The attorney for defendants, with commendable frankness has stated in his brief that after carefully reviewing the entire record on appeal he can find no legitimate assignment of error and can offer no valid contention wherein the trial court erred or whereby defendants or either of them would be entitled to a new trial. Nevertheless, we have carefully reviewed the entire record before us. We find no error.

Prior to accepting the pleas of guilty, the trial judge carefully examined each defendant to determine that each fully understood the nature of the charges against him and knew the maximum punishment which might be imposed upon his pleas of guilty; that each had been fully informed of his rights; that no promises or threats had been made by anyone to influence the pleas of guilty; that each defendant had had ample time to subpœna any witnesses desired by him and to be ready for trial and was in fact ready for trial; that the pleas were freely, understandingly, and voluntarily made; and that each defendant had had time to confer with and had conferred with his lawyer and was satisfied with his lawyer's services. After making this careful examination, the judge determined that the pleas of guilty tendered by each defendant were being freely, understandingly, and voluntarily made, and were made without undue influence, compulsion, or duress and without promise of leniency, and based on these determinations the court accepted the pleas of guilty.

Prior to imposing sentence on each defendant, the court heard the testimony of a special agent with the State Bureau of Investigation who had investigated the crimes and who testified that each defendant separately had voluntarily disclosed to him in detail the part which each had played in committing the offenses with which each

was charged. This agent also testified that based on the information given by the defendants a considerable portion of the stolen property had been recovered.

[1, 2] It should be noted that while a separate sentence might have been lawfully imposed based on the pleas of guilty to the first two counts in the bill of indictment, the court imposed but a single sentence on each defendant. A single sentence covering a number of counts on which an accused is convicted or to which he pleads guilty is valid if the punishment thereby imposed does not exceed the maximum that could have been imposed for any single sufficient count. *State v. Smith,* 266 N.C. 747, 147 S.E. 2d 165; 24 C.J.S., Criminal Law, § 1567(4), p. 430. The sentences imposed on the defendants were within statutory limits.

The judgment of the superior court as to each defendant is

Affirmed.

BROCK and BRITT, JJ., concur.

GEORGIA LEWIS, EMPLOYEE, PLAINTIFF-APPELLEE v. DIAMOND MILLS COMPANY, EMPLOYER, AND THE EMPLOYERS LIABILITY ASSURANCE CORPORATION, CARRIER, DEFENDANTS-APPELLANTS

No. 6818IC285

(Filed 18 September 1968)

1. Master and Servant § 96— findings supported by evidence are binding on appeal

Findings of fact by the Industrial Commission are binding upon the Court of Appeals when supported by any competent evidence.

2. Master and Servant §§ 69, 96— evidence held sufficient to support findings and award

The evidence *is held* sufficient to support findings and conclusions by the Commission that plaintiff's 20% permanent partial disability of her back resulted solely from an injury while working for defendant employer, although the employer presented evidence of a pre-existing 10% disability of plaintiff's back.

3. Master and Servant § 99— attorney's fees — additional hearing after original award

Where additional evidentiary hearings held at defendant's request after the original award had been made resulted in no alteration of the award, no abuse of discretion is shown in the Commission's order that an additional fee for plaintiff's attorney be taxed as part of defendant's costs.

LEWIS *v.* DIAMOND MILLS CO.

APPEAL by defendant employer and defendant carrier from an opinion and award of the North Carolina Industrial Commission filed 11 April 1968.

Evidence in this case was first offered before Commissioner Shuford at a hearing in High Point, North Carolina, on 12 April 1967. At that hearing plaintiff employee offered evidence which tended to show that she sustained injury to her back by tripping and falling while in the performance of her duties on 8 September 1966. The parties stipulated that plaintiff "had 20% permanent partial disability of the back and that the date on which she reached maximum improvement was January 23, 1967." Defendants contended that plaintiff was suffering from back trouble prior to her fall on 8 September 1966, and offered evidence that tended to show that, before 8 September 1966, she had complained of trouble with her back.

By opinion and award filed 26 April 1967, Commissioner Shuford found as facts that plaintiff sustained injury to her back by accident arising out of and in the course of her employment with defendant employer on 8 September 1966, and that as a result of the injury by accident plaintiff has a 20% permanent partial disability or loss of use of her back. Compensation was awarded in accordance with those findings.

Defendants filed an application for review by the Full Commission, but, before a review was conducted, defendants filed motion for an additional evidentiary hearing to present newly discovered evidence. Based upon defendants' motion the case was remanded to the hearing docket and reset first in Cumberland County and second in High Point for the sole purpose of receiving expert medical opinions. Commissioner Shuford conducted a hearing in Cumberland County on 16 January 1968, at which time defendant offered evidence that tended to show plaintiff was injured in an automobile accident on 19 March 1960 and was treated by an orthopædic surgeon for "lumbrosacral sprain with a fifth lumbar root compression syndrome." The doctor stated he did not find a herniated disc. The defendants' evidence further tended to show that plaintiff was treated for her 1960 back injury until March 1961, at which time she was rated as having a 10% permanent partial disability of her back.

On 14 February 1968 Commissioner Shuford conducted a further hearing in High Point at which time the plaintiff offered the statement of a neurosurgeon which tended to show that while plaintiff was working for defendant employer she suffered a herniated disc at L-5, S-1 left; that corrective surgery was performed; and that plain-

tiff has a 20% permanent partial disability attributed to the herniated disc.

At the completion of the two additional evidentiary hearings the Full Commission reinstated and affirmed the opinion and award of Commissioner Shuford which was filed 26 April 1967, and taxed $250.00 attorney fee in the costs against the defendants. From this opinion and award the defendants appealed.

Bencini and Wyatt, by Frank B. Wyatt, and Silas B. Casey for plaintiff appellee.

Smith, Moore, Smith, Schell and Hunter, by Herbert O. Davis for defendant appellants.

BROCK, J.

[1] Defendants argue that plaintiff testified falsely at the first hearing when she denied ever having trouble with her back before the injury from falling on 8 September 1966, and therefore her entire evidence is tainted and not worthy of belief. All of the evidence was heard by the Industrial Commission and its findings of fact are binding upon this Court, if supported by any competent evidence. *Anderson v. Construction Co.*, 265 N.C. 431, 144 S.E. 2d 272.

[2] Defendants contend that the Industrial Commission committed error in finding the plaintiff has a 20% permanent partial disability of her back as a result of the fall on 8 September 1966. Defendants argue that their evidence offered at the Cumberland County hearing established that plaintiff had a 10% permanent partial disability in March 1961, and that a 20% rating now means only that the additional 10% is attributable to the 1966 fall. We might concede that defendants offered evidence which tended to show that in 1960 plaintiff had a 10% permenant partial disability of her back, but this evidence of itself does not establish the fact; there must be a finding of fact to that effect before the fact is established. The evidence was conflicting, and the Industrial Commission has resolved the controversy by its findings of fact. We hold there was competent evidence before the Commission to support its findings of fact, and its findings of fact support its conclusions of law, which in turn support the award.

[3] Defendants argue that the Commission abused its discretion in awarding an additional attorney fee to counsel for plaintiff and ordering it to be taxed as part of the costs to be paid by the defendants. This was done because the defendants requested the additional evidentiary hearings in this case which resulted in no alteration of

the original award. The defendants have shown no abuse of discretion.

Each of the defendants' assignments of error is overruled, and the opinion and award of the Industrial Commission is

Affirmed.

BRITT and PARKER, JJ., concur.

MRS. BETTY S. PARDUE, ADMINISTRATRIX OF THE ESTATE OF JAMES M. PARDUE, DECEASED v. CHARLOTTE MOTOR SPEEDWAY, INC.

No. 6823SC287

(Filed 18 September 1968)

Appeal and Error § 6; Pleadings § 32— appeal from order allowing motion to amend pursuant to G.S. 1-131 — dismissal as premature

Where plaintiff moves pursuant to G.S. 1-131 to amend his complaint following certification of a Supreme Court opinion affirming a judgment sustaining defendant's demurrer, defendant's appeal from the order allowing the amendment is premature and will be dismissed by the Court of Appeals *ex mero motu*, the proper procedure being to note an exception and appeal from the final judgment if adverse to defendant.

APPEAL by defendant from *Gambill, J.*, at the 29 April 1968 Session of WILKES Superior Court.

This case was before the Supreme Court on demurrer at the Fall Term 1967. An opinion was entered during the Spring Term 1968 affirming the Superior Court in sustaining the demurrer to the complaint. See opinion appearing in 273 N.C. 314, 159 S.E. 2d 857, for a more complete statement of facts.

Following the certifying of the Supreme Court opinion, plaintiff, pursuant to G.S. 1-131, moved to amend her complaint and Judge Gambill allowed the motion. Defendant appeals from the order allowing the amendment and also, in this Court, demurs *ore tenus* for failure of the complaint to state a cause of action.

Jordan, Wright, Nichols, Caffrey & Hill and McElwee & Hall by Edward L. Murrelle for plaintiff appellee.

John H. Small; Sanders, Walker & London and Moore & Rousseau for defendant appellant.

BRITT, J.

Defendant's appeal to this Court is premature and, *ex mero motu*, is dismissed on authority of *Morris v. Cleve*, 194 N.C. 202, 139 S.E. 230, where on almost identical procedural facts the Supreme Court held: "The appeal must be dismissed as premature, since the proper procedure was to note an exception and appeal from the final judgment, if adverse to the defendants. [Citations]."

Defendant's demurrer *ore tenus* filed in this Court is dismissed without prejudice to the defendant.

Appeal dismissed.

BROCK and PARKER, JJ., concur.

CITY OF RANDLEMAN, PETITIONER v. JAMES J. HUDSON AND WIFE, MARIE G. DUNN HUDSON, DEFENDANTS

No. 6819SC259

(Filed 18 September 1968)

Trial § 48; Appeal and Error § 54— power of court to set aside verdict — review on appeal

A motion to set aside the verdict rests in the discretion of the trial judge, and his order doing so and awarding a new trial is not reviewable on appeal in the absence of abuse of discretion.

APPEAL from *Seay, J.*, February 1968 Civil Session of Superior Court, RANDOLPH County. This is a special proceeding in which the City of Randleman, as petitioner, under the provisions of Chapter 40 of the General Statutes of North Carolina, seeks to condemn a right-of-way for the construction of a sewer line over and across a portion of the lands of the defendant landowners. The property is located within the city limits of the City of Randleman, Randolph County, North Carolina. The case came on for trial before a jury. There was conflicting evidence as to the amount of damages sustained and varied from a top figure of $3,000 to a low figure of $370. The jury awarded the sum of $1,800 and the City of Randleman made a motion to set the verdict aside and for a new trial. Judge Seay entered an order: "IT IS, THEREFORE, ORDERED, in the discretion of the Court, that the verdict of the jury in this trial be set aside and

that a new trial be held in this matter." The defendant landowners objected and excepted to this order and appealed.

Ottway Burton, Attorney for defendant appellants.

L. T. Hammond, Sr., Attorney for petitioner appellee.

CAMPBELL, J.

In *Goldston v. Chambers,* 272 N.C. 53, 157 S.E. 2d 676, Chief Justice Parker stated:

> "It is within the power of the trial judge in the exercise of his sound discretion to set aside a jury verdict, in whole or in part. G.S. 1-207; . . . A verdict is a solemn act of a jury, and it should not be set aside without mature consideration; but the power of the court to set aside a verdict as a matter of discretion has always been inherent and is necessary to the proper administration of justice."

He goes on to state:

> "We have held repeatedly since 1820 in case after case, and no principle is more fully settled in this jurisdiction, that the action of the trial judge in setting aside a verdict in his discretion is not subject to review on appeal in the absence of an abuse of discretion."

He then quotes from *Settee v. Electric Ry.,* 170 N.C. 365, 86 S.E. 1050 as follows:

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

The record in this case discloses no abuse of discretion on the part of the trial judge; hence, the order setting aside the verdict in this case is not subject to review on appeal.

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

Dismissed.

MALLARD, C.J. and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. JUNIOR CLEVELAND CAMPBELL
No. 6822SC307

(Filed 18 September 1968)

APPEAL by defendant from *McLaughlin, J.*, February 1968 Special Criminal Session of IREDELL Superior Court.

By bill of indictment proper in form, defendant was charged with breaking and entering a store building and larceny. He was represented at his trial by court-appointed attorney. The jury returned a verdict of guilty as charged, and on the breaking and entering count, a prison sentence of ten years was imposed; on the larceny count a prison sentence of eight years was imposed, this sentence to begin at the expiration of the ten years sentence. Defendant appealed.

Attorney General T. Wade Bruton by Deputy Attorney General James F. Bullock for the State.

L. Hugh West, Jr., for defendant appellant.

BRITT, J.

Following his conviction in Superior Court, defendant requested that an attorney other than his trial attorney be assigned to represent him on appeal to this Court. Attorney L. Hugh West, Jr., was appointed and proceeded to perfect the appeal; however, said attorney states in the record that he has carefully read the record and the law with respect thereto and can find nothing in the record which he can in good faith assign as error. At the same time, he requests that this Court carefully review the record and grant the defendant a new trial if reversible error is discovered.

Accordingly we have carefully reviewed the entire record in this case and find that the defendant was given a fair trial, free from prejudicial error, and that the sentences imposed were within statu-

tory limits. *State v. Hopper,* 271 N.C. 464, 156 S.E. 2d 857; *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330.

The judgment of the Superior Court is
Affirmed.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. PAUL GEORGE SNEAD
No. 6822SC292

(Filed 18 September 1968)

APPEAL by defendant from *McLaughlin, J.,* January-February 1968 Session, IREDELL Superior Court.

Defendant was charged in three separate bills of indictment with breaking and entering and larceny and in two separate bills with assault on a female. The charges of assault on a female were *nol prossed.* Defendant, through his counsel, entered a plea of guilty to each of the other charges. From the judgment in each case entered by the court, defendant appealed. Upon a finding of indigency, the court appointed counsel and ordered that transcript of the trial proceedings be furnished defendant without charge.

Fred G. Chamblee for defendant appellant.

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

MORRIS, J.

Appellant assigns as error (1) the consideration by the court of defendant's confession without adequate or proper determination that the same was freely and voluntarily given, and (2) the sentences imposed constituted cruel and unusual punishment under the circumstances.

Counsel for appellant candidly states in his brief that he has carefully investigated and finds no support for his assignments of error but asks that the Court review the record. This we have done.

We find, upon a careful examination of the record and the evidence, that evidence as to defendant's signed waiver of rights and

confession was admitted in each instance without objection and that defendant himself, on questioning by the court, stated that he was guilty of the charges but that the two others he implicated in his confession were not; that his statement was true as to him but not true as to the others.

The sentences imposed were within the statutory limit.

Defendant was represented by counsel, entered a plea of guilty, reiterated his guilt in open court, and received sentences within the limits provided by statute.

No error.

MALLARD, C.J., and CAMPBELL, J., concur.

H. T. JACKSON, ROY BUMPASS, G. C. SMITH, AND SANFORD SMITH v. GUILFORD COUNTY BOARD OF ADJUSTMENT UNDER THE ZONING ORDINANCE OF GUILFORD COUNTY, DR. ROBERT M. FOX, CHAIRMAN; S. R. STAFFORD, PAUL PHIPPS, ORVIE HAYWORTH, HOWARD S. WAYNICK, REGULAR MEMBERS; WILLIAM H. LANIER, R. MACK PEOPLES, ALTERNATE MEMBERS; AND LESTER O. JONES

No. 6818SC316

(Filed 25 September 1968)

1. Counties § 5; Constitutional Law § 8— county zoning — board of adjustment — authority to grant special exception — delegation of power

A county zoning ordinance which delegates to a board of adjustment the authority to grant a special exception to erect a mobile home park in an A-1 Agricultural District upon a finding that the grant "will not adversely affect the public interest" is in conformity with the statutory authority given by G.S. 153-266.17 and is not unconstitutional as a naked and arbitrary delegation of authority to make a determination without standards of legislative guidance, since the ordinance (1) clearly states its purpose of discouraging any use which, because of character or size, would create unusual requirements and costs for public services before such services are generally needed and (2) clearly details the conditions to be met before a mobile home park can be granted a special exception in the district.

2. Counties § 5; Municipal Corporations § 30— zoning ordinances — variance — special exception

A provision of a zoning ordinance permitting a variance from its terms and a provision granting a special exception meet two entirely different needs: (1) the variance contemplates a departure from the terms of the

ordinance and is authorized where the literal enforcement of the ordinance would result in unnecessary hardship, (2) the special exception contemplates a permitted use in a given zone or district and is granted after a public hearing and upon a finding that all the pertinent conditions of the ordinance are satisfied. G.S. 153-266.17.

3. Counties § 5; Municipal Corporations § 30— standards for issuance of special exceptions

The standards for the issuance of special permits and exceptions are usually less stringent than in the case of variances.

4. Counties § 5; Municipal Corporations § 30— board of adjustment — authority as a quasi-judicial body — fact-finding powers

The legislature may delegate to a zoning board of adjustment the authority as a quasi-judicial body to determine facts and therefrom to draw conclusions as a basis of its official action; the board must be given a standard to guide it in its determination, which standard, because of the nature of zoning ordinances and the unforeseeable factors involved, frequently must necessarily be general.

5. Counties § 5; Municipal Corporations § 30— board of adjustment — sufficiency of legislative guidelines

In determining the sufficiency of the standard by which a zoning board of adjustment is to be guided, the purpose and intent of the ordinance may be considered.

6. Counties § 5— board of adjustment — review by certiorari

Decision of a county board of adjustment is subject to review by the Superior Court in a proceeding in the nature of certiorari. G.S. 153-266.17.

7. Counties § 5— board of adjustment — review — conclusiveness of findings

Findings by a county board of adjustment that the granting of a special exception to permit construction of a mobile home park in an A-1 Agricultural District "will not adversely affect the public interest," which findings were based upon conflicting testimony taken under oath, *are held* supported by sufficient evidence and are conclusive on appeal.

APPEAL by petitioners from *Crissman, J.*, 13 May 1968 Civil Session, GUILFORD Superior Court.

On 15 March 1967, Lester O. Jones filed with the Guilford County Board of Adjustment an application for a special exception to the Guilford County Zoning Ordinance to erect a mobile home park in a district zoned A-1 Agricultural District, which permitted one or two family dwellings or mobile home and required a minimum lot area of one acre. After due notice, a public hearing was had and evidence was taken. After all interested parties had been heard, the Board, on unanimous vote, deferred decision pending an on-site study. The applicant and the spokesman for those opposing the application

met with the Board on the property. Thereafter on 1 May 1968 the Board found facts and unanimously granted the special exception with certain provisions attached. The petitioners filed a petition for writ of *certiorari* for review by the Superior Court of the action of the Board of Adjustment. The writ was issued and the matter heard before Lupton, J., at the 11 September 1967 Non-Jury Session of Guilford Superior Court. The court entered an order finding facts and remanding the matter to the Board "to hold a further hearing and then to make a finding of fact only on the question of whether or not the granting of the special exception to Lester O. Jones to erect a mobile home park as previously granted by the said Board will adversely affect the public interest."

On 7 November 1967, the Board, after due advertisement and notice, held another public hearing. Again all interested parties were heard and after all evidence was presented counsel for petitioners and respondents made statements. Thereafter the Board found as a fact "that the granting of the special exception to permit Lester O. Jones to construct a mobile home park as applied for will not adversely affect the public interest", and by unanimous vote, granted the special exception.

The petitioners applied to the Superior Court of Guilford County for a writ of *certiorari* to review the action of the Board of Adjustment. The writ was issued and a hearing was had before Crissman, J. The petitioners argued that the decision of the Board should be set aside for three reasons: (1) there was not sufficient evidence before the Board to support its finding that to grant the special exception will not adversely affect the public interest and to support its decision, (2) that the Board put the burden of proof on the petitioners, and (3) that the authority of the Board to grant the special exception is an unlawful and unconstitutional delegation of power and authority to the Board of Adjustment.

The trial court entered an order overruling all of the exceptions and assignments of error of the petitioners and affirming the ruling of the Board of Adjustment granting the special exception. From the entry of this judgment, petitioners appealed.

Cannon, Wolfe, Coggin & Taylor by George W. Coggin for petitioner appellants.

J. Howard Coble and David I. Smith for respondent appellees.

MORRIS, J.

Appellants raise two questions on appeal: (1) Did the court err in finding as a fact that there was sufficient evidence before the

Board of Adjustment that the granting of the special exception to the zoning ordinance would not adversely affect the public interest? and (2) Did the court err in finding that there was a lawful delegation of authority to the Board of Adjustment to find that the public interest will not be adversely affected when the zoning ordinance has no standard or guideline to control said Board?

[1] We will consider the second question first. Appellants earnestly contend that Section 6-13(B) of the Guilford County Zoning Ordinance is an unconstitutional attempt to confer on the Board of Adjustment a naked, arbitrary power to make a determination without standards of legislative guidance. That portion of the ordinance which appellants attack is subsection (4) of Section 6-13(B) as follows:

> "The Board shall make a finding that it is authorized and empowered to grant a special exception under the section of this ordinance described in the application and that the granting of the special exception will not adversely affect the public interest."

Appellants rely on *Coastal Highway v. Turnpike Authority*, 237 N.C. 52, 74 S.E. 2d 310. There Chapter 1024, Session Laws of 1949, was under consideration. The statute prescribed procedure by which the Municipal Board of Control, created by G.S. 160-195, could organize and create a municipal corporation for the purpose of acquiring rights of way, owning and operating a toll road or highway in the State. Section 3 of that statute provided:

> "Any person in any manner interested in the laying out and construction of the said toll road or highway may appear at the hearing of such petition, and the matter shall be tried as an issue of fact by the Municipal Board of Control, and no formal answer to the petition need be filed. The board may adjourn the hearing from time to time in its discretion. *The Municipal Board of Control shall determine whether or not the laying out, construction and operation of the toll road is in the public interest* and whether all the requirements of this Act have been substantially complied with and, if the Municipal Board of Control shall so find, it shall enter an order creating a municipal corporation and fixing the name of the same, giving it the name proposed in the petition unless, for good cause, it finds that some other name should be provided." (Emphasis supplied.)

Section 1 of the statute provided that not less than 10 persons were required to file a petition asking for the creation of the corporation.

Section 2 set out what the petition should contain, the required procedure for public hearing, and requirements of notice thereof.

Section 4 provided for election of board of commissioners of the corporation.

Section 5 provided for officers of the board of commissioners.

Section 7 conferred power of eminent domain on the corporation.

Section 8 provided corporation to be operated for benefit of public.

Section 9 conferred power to issue revenue bonds.

Section 10 exempted the bonds and notes from tax and exempted the property of the corporation from tax.

Section 11 gave State Highway and Public Works Commission right to acquire any toll road or highway constructed by the corporation and set out procedure therefor.

Justice Johnson, speaking for the Court, said that by Section 3 the Legislature had attempted to delegate to an administrative agency the crucial question whether a toll road or toll bridge in any given instance will be "in the public interest." With respect to that he said:

> "Manifestly, the power to determine whether the construction and operation of a toll road or toll bridge in any given instance will be 'in the public interest' is purely a legislative question to be resolved only in the exercise or *under the direction of legislative powers of guidance and control.* Yet, the statute attempts to confer on the Municipal Board of Control the naked, arbitrary power to make this determination, *without standards of legislative guidance of any kind,* thereby attempting to clothe the members of this administrative agency with apparent power in their unguided discretion to give or withhold the benefits of the law in any given case or cases." (Emphasis supplied.)

The Court held, therefore, that the statute was violative of Article II, Section 1, of the North Carolina Constitution, which section inhibits the General Assembly from delegating its legislative powers to any other department or body.

It seems obvious that the statute before the Court in that case, set out in some detail herein, contained absolutely no guides for the determination of whether the construction and operation of the toll road would be in the public interest.

We think the problem before the Court now is entirely different from the problem before the Court in the *Turnpike* case. In order to reach a determination of the problem, we look at the ordinance it-

self as did the Court in the *Turnpike* case. When we do so, important differences and distinctions are apparent.

Section 1-1 of Article I sets out the purpose of the ordinance as follows:

> "The zoning regulations and districts as herein set forth have been made in accordance with a comprehensive plan and are designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; and to facilitate the adequate provisions of transportation, water, sewerage, schools, parks and other public requirements. These regulations have been made with reasonable consideration, among other things, as to the character of each district and its peculiar suitability for particular uses and with a view to conserving the value of builders and encouraging the most appropriate use of land throughout the county. Further, these regulations have been made with reasonable consideration for the expansion and development of each municipality within the county so as to provide for their orderly growth and development."

Section 1-3 of Article I provides: "In order to achieve the purposes of this ordinance as set forth, Guilford County, outside the zoning jurisdiction of incorporated municipalities, is hereby divided into nine (9) districts with the designations and purposes as listed below:". Among the listed districts is "A-1 Agricultural District. Primarily for agricultural purposes with provisions for single family residences and mobile homes and two family residences on large lots."

Section 3-10 of Article III is entitled "Regulations Governing Mobile Home Parks". This section provides that "a mobile home park may be established as a special exception in certain districts as prescribed by Article IV of this ordinance subject to the following conditions:". There follow fourteen enumerated and detailed conditions, the last of which provides that "The Board of Adjustment may attach any other reasonable and appropriate conditions or requirements necessary to accomplish the purpose of this ordinance."

Article IV tabulates permitted uses within the various zoning districts. A permitted use in the A-1 Agricultural District is "Mobile home parks as a special exception, subject to the provisions of Section 6-13 B and operated in accordance with the provisions of Sec-

tion 3-10 and the Guilford County Board of Health's regulations relating to the establishment and operation of mobile home parks."

Section 5-1(A) of Article V describes A-1 Agricultural District as follows:

> "The A-1 Agricultural District is established as a district in which the principal use of land is for general agricultural purposes. In promoting the general purposes of this ordinance the specific intent of this Section is: to encourage the continued use of land for agricultural purposes; to prohibit scattered commercial and industrial uses of land; to prohibit any other use which would interfere with an integrated and efficient development of the land for more intensive use as the county population increases; and to discourage any use, which because of its character or size, would create unusual requirements and costs for providing public services, such as law enforcement, fire protection, water supply and sewage disposal before such services are generally needed."

Section 6-10 of Article VI establishes a Board of Adjustment consisting of five members and two alternate members to be appointed by the Guilford County Board of Commissioners. It provides for the term of office, filling vacancies, etc.

Section 6-13 of Article VI prescribes the powers and duties of the Board of Adjustment. Subsection A gives it the power of administrative review. Subsection B thereof is entitled "Special Exceptions: Conditions Governing Application Procedures" and is as follows:

> "To hear and decide only such special exceptions as the Board is specifically authorized to pass on by the terms of this ordinance: to decide such questions as are involved in determining whether special exceptions should be granted; and to grant special exceptions in accordance with the principles, conditions, safeguards, and procedures specified in this ordinance, or to deny special exceptions when not in harmony with the purpose and intent of this ordinance. A special exception shall not be granted by the Board unless and until;
>
> (1) A written application for a special exception is submitted, indicating the section of this ordinance under which the special exception is sought and stating the grounds upon which it is requested.
>
> (2) A public hearing is scheduled and duly advertised by posting on the property for which the special exception is sought and in the Guilford County Courthouse a notice indi-

cating the time and place of the public hearing and other necessary information. Such notice shall be posted at least fifteen (15) days prior to the public hearing.

(3) The public hearing shall be held. Any party may appear in person, or by agent or attorney.

(4) The Board shall make a finding that it is authorized and empowered to grant a special exception under the section of this ordinance described in the application and that the granting of the special exception will not adversely affect the public interest. Violation of any conditions or safeguards applied by the terms of this ordinance or by the Board of Adjustment, when such conditions and safeguards are made a part of the terms under which a special exception is granted, shall be deemed a violation of this ordinance. It is the intent of this ordinance that a special exception granted subject to a condition be permitted only so long as such condition is complied with. In the event that any such condition be held invalid, for any reason, such holding shall have the effect of invalidating the grant of the special exception and rendering it null and void. The Board shall prescribe a time limit within which the action for which the special exception is required shall be begun and/or completed. Failure to begin and/or complete such action within the prescribed time limit shall void the special exception."

Appellants argue that through use of the power to grant exceptions under the ordinance, the result could be the change of the entire zoning area and virtual abandonment of the ordinance by reason of allowing the Board of Adjustment to grant an exception without safeguards or standards.

[2, 3] It seems appropriate here to note that we are not dealing with a section of an ordinance permitting variances but a section providing a procedure for granting a special exception. The variance and exception are designed to meet two entirely different needs. The variance contemplates a departure from the terms of the ordinance and is authorized where the literal enforcement of its terms would result in unnecessary hardship. G.S. 153-266.17. The exception contemplates a permitted use when, under the terms of the ordinance, the prescribed conditions therefor are met. It is expressly permissible in a given zone or district and is granted after a public hearing and upon a finding that all the conditions of the ordinance pertaining thereto are satisfied. G.S. 153-266.17. *Krœmer v. Zoning Board of Review,* 98 R.I. 328, 201 A. 2d 643; *Stacy v. Montgomery Co.,* 239 Md. 189, 210 A. 2d 540.

"While a special permit may be granted only where it is authorized by the ordinance, and upon proof that the standards imposed by the ordinance have been met, the standards for the issuance of special permits and exceptions are usually less stringent than in the case of variances." Anderson, *American Law of Zoning,* § 1403.

A mobile home park is a use allowed by the Guilford County Zoning Ordinance. Requirements as to size of the mobile home lots, street requirements, number of parking spaces for automobiles, etc., are specifically set out in detail in Section 3-10. The ordinance provides that it is the duty of the Board of Adjustment to decide such questions as are involved in determining whether special exceptions shall be granted, and the Board is to grant special exceptions *"in accordance with the principles, conditions, safeguards, and procedures specified in this ordinance, or to deny special exceptions when not in harmony with the purpose and intent of this ordinance."* (Emphasis supplied.)

It is further provided that the Board shall make a finding that it is authorized and empowered to grant the exception and that such a grant "will not adversely affect the public interest."

A case in which this precise question has been discussed and decided by our Supreme Court has not been called to our attention. We do find that similar provisions in zoning ordinances have been passed upon by other states.

Florka v. City of Detroit, 369 Mich. 568, 120 N.W. 2d 797, involved an ordinance which allowed special exceptions in a business zone. It provided: "The following uses, or other uses similar thereto, subject to the approval of the commission as being not injurious to the surrounding neighborhood and not contrary to the spirit and purpose of this ordinance . . ." The question before the Court was whether that provision was unconstitutional as failing to provide sufficient standards by which the planning commission could be governed in passing upon an application. In upholding the validity of the provision, the Court said that the City of Detroit had the right to adopt reasonable zoning regulations. "In connection with the exercise of its legislative authority it had the right to delegate to administrative officers the determination of facts which should control the application of legislative provisions." The Court further said, "Clearly it was intended that the commission should proceed to determine whether the operation of the business sought to be carried on by virtue of a required permit would injuriously affect other properties and the owners and occupants thereof within the im-

mediate district. This involved consideration of the inherent nature of the proposed business, the means of operation thereof, the extent of operations contemplated, and other pertinent facts. Likewise, the requirement of a finding that any such business, in order to be approved, will be operated in accord with the general purpose and intent of the zoning ordinance necessitates careful consideration of the intended project and whether it will tend to serve the general welfare of the community or result to the prejudice thereof. Such standards are not inherently vague and uncertain but obviously require the ascertainment of facts and a determination as to whether the application shall be approved in accordance therewith."

In *Burnham v. Board of Appeals of Gloucester,* 333 Mass. 114, 128 N.E. 2d 772, the ordinance provision before the Court was: "No permit [for a motel] shall be granted by the Board of Appeals without considering the effects upon the neighborhood and the City at large." In holding the standard sufficient, the Court noted that zoning is a local matter, and weight must be accorded the judgment of the local legislative body, since it is familiar with local conditions. The Court recognized that the degree of certainty with which standards for the exercise of discretion must be set up will vary with the situation when it said: "It would have been difficult, if not impossible, to specify in what circumstances permits should be granted and in what circumstances denied. That would depend on numerous unforeseeable factors. The board was charged with the quasi judicial duty of considering the effect of the construction of a motel on the neighborhood and the city and to pass upon the application in each instance 'under the serious sense of responsibility imposed upon them by their official positions and the delicate character of the duty entrusted to them.' (citing cases) We do not think that greater particularity was required."

However, in *Clark v. Board of Appeals of Newbury,* 348 Mass. 408, 204 N.E. 2d 434, the Court held invalid that part of an ordinance providing "Commercial or industrial structures may be erected with permission of the Selectmen, but no permit shall be granted until by public hearing the Selectmen are assured that the proposed business or industry is for the best interests of the Town and not injurious or obnoxious to the neighboring properties" on the basis that no sufficient standards were given and the result would be to allow spot zoning which would directly contravene the basic objective of the enabling statute. This case is factually distinguishable from the *Burnham* case, *supra,* and does not overrule *Burnham.*

We recognize, of course, that an exhaustive discussion of both ap-

proved and disapproved standards would reveal overlappage which cannot be satisfactorily explained. Anderson, *American Law of Zoning,* § 15.09 (1968) suggests that "(t)here may be a trend toward more liberal construction of standards." Indicative thereof is the discussion by the Virginia Court in *Ours Properties, Inc. v. Ley,* 198 Va. 848, 96 S.E. 2d 754. The ordinance under consideration, in a list of special uses permitted in an M-1 zone, included ". . . and any other industrial establishment for which *satisfactory evidence* is presented that such establishment will not adversely affect any contiguous district through the dissemination of smoke, fumes, dust, odor, or noise or by reason of vibration and that such establishment will not result in any unusual danger of fire or explosion." It was argued that the term "satisfactory evidence" is so vague and indefinite that it did not furnish a sufficient standard to guide the inspector in exercising its discretion. The Court refused to strike down the provision saying that it is presumed that the ordinance is valid and that the public officials will discharge their duties honestly and in accordance with the law. The Court recognized that a legislative body does not sit continuously and that it is necessary to delegate discretionary power to an administrative agency so that it can determine some fact or state of things upon which the laws of the legislative body are to operate. "Although there is some conflict among the decisions, a majority of the courts hold that considerable freedom to exercise discretion and judgment must be accorded officials in charge under a zoning ordinance, and that the courts should be liberal in upholding such ordinances in order to facilitate their proper administration."

Our Court, in *Harden v. Raleigh,* 192 N.C. 395, 135 S.E. 151, in speaking of the Board of Adjustment under the Zoning Ordinance of the City of Raleigh, said: "It is evident, we think, that the board of adjustment is clothed, if not with judicial, at least with *quasi*-judicial power, it being its duty to investigate facts and from its investigation to draw conclusions as a basis of official action and to exercise discretion of a judicial nature. . . . Within the class of *quasi-judicial acts fall the board's conclusions as to whether the proposed building would be noxious or offensive or detrimental to the public safety or welfare by reason of its situation or the surrounding conditions;*". (Emphasis supplied.)

In *Lee v. Board of Adjustment,* 226 N.C. 107, 37 S.E. 2d 128, the action of the Board of Adjustment of Rocky Mount in granting a variance was before the Court. The Court reiterated that "(t)he board of adjustment authorized in the zoning statute, G.S. 160-178, is an administrative agency, acting in a *quasi*-judicial capacity.",

but in exercising its discretion, it must abide by the rules "provided by its charter — the local ordinance enacted in accord with and by permission of the State zoning law." Its determination must be " 'in harmony with their general purpose and intent and in accordance with general or specific rules therein contained,' G.S. 160-172, 'so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done.' G.S. 160-178; Baker, Legal Aspects of Zoning, 98; Bassett, Zoning, 131-132."

It is interesting to note that the language of G.S. 160-172 granting cities and towns the power to regulate by zoning and G.S. 153-266.10 granting the same power to boards of commissioners of counties are almost identical in phraseology as are G.S. 160-178 providing for a board of adjustment under a city ordinance and G.S. 153-266.17 providing for a board of adjustment under a county ordinance.

G.S. 153-266.17 provides: "The zoning ordinance may provide that the board of adjustment may permit special exceptions to the zoning regulations in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified in the ordinance."

[4, 5] It is manifest, therefore, that the Legislature may delegate to the Board of Adjustment, as a *quasi*-judicial body, the authority to determine facts and therefrom to draw conclusions as a basis of its official action. *Harden v. Raleigh, supra.* It is also manifest that a standard must be given to guide the board in its determination. Because of the very nature of zoning ordinances and the unforeseeable factors involved, this standard frequently must necessarily be general, requiring ascertainment of facts. *Florka v. City of Detroit, supra.* Further, in determining the sufficiency of the standard, the purpose and intent of the ordinance is to be considered. *Florka v. City of Detroit, supra.* See also *New York Central Securities Corp. v. United States of America,* 287 U.S. 12, 53 S. Ct. 45, 77 L. Ed. 138, where the question was the constitutionality of a clause in the Interstate Commerce Commission Act providing that the Commission could authorize the acquisition of control of one carrier by another if such an acquisition would be "in the public interest." To the argument that this was a vague and uncertain standard, the Supreme Court said: "It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary."

[1] Testing the provision here before us by these principles, we

are constrained to say that the standards are adequate and the provision valid. The purpose of the ordinance is clearly set out. The description of A-1 Agricultural District discourages "any use, which because of its character or size, would create unusual requirements and costs for providing public services, such as law enforcement, fire protection, water supply and sewage disposal before such services are generally needed." The ordinance clearly details the conditions to be met before a mobile home park can be granted for construction in that district. The Board of Adjustment is authorized and empowered: "to decide such questions as are involved in determining whether special exceptions should be granted, and to grant special exceptions in accordance with the principles, conditions, safeguards, and procedures specified in this ordinance, or to deny special exceptions when not in harmony with the purpose and intent of this ordinance." Based on facts found by it in accordance with these standards the Board is directed, as a condition of granting an exception, to make a finding that the grant "will not adversely affect the public interest." In our opinion this is in keeping with the statutory authority given by G.S. 153-266.17: "The zoning ordinance may provide that the board of adjustment may permit special exceptions to the zoning regulations in classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified in the ordinance." In our view of the case, it does not come within the rationale of the *Turnpike* case, where there were no standards of any kind in the statute delegating the authority.

It would be difficult, if not impossible, to designate in minute detail in what circumstances exceptions should be granted and in what circumstances denied. That would depend on a great many unforeseeable factors. The Board of Adjustment is charged with discouraging in an A-1 Agricultural District any use which would create unusual requirements and costs for providing public services, such as law enforcement, fire protection, water supply and sewage disposal before such services are generally needed. It is instructed, in determining whether a special exception should be granted, to grant an exception in accordance with the principles, conditions, safeguards, and procedures specified in the ordinance and to deny an exception when not in harmony with the purpose and intent of the ordinance, and to find as a fact that the grant will not adversely affect the public interest before granting an exception. We do not think any greater particularity is required.

Appellants also stressfully contend that the trial court erred in finding as a fact that there was sufficient evidence before the Board of Adjustment to support a finding that granting the special excep-

tion applied for would not adversely affect the public interest, and they rely on *Jarrell v. Board of Adjustment,* 258 N.C. 476, 128 S.E. 2d 879.

[6] The statute, G.S. Art. 20, Ch. 153, under which the county commissioners of Guilford County adopted the Guilford County Zoning Ordinance, provides that every decision of the Board of Adjustment "shall be subject to review by the superior court by proceedings in the nature of certiorari." G.S. 153-266.17. *Durham County v. Addison,* 262 N.C. 280, 136 S.E. 2d 600. The writ thus permitted is a writ to bring the matter before the court upon the evidence presented by the record itself for review of alleged errors of law. *Lee v. Board of Adjustment, supra; In re Pine Hill Cemeteries, Inc.,* 219 N.C. 735, 15 S.E. 2d 1.

> "The decisions of the board are final, subject to the right of the courts to review errors in law and to give relief against its orders which are arbitrary, oppressive, or attended with manifest abuse of authority. (citing cases)" *Lee v. Board of Adjustment, supra,* at 109. See also *Durham County v. Addison, supra; Yancey v. Heafner,* 268 N.C. 263, 150 S.E. 2d 440.

The *Jarrell* decision is discussed and explained in *Craver v. Board of Adjustment,* 267 N.C. 40, 147 S.E. 2d 599, thusly:

> ". . . In *Jarrell* the zoning board was required to find as a fact whether on the day the zoning ordinance became effective the petitioner's property was in use as a one family or as a two family unit — if a two family unit, the owner had the right to continue its use as such — if a one family unit the owner was in violation of the ordinance by using it for two families. The dispute presented a question of fact. The finding involved a property right. The courts are bound by the findings if supported by competent, material, and substantial evidence. Obviously, when material findings of fact must be made on conflicting testimony witnesses should be sworn. To that end G.S. 160-178 authorizes the chairman or acting chairman of the board 'to administer oaths to the witnesses in any matter coming before the board.'"

[7] Here the record clearly shows that all witnesses at both hearings were sworn. Here, as was the case in *Craver,* the petition is one addressed to the discretion of the Board of Adjustment.

The evidence presented to the Board of Adjustment appears in the record in the minutes of the meetings. These minutes include in narrative form the testimony of the persons appearing before the Board of Adjustment and statements made by counsel for the appli-

cant and counsel for the protestants, appellants here. We have carefully examined the record.

Our examination of the evidence submitted to the Board of Adjustment discloses sufficient evidence to support its findings. Based on the evidence, the Board could have found the facts as contended by applicant or contrary thereto. In this situation its findings are conclusive. *In re Appeal of Hastings,* 252 N.C. 327, 113 S.E. 2d 433.

The trial court was correct in sustaining the Board's order granting the exception.

Affirmed.

MALLARD, C.J., and CAMPBELL, J., concur.

IN THE MATTER OF THE ESTATE OF HARVEY NIXON, DECEASED

No. 68SC52

(Filed 25 September 1968)

1. Clerks of Court § 2; Escheats; Courts § 6— proceeding to recover funds paid by clerk to University as escheated property — jurisdiction of clerk — jurisdiction of Superior Court upon appeal from clerk

Funds from a partition sale of real property of a decedent were paid into the office of the clerk of Superior Court under G.S. 46-34 to be held for certain tenants in common whose whereabouts were then unknown, and the clerk thereafter voluntarily paid the funds as escheated property to the University of North Carolina. The descendants of the persons for whom the clerk originally held the funds instituted a proceeding before the clerk to have the funds returned for distribution to them, the University being made a party and filing an answer claiming the right to retain the funds. *Held:* The clerk had no jurisdiction either to order the University to return the funds to him for distribution to petitioners or to adjudicate that the University had a right to retain them, the relief sought by the parties being obtainable only by a civil action; however, upon purported appeal by petitioners to the Superior Court from the clerk's order finding in favor of the University, the parties having waived jury trial, the judge was empowered to hear and determine all aspects of the case. G.S. 1-276.

2. Escheats— when real property escheats

Real property escheats to the University under G.S. 116-20 only when the owner dies intestate or dies testate without disposing of the same by will and without leaving surviving any heir, kindred or spouse to inherit under the laws of this State.

3. Escheats— unclaimed personalty — just claims by parties entitled thereto

Unclaimed personalty which is paid to the University of North Carolina under G.S. 116-22 or G.S. 116-23 may be held by the University without liability for profit or interest thereon, but subject to any just claims by parties entitled thereto.

4. Escheats— just claim for unclaimed property paid to University

In an action to recover from the University of North Carolina funds originally held by the clerk of Superior Court under G.S. 46-34 for persons whose whereabouts were unknown, the clerk having voluntarily paid the funds as escheated property to the University, a just claim for the funds has been presented where it is stipulated that petitioners are the descendants and legal successors in interest to the persons for whom the clerk originally held the funds.

5. Clerks of Court § 12; Partition § 9; Limitation of Actions §§ 4, 8 — liability of clerk for funds held under G.S. 46-34 — statute of limitations

Where the clerk of Superior Court receives funds under court order pursuant to G.S. 46-34 to hold for persons whose whereabouts are unknown, he remains liable to account for these funds to the persons entitled thereto as long as the funds remain in his possession, and no statute of limitations applies to bar an action by the beneficiaries for whose account he holds the funds until they have made demand upon him for the funds and the clerk has refused to honor their demand.

6. Escheats; Limitation of Actions § 4— action to recover unclaimed property paid to University — statute of limitations

No statute of limitations applies to bar an action against the University of North Carolina by persons asserting a just claim for property theretofore paid to the University under statutes relating to the disposition of unclaimed property until there has been a demand and refusal to pay.

APPEAL by respondent from *McLean, J.*, September 1967 Session of LINCOLN Superior Court.

This proceeding was commenced on 20 April 1967 by petition filed with the Clerk of Superior Court of Lincoln County, North Carolina. Petitioners allege that they are the descendants of certain persons for whose account funds had theretofore been paid into the office of said clerk under G.S. 46-34 in connection with the sale of lands of Harvey Nixon, deceased; that these funds had been thereafter paid by the clerk as escheated property to the University of North Carolina; and that the University is a necessary party to these proceedings. On these allegations petitioners prayed for an order that the escheated funds be returned to the court to be distributed to petitioners as the persons lawfully entitled thereto. Summons was served upon the Escheats Officer of the University. The

University, respondent herein, filed answer to the petition in which it denied knowledge or information as to the relationship between petitioners and the persons for whom the escheated funds had theretofore been held and by way of further answer claimed title to said funds under G.S. 116-20. As alternative defenses the respondent pleaded the statute of limitations, G.S. 1-52(2), and that petitioners were barred by previous proceedings in the estate of Harvey Nixon, deceased.

The facts, as established by the pleadings, by stipulations of the parties, and as found by the trial judge, are as follows: Harvey Nixon died intestate on 22 December 1947, a resident of Lincoln County, N. C., and the owner of lands in Lincoln and Catawba Counties, N. C. He left no widow or lineal descendants surviving. On 10 November 1954, the administrator of his estate joined with certain of his heirs in filing a petition in a special proceeding before the Clerk of Superior Court of Lincoln County to sell for partition the real property belonging to the deceased. In this petition the administrator alleged that the estate had not been fully administered, that the personalty was insufficient to pay debts, that a sale of real property was necessary to make assets, and that the administrator joined in the petition pursuant to G.S. 28-83. This petition set forth in extensive detail the names, relationships, and the respective interests in the lands of a large number of persons who were alleged to be heirs of the decedent and who were alleged to be tenants in common of his real property. Summons in the partition proceeding was personally served upon certain of the heirs and service by publication was effected on the heirs named in the petition but who were not found and upon heirs whose names were not known. A guardian *ad litem* was appointed to represent all parties in interest upon whom personal service had not been effected. On 25 May 1956 the clerk entered an order, which was approved by the presiding superior court judge, appointing two commissioners to sell the lands described in the petition, to pay all expenses of the sale, and to hold the net proceeds subject to the further orders of the court. On 22 December 1958 the clerk entered an order, which was approved by the resident judge of the Twenty-seventh Judicial District, which recited that all expenses of sale, and all debts, costs of administration, and taxes of the Harvey Nixon estate had been paid in full, and that after such payments the commissioners had on hand the sum of $136,342.92 for distribution among the tenants in common. Attached to this order was an exhibit consisting of 56 pages listing the parties entitled to share in the distribution and giving the amount due to each. The order directed the commissioners to make distribution among the

tenants in common as shown on the exhibit, except as to certain heirs whose whereabouts were unknown. As to these latter, the order provided as follows:

> "(d) That all amounts due the tenants in common listed in Group 1 through 7 on pages 1 and 2 of Exhibit A and pages 29 and 30 of Exhibit A, totalling $43,821.29 shall be paid by said Commissioners to the Clerk of Superior Court for Lincoln County, N. C., to be held by said Clerk of Superior Court for Lincoln County, N. C., in accordance with law, since said Commissioners do not know of their own knowledge the whereabouts of said heirs and have reason to believe that they or their descendants are alive, said amounts to be paid into the possession of the Clerk of Superior Court for Lincoln County, N. C., under the provisions of Section 46-34 of the General Statutes of North Carolina; that the sums so paid to the Clerk of Superior Court for Lincoln County, N. C., shall be held as a separate fund and shall not be commingled with other funds and any funds not distributed within 60 days of receipt shall be invested by said Clerk of Superior Court for Lincoln County, North Carolina, in any investment or investments set forth in North Carolina General Statutes, Section 2-55(a) through (f)."

The persons listed in groups 1 through 7 of the exhibit which was attached to the order were Loyd, William, and Adeline Edwards, the children of Elizabeth Nixon Edwards, and Monroe, John, Sarah, and Caroline Edwards, the children of Margaret Nixon Edwards. Elizabeth Nixon Edwards and Margaret Nixon Edwards were in turn descendants of a common ancestor of the decedent, Harvey Nixon. Pursuant to this order the commissioners paid into the office of the Clerk of Superior Court of Lincoln County the sum of $43,821.29, which sum was deposited by the clerk at interest in savings institutions in Lincoln County in separate accounts. The clerk maintained separate ledgers in his Trust and Estate Account Book, showing that the funds were being held in separate accounts for the benefit of the named beneficiaries or their heirs, being the persons listed in groups 1 through 7 on the exhibit and as referred to in paragraph (d) of the order of 22 December 1958. The funds remained on deposit at interest in the accounts as so established by the clerk until 8 March 1966, when the clerk on his own motion paid the entire amount, which with accumulated interest amounted to $56,377.60, to the Escheats Officer of the University of North Carolina.

The present proceeding came on for hearing before the Clerk of Superior Court of Lincoln County on 26 May 1967, at which time

the petitioners and the respondent, the University of North Carolina, were represented by their respective attorneys. After hearing evidence, the clerk requested both parties to file briefs. Thereafter on 23 June 1967 the clerk entered an order in which he found that the funds in question had escheated to the University of North Carolina, that he was without authority to make the requested determination and distribution of the funds, and accordingly he denied the relief prayed for by petitioners. On 26 June 1967 the clerk signed an appeal entry reciting that the petitioners, through their attorneys, had in open court given notice of appeal to the superior court.

The matter came on for hearing before the judge presiding at the September 1967 Session of the Superior Court of Lincoln County, at which time the attorney for the respondent moved to dismiss the appeal on the grounds that no notice of the appeal had been given as required by G.S. 1-272. This motion was overruled. The parties then waived a jury trial and entered into a stipulation as to the facts relative to the payment of the funds by the commissioners into the office of the clerk of superior court pursuant to the order of 22 December 1958 and the subsequent payment of such funds with accumulated interest made on 8 March 1966 by the clerk to the Escheats Officer of the University, as hereinabove recited. In this stipulation the parties also stipulated and agreed that the children born of the marriages of Elizabeth Nixon Edwards and her husband, and Margaret Nixon Edwards and her husband, and their descendants are as described in the petition filed 20 April 1967. Based on these stipulations, the admissions in the pleadings, and the public records in the office of the Clerk of Superior Court of Lincoln County relating to the proceedings for sale of the real properties of Harvey Nixon, deceased, the judge of superior court entered an order making extensive findings of fact. On these findings he concluded that the funds in question were legally due to the heirs as named in the petition, and accordingly entered judgment setting aside the order theretofore entered by the clerk and directed the Escheats Officer of the University to transmit forthwith the amount of $56,377.60 to the Clerk of Superior Court of Lincoln County to be distributed by him to the petitioners. From this order the respondent, University of North Carolina, appeals.

John R. Friday and W. H. Childs, Sr., for petitioner appellees.

Attorney General T. W. Bruton, Staff Attorneys (Mrs.) Christine Y. Denson and Andrew A. Vanore, Jr., for respondent appellant.

PARKER, J.

[1] While the question has not been raised by either petitioners or respondent, in our view the clerk of superior court had no jurisdiction to hear or determine the matters presented by the petition and answer filed in this case. While the pleadings were entitled "In The Matter of The Estate of Harvey Nixon, Deceased," administration of that estate had long since been closed. The funds which were the subject matter of this proceeding had been received by the clerk in 1958 from commissioners appointed in a partitioning proceeding to sell lands of tenants in common, and these funds had for a time been held by him as the separate property of certain of the tenants in common, the children of Elizabeth Nixon Edwards and of Margaret Nixon Edwards, whose exact identities and whereabouts were not then known. More than two years prior to the filing of the petition presently before us these funds had been voluntarily paid by the clerk into the Escheats Office of the University and after such payment the funds in question were no longer under the control or jurisdiction of the clerk. Therefore neither the probate jurisdiction vested by statute in the clerk of superior court nor the jurisdiction granted the clerk over special proceedings for partitioning of real property among tenants in common could any longer be invoked to support the clerk's jurisdiction in this matter. Under the circumstances the clerk had no power either to order the University to return the funds to him to be distributed among the petitioners, as petitioners requested, or to adjudicate that the University had the legal right to retain them, as prayed for by respondent. In our opinion the relief sought by the parties could only have been obtained in a civil action. However, when the matter did in fact come before the judge of the superior court, the judge had jurisdiction, G.S. 1-276, and when the parties waived jury trial, the judge was fully empowered to hear and determine all aspects of the case. We therefore find it unnecessary to pass upon respondent's assignment of error directed to the judge's action in overruling its motion to dismiss the petitioners' appeal from the clerk on the grounds that notice of appeal had not been properly given.

[2] Respondent's principal assignment of error is directed to the trial judge's entry of judgment holding that petitioners are entitled to the funds here in question. Respondent contends that these funds, having been derived from sale of real properties which belonged to Harvey Nixon at the time of his death in 1947, retained their character as realty and has escheated to the University under G.S. 116-20 as of the date of Nixon's death. Real property escheats only when the owner dies intestate or dies testate without disposing of the same

by will and without leaving surviving any heir, kindred or spouse to inherit under the laws of this State. Such a situation did not exist in the present case. Quite to the contrary, Harvey Nixon left numerous heirs, many of whom became parties to the partitioning proceeding brought in 1954 for sale of his real property. Attached to the judgment entered in that proceeding on 22 December 1958 was an exhibit containing 56 pages listing the Nixon heirs. The existence of only one known heir capable of succeeding to title to his property would have prevented an escheat.

[3, 4] Alternatively, respondent contends it became entitled to the funds here in question under the provisions of G.S. 116-22 and G.S. 116-23. Those sections deal with the disposition of unclaimed personal property and provide that in certain cases covered by the statute such unclaimed personal property shall be paid to the University and the University is authorized to bring suit to recover the same. While these sections have been amended in some respects in the years since Harvey Nixon's death, throughout the entire period following his death and to the present time these statutes have provided that the University might hold such unclaimed funds and personal property without liability for profit or interest thereon, but subject to any just claims by parties entitled thereto. In this case, the funds were paid to the clerk of superior court under the order of 22 December 1958 to be held by him for the account of certain named individuals. He did so hold them until 8 March 1966, when he paid the funds to the University. The present petitioners now appear and assert they are the descendants and legal successors in interest to the named persons for whom the clerk originally held the funds. Respondent University has formally stipulated that such is the case. Petitioners have presented a just claim for the funds.

[5, 6] Nor is the present action barred by the three-year statute of limitations, G.S. 1-52(2), as respondent contends. That section provides that the three-year statute of limitations shall apply to an action "upon a liability created by statute, other than a penalty or forfeiture, unless some other time is mentioned in the statute creating it." Respondent's contention is that this statute would have served to bar an action by petitioners against the clerk of the superior court, who held the funds in his possession for more than three years without an action being brought against him to recover the same, and that the action being thus barred against the clerk is also barred as against respondent University. This argument ignores the fact that the clerk's liability in this case was not created by statute but arose simply because he received certain funds under an

order of court which directed he hold the same for the benefit of named individuals. The clerk remained liable to account for these funds to the persons entitled thereto so long as the funds remained in his possession, and no statute of limitations would apply to bar an action by the beneficiaries for whose account he held the funds until they had made demand upon him and he had refused to honor the same. Similarly, no statute of limitation now applies to bar an action against the University by persons asserting a just claim for the funds until there has been a demand and refusal to pay. It should be noted that prior to 1947 G.S. 116-22 and G.S. 116-23 provided that if no claim was preferred within ten years after unclaimed property was received by the University, then such property was to be held by the University absolutely. This language was expressly stricken by Chapter 614 of the 1947 Session Laws. This Act evidenced a clear legislative intent, and we so hold, that lapse of time alone, absent a demand and refusal to pay, will not forfeit a just claim to recover property theretofore paid to the University under our statutes relating to the disposition of unclaimed property. In view of this holding, we find respondent's remaining assignments of error to be without merit.

The judgment appealed from is

Affirmed.

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

CITY OF CHARLOTTE, A MUNICIPAL CORPORATION v. F. GELDER ROBINSON; GORDON A. ROBINSON AND WIFE, DOROTHY L. ROBINSON; J. RUSSELL ROBINSON; NORTH CAROLINA NATIONAL BANK, SUCCESSOR TRUSTEE; AND JOSEPH E. JOHNSTON, CESTUI QUE HOLDER

No. 67SC6

(Filed 25 September 1968)

1. Eminent Domain § 7; Injunctions §§ 7, 13— G.S. Ch. 136 condemnation — failure to allege prior good faith negotiations — injunction to prevent taking

In an action by the City of Charlotte to condemn property for widening a street, the City being authorized by its charter to use the procedure prescribed in G.S. Chapter 136, Article 9, for condemning such property, a complaint which contains the allegations required by G.S. 136-103 but which fails to allege an attempt by the City to acquire the property by prior good faith negotiations *is held* to allege a defective statement of a

good cause of action, such negotiations being a condition precedent to the exercise of the power of eminent domain by the city; consequently, defendants, having aptly raised in their answer the question of plaintiff's failure to plead such negotiations, are entitled to an order restraining the City from taking their property.

2. Eminent Domain § 7— condemnation of entire building severed by street right of way

Chapter 740, Session Laws of 1967, which authorizes the City of Charlotte to condemn an entire building when it is severed by a street right of way but which by proviso states that "nothing herein contained shall be deemed to give the City authority to condemn the underlying fee of the portion of any building or structure which lies outside the right of way of any existing or proposed public road, street or highway," does not prevent the condemnation of property needed to widen an existing street where such property is covered by any portion of a building, the proviso operating merely to make it clear that the City is not given authority to condemn the underlying fee to the portion of a building lying outside a proposed right of way although it may condemn that portion of the building itself.

APPEAL by defendants from *Ervin, J.*, at the 9 October 1967 Schedule D Civil Session of MECKLENBURG Superior Court.

This is a civil action brought in the Superior Court of Mecklenburg County by the City of Charlotte to condemn a portion of defendants' land for widening Sixth Street in said City. Defendants are owners or lien holders of a lot located at the northeast corner of the intersection of North Tryon Street and East Sixth Street in Charlotte. The lot fronts 46 feet 3 inches on North Tryon Street and 80 feet on East Sixth Street and is covered by a brick store building. Plaintiff filed its Complaint and Declaration of Taking and deposited with the court the sum estimated by plaintiff to be just compensation for the taking. Paragraphs 5 and 6 of the Complaint are as follows:

"5. Section 7.81, Chapter 713 of the 1965 Session Laws of North Carolina, as amended by Chapter 216, Session Laws of 1967, a copy of which Section is set forth in Exhibit 'C' attached hereto, authorizes the City of Charlotte to follow the condemnation procedure prescribed for the State Highway Commission in Chapter 136 of the General Statutes of North Carolina.

"6. Pursuant to the authority vested in the plaintiff under the provisions of G.S. 160-200(1), G.S. 160-204, G.S. 160-205, and G.S. 136-103 et seq., the City Council of the City of Charlotte on July 3, 1967, determined that it is necessary to condemn and appropriate the fee simple estate in the property described in Exhibit 'B', for public use in the construction of the Sixth Street Improvement Project No. 513-66-397. The estate

and the area appropriated are described in Exhibit 'B' attached hereto."

The Complaint and Declaration of Taking also have attached as exhibits the allegations and statements substantially as listed in G.S. 136-103. The description of the property acquired as attached to the Original Complaint described a strip of land at the intersection of the two streets and fronting 18 feet on North Tryon Street and running the full distance of defendants' property on East Sixth Street. Subsequently plaintiff amended the description of the property acquired to include, in addition to the 18-foot strip of land, all right, title and interest in the entire building on defendants' entire lot, with the right to enter upon the surrounding land "for the purpose of removing said structure pursuant to the authority vested in the plaintiff under the provisions of Chapter 740, Session Laws of 1967."

Defendants filed answer in which they deny plaintiff's allegations relative to the determination by the Charlotte City Council of the necessity to condemn defendants' property for the purposes stated, and in a further answer defendants allege that plaintiff has no right to condemn defendants' land "for the reason that the Plaintiff has made no allegations in its Complaint that it has undertaken to purchase said land or any part thereof, in good faith, from these answering Defendants," and on the further ground that plaintiff in this action is not undertaking to condemn the land of the defendants for any "proposed public street." Defendants ask that their answer be considered as an affidavit in the application by them for an order restraining plaintiff from taking defendants' property pending the final outcome of the case.

On 20 September 1967 Judge Snepp entered an order directing that the plaintiff appear before the judge of the superior court at the session beginning 9 October 1967 and show cause why plaintiff should not be restrained from proceeding with the condemnation of defendants' land. Pursuant to this order the matter came on for hearing before Judge Ervin, judge presiding at the 9 October 1967 Schedule D Term of the Superior Court for Mecklenburg County. After hearing, Judge Ervin entered an order on 12 October 1967 in which he made the following findings of fact:

"1. The said property taken by Plaintiff in this condemnation action is outside of the present existing Sixth Street, but within the proposed right-of-way for widening Sixth Street.

"2. That Plaintiff by the same condemnation action has taken, in its entirety, a building located in part upon the realty condemned and in part, upon a remaining portion of Defend-

ants' property, which is outside the right-of-way of the proposed widened portion of Sixth Street; and which said property has not been taken or appropriated by Plaintiff; that Plaintiff has proceeded with this condemnation action pursuant to Chapter 740, Session Laws of 1967, which is an act authorizing the City to acquire an entire structure when such structure is severed by street right-of-way, but which does not require the City to take and pay for the land from which such structure is removed beyond its proposed right-of-way for widening the street."

Based on these findings of fact, the judge concluded as a matter of law that the plaintiff may acquire by condemnation the defendants' building, and that Section 136-103 of the General Statutes and the procedure outlined thereunder do not require plaintiff to allege in its Complaint or Declaration of Taking that it has undertaken to purchase the land or had negotiated in good faith for the purchase of the land. Judge Ervin's order then provided:

"It is the opinion of the Court that the temporary restraining order restraining and enjoining Plaintiff from proceeding further with this condemnation action, and from tearing down and demolishing the building of Defendants, should be dissolved, but it shall remain in effect pending Defendants' appeal to the North Carolina Supreme Court, and the decision of that Court."

Defendants excepted and appealed, making as their only assignment of error the entry of the foregoing order.

W. A. Watts for plaintiff appellee.

Hugh M. McAulay and J. C. Sedberry for defendant appellants.

PARKER, J.

As far as the record before us discloses no restraining order has ever been entered in this case. However, since the order appealed from apparently assumed that one had been entered and the parties in their briefs and arguments before us have treated the matter as though a restraining order is in effect pending a final determination of this appeal, we have also so considered the matter.

[1] Appellants' first contention is that the Complaint is insufficient in that it fails to allege that plaintiff has made prior good faith efforts to acquire the land sought to be condemned by negotiated purchase from the defendants, citing such cases as *Hertford v. Harris,* 263 N.C. 776, 140 S.E. 2d 420; *Kistler v. Raleigh,* 261 N.C. 775, 136 S.E. 2d 78; and *Winston-Salem v. Ashby,* 194 N.C. 388, 139 S.E. 764.

Plaintiff City concedes that if the source of its authority to condemn should be the Municipal Corporations Act, G.S., Chap. 160, and particularly G.S. 160-205, or if it should be found in G.S., Chap. 40, entitled "Eminent Domain," then under the above-cited cases and many others handed down by the North Carolina Supreme Court, prior good faith negotiation is a prerequisite before the City could institute valid condemnation proceedings. The City contends, however, that allegation and proof of its prior good faith attempts to acquire the property by purchase is not required of it in the present case for the reason that the source of its authority to condemn is not found in the general law but in the express grant of that power in its City Charter; that this Charter provision makes no such requirement, but on the contrary expressly authorizes the City, in the exercise of its authority of eminent domain for the acquisition of property to be used for streets, to use the procedure and authority prescribed in G.S., Chap. 136, Art. 9. In paragraph 5 of the Complaint, plaintiff referred to Section 7.81 of the Charter of the City of Charlotte and attached as an exhibit to its Complaint a copy of this Section, which reads in part as follows:

> "Section 7.81, Powers and Procedures. . . . In the exercise of the power of eminent domain, the city is hereby vested with all power and authority now or hereafter granted by the laws of North Carolina applicable to the City of Charlotte, and the City shall follow the procedures now or hereafter prescribed by said laws; provided, that in the exercise of its authority of eminent domain for the acquisition of property to be used for streets and highways and water and sewer facilities, the City of Charlotte is hereby authorized to use the procedure and authority prescribed in Article 9 of Chapter 136 of the General Statutes of North Carolina, as now or hereafter amended; . . ."

Contrary to its present argument, plaintiff alleged in paragraph 6 of its Complaint that the City Council of the City of Charlotte had determined that it is necessary to condemn defendants' property "(p)ursuant to the authority vested in the plaintiff under the provisions of G.S. 160-200(1), G.S. 160-204, G.S. 160-205, G.S. 136-103 et seq. . . ." Plaintiff concedes that if the source of its authority to condemn should be found solely in the first three of the cited Sections, which are embodied in the general Municipal Corporation Act, it would have been necessary for its Complaint to contain an allegation that prior to commencing condemnation proceedings it had negotiated in good faith to acquire defendants' property by purchase and that it had been unable to reach agreement with defendants. Plaintiff contends, however, that by Section 7.81 of its

Charter it is entitled to utilize the procedures set forth in G.S. 136-103, that it has done so in this case, and that the last cited Section expressly sets forth the allegations which must be contained in the Complaint and that this Section does not require any allegation relative to prior good faith attempts to acquire the property of the defendants by negotiated purchase.

We considered a similar contention in the case of *Highway Commission v. Matthis,* 2 N.C. App. 233, 163 S.E. 2d 35, decided by this Court 18 September 1968. In that case we held that since the effective date of G.S. 136-103 an allegation of prior good faith attempts to acquire the property by negotiation is not required in a condemnation complaint filed by the *State Highway Commission* in order to show jurisdiction, but that absent such an allegation a complaint otherwise containing the express allegations required by G.S. 136-103 would allege a defective statement of a good cause of action. In that case we held that the defendants having failed to raise the objection by demurrer or other appropriate means, having admitted in their answer the plaintiff's authority and power to condemn, and having accepted the benefit of the statute by drawing down the funds deposited with the clerk of superior court as estimated fair compensation of their property, could not later raise the question. In the case presently before us, however, the defendants have expressly raised the question in apt time and in an appropriate manner. Therefore, consistent with our holding in *Highway Commission v. Matthis, supra,* we now hold that the Complaint in the present action contains a defective statement of an otherwise good cause of action by reason of its failure to contain any allegation of an attempt to acquire the property by prior good faith negotiations. This was a condition precedent to its having authority to exercise the power of eminent domain. Absent that allegation in the Complaint defendants are entitled to an order restraining plaintiff from taking their property. The plaintiff should be given an opportunity to amend its Complaint if it should feel so advised.

[2] Defendants also contend that the plaintiff is prevented from maintaining this action by the express language of the proviso in Chapter 740 of the Session Laws of 1967. This Chapter is entitled "An Act To Authorize The City of Charlotte To Acquire An Entire Structure When It Is Severed By Street Right Of Way," and provides in part as follows:

> "Section 1. Where the proposed right of way of a street or highway necessitates the taking of a portion of a building or structure, the City of Charlotte may acquire, by condemnation

or purchase, the entire building or structure, together with the right to enter upon the surrounding land for the purpose of removing the building or structure. Provided, the City must make a determination based upon an affidavit of an independent real estate appraiser that the partial taking will substantially destroy the economic value or utility of the building or structure and a determination either

"(1) that an economy in the expenditure of public funds will be promoted thereby; or

"(2) that it is not feasible to cut off a portion of the building without destroying the entire building; or

"(3) that the convenience, safety or improvement of the street or highway will be promoted thereby;

"Provided, further, nothing herein contained shall be deemed to give the City authority to condemn the underlying fee of the portion of any building or structure which lies outside the right of way of any existing or proposed public road, street or highway."

Defendants contend that since Sixth Street in the City of Charlotte is an existing street and since the 18-foot strip of land here sought to be condemned lies outside of the right-of-way of Sixth Street *as it presently exists,* the proviso in the statute operates to prevent the City from condemning the underlying fee to the 18-foot strip needed to widen Sixth Street. So interpreted, the proviso would prevent the condemnation of any property needed to widen any existing street where the property in question is covered by any portion of a building or structure. We do not believe the Legislature intended any such result. Chapter 740 is an enabling Act. Without its enactment the City had full authority to condemn the 18-foot strip which will be within the proposed right-of-way of the widened Sixth Street. Chapter 740 merely clarifies the City's authority to condemn, *in addition,* the building located on the entire lot of which the 18-foot strip is a part. The proviso was included to show that the grant of authority to condemn the entire building did not extend to permit condemnation of the *underlying fee* to the portion of the building situated over that part of defendants' lot *outside* of the 18-foot strip. The proviso does not operate, as defendants contend, to deny the City power to widen rights-of-way of existing streets bordered by buildings. To so construe the proviso would defeat the very purpose of the statute and choke the future development of the City. In order to utilize the 18-foot strip which plaintiff here seeks to condemn for street purposes, it is necessary that the entire building on

the entire lot of which the 18-foot strip is a part be demolished. We hold that the plaintiff City is authorized by Chapter 740 of the Session Laws of 1967 to proceed to condemn the entire building, and the proviso in the statute operates merely to make it clear that the City is not given authority to condemn the underlying fee outside of the 18-foot strip, which in any event the City is not here attempting to do.

This case is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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

STATE AND COUNTY OF BLADEN, NORTH CAROLINA, EX REL DONALD LEE PARKER, ADMINISTRATOR OF THE ESTATE OF KATHRYN ANN PARKER, DECEASED v. JOHN B. ALLEN, LEROY REGISTER, BROADUS HESTER, CHARLIE YARBOROUGH, AND UNITED STATES FIDELITY AND GUARANTY COMPANY

No. 6813SC361

(Filed 25 September 1968)

1. **Death § 3— wrongful death action — nonsuit for contributory negligence as a matter of law**

A judgment of nonsuit may not be entered in an action for wrongful death on the ground of deceased's contributory negligence unless the plaintiff administrator's evidence, considered in the light most favorable to him, so clearly establishes that negligence by the deceased was one of the proximate causes of the collision as to admit of no other reasonable conclusion.

2. **Automobiles § 76— nonsuit on ground of contributory negligence in hitting stopped vehicle**

In an action for wrongful death, plaintiff administrator's evidence discloses contributory negligence by the deceased as a matter of law in hitting a stopped vehicle where the evidence tends to show (1) that the deceased was following a truck-trailer in a northerly direction for a distance of at least three miles on a clear day, (2) that as the driver of the truck-trailer approached a bridge he saw the sheriff's car parked on the right shoulder of the road a short distance south of the bridge and the three defendant officers seated on the left rail of the bridge, (3) that as the truck-trailer went over the bridge at a decreasing rate of speed a deputy sheriff told the driver to stop, which he did, and that the car driven by the deceased hit the rear of the trailer, (4) and that the deceased had a clear and unobstructed view for at least one-half mile before she reached the point of collision.

PARKER *v.* ALLEN

APPEAL by plaintiff administrator from *Clark, J.*, May 1968 Civil Session BLADEN Superior Court.

This is a civil action to recover damages for the wrongful death of Kathryn Ann Parker. The action is brought by the administrator of her estate against the Sheriff and three deputies sheriff of Bladen County, together with their bonding company. Appropriate permission was obtained from the Attorney General to bring the action in the name of the State and County of Bladen on the relation of the plaintiff administrator.

In his amended complaint, plaintiff administrator alleges that on 11 March 1966 at about 5:25 p.m., his intestate received injuries, from which she later died, as the result of a collision between a Ford automobile she was driving and a Mack truck and trailer stopped on the Cape Fear River Bridge on N. C. Highway 141 in Bladen County.

The complaint alleges that plaintiff's intestate was operating the Ford northwardly on Highway 141; that as she entered onto the Cape Fear River Bridge, the truck and trailer, driven by one Highsmith and proceeding ahead of intestate in the same direction and while on said bridge, was abruptly stopped by the three defendants-deputies sheriff, without any signal or warning to intestate by said deputies or the driver of the truck, causing said intestate to run into the rear of said trailer.

The bonds executed by defendant United States Fidelity and Guaranty Company were introduced in evidence. Each bond contains a paragraph reading as follows: "The condition of this obligation is such, that if the Principal [name of sheriff or deputy sheriff] shall well and faithfully perform the duties of his office, then this obligation shall be void, otherwise to remain in full force and effect."

Plaintiff administrator alleged that the collision was caused by the negligence of the three deputies sheriff in causing the driver of the truck-trailer to stop suddenly, creating an emergency, and also violating the statute prohibiting parking or stopping on a bridge.

At the close of plaintiff's evidence, on motion of defendants, judgment as of involuntary nonsuit was entered. Plaintiff administrator appealed.

Aaron Goldberg and Johnson, McIntyre, Hedgepeth, Biggs & Campbell by John W. Campbell for plaintiff appellant.

Hester & Hester by R. J. Hester, Jr., Giles R. Clark, and Henry & Henry by Ozmer L. Henry for defendant appellees.

BRITT, J.

Among other contentions, appellees strenuously contend that the judgment of involuntary nonsuit was fully justified because of contributory negligence on the part of plaintiff's intestate. We agree with this contention.

[1] A judgment of nonsuit may not be entered in an action for wrongful death on the ground of contributory negligence by the deceased, unless the plaintiff's evidence, considered in the light most favorable to him, established negligence by the deceased and that such negligence was one of the proximate causes of the collision so clearly as to admit of no other reasonable conclusion. *Ratliff v. Power Co.*, 268 N.C. 605, 151 S.E. 2d 641 (opinion written by Lake, J.); *Young v. R. R.*, 266 N.C. 458, 146 S.E. 2d 441; *Short v. Chapman*, 261 N.C. 674, 136 S.E. 2d 40.

The Supreme Court of our State, in many cases, has declared nonsuit proper because of contributory negligence on the part of the plaintiff. We briefly review two of those cases.

In *Black v. Milling Co.*, 257 N.C. 730, 127 S.E. 2d 515, defendant's truck was stopped disabled on the highway at about 2:30 p.m. on a fair day. Plaintiff's evidence tended to show that the driver of plaintiff's gasoline tank truck was following another gasoline tank truck about 35 mph at a distance of some 75 feet; that the blinker lights of the preceding truck were turned on as the driver thereof swung to his left to pass defendant's truck, which was standing disabled in his lane of travel; that the driver of the preceding truck, upon seeing oncoming traffic, then pulled sharply back to the right, applied his brakes and stopped three feet behind the stationary truck; that when the preceding truck was pulled back to its right, plaintiff's driver was about 50 feet behind him, saw its brake lights go on, but was not able to stop his heavily loaded vehicle, and, to avoid collision, drove off the highway to the right and hit a telephone pole, resulting in the damages in suit. In an opinion written by Parker, J. (now C.J.), the Supreme Court held that plaintiff's evidence disclosed contributory negligence as a matter of law on the part of his driver and nonsuit was correctly entered.

In *Clontz v. Krimminger*, 253 N.C. 252, 116 S.E. 2d 804, the evidence tended to show that plaintiff was following defendant's vehicle upon a highway on a foggy morning while it was still dark, that plaintiff at all times could see the tail lights of the defendant's vehicle, that defendant stopped his vehicle without signal, and that plaintiff was within 15 feet thereof before he realized the vehicle had stopped and had insufficient time to either apply his brakes or to

turn aside in order to avoid a collision. In an opinion written by Winborne, C.J., the Supreme Court held that the evidence disclosed contributory negligence on the part of plaintiff as a matter of law, barring recovery. The following is quoted from the opinion:

> "The mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed or was following too closely." 10 Blashfield's Cyc. of Automobile Law and Practice, Per. Ed., Vol. 10 p. 600. And in *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 333 [p. 330], the Court laid down the following rule: "It is the duty of the driver of a motor vehicle not merely to look, but to keep an outlook in the direction of travel, and he is held to the duty of seeing what he ought to have seen."
>
> 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, so as to avoid collision with persons and vehicles upon the highway." *Smith v. Rawlins, ante,* 67.

[2] In the case before us, R. L. Highsmith, driver of the truck-trailer which plaintiff's intestate ran into, testified as a witness for plaintiff, and pertinent portions of his testimony are summarized as follows: He arrived at the bridge about 5:00 or 5:15 p.m.; it was daylight, the sun was up and it was fair and dry. The sheriff's car was parked on the right shoulder of N. C. Highway 141 a short distance south of the bridge. When he saw the car, he slowed down to about 40 mph and was then about 200 yards from the bridge. He saw three officers sitting on the left rail of the bridge. When he approached the bridge, Deputy Sheriff Register stood up and waved for the witness to stop, after which the witness slowed down more. "Mr. Register just stood up from the rail and * * * come towards the white line, in the center of the bridge. * * * I almost stopped, and then I was just gradually rolling along, and I was going to roll off the bridge. It was not too far. I passed by Mr. Register a piece. At that time he just said stop. * * * I stopped. I came to a complete stop. * * * I just keep the registration card over the sun visor. I just reached up there to get it and hand it to him * * *. After I got the registration card down and was going to give it to Mr. Register, the car hit me. The car hit the rear end of my tractor-trailer." It is approximately three miles from N. C. 87 to the Cape Fear River

Bridge on N. C. 141. After he turned off 87 onto 141, he looked in his mirror and Mrs. Parker turned off 87 onto 141 behind him, but he did not know how far she was behind him when he reached the bridge. Mrs. Parker did not pass the witness on 141 at any time. He had traveled about half the length of the bridge when he came to a stop at Mr. Register's direction. On cross-examination, he testified that he could see the sheriff's car for approximately one-half mile before reaching it and that he could see the bridge, on the straight road that he was traveling, for about a half mile before reaching it; that he brought the vehicle to a gradual stop and might have been going 5 mph when Mr. Register held up his hand and signaled the witness to stop. He first applied his brakes when he entered the south end of the bridge.

Roland Murphy, who was riding in the tractor-trailer with Highsmith, testified as a witness for the plaintiff, and pertinent portions of his testimony are summarized as follows: He heard Officer Register tell Highsmith to stop and Highsmith stopped, after which he reached up inside the cab to get his registration card. "When Highsmith stopped he did not take his hands off the steering wheel until he stopped. When he stopped he reached up there to get his registration card. He stopped and then reached up for the registration card. He was fixing to show it to the officer. He had it in his hand" when the car driven by Mrs. Parker hit the rear of the trailer.

State Highway Trooper Blalock testified as a witness for plaintiff, and pertinent portions of his testimony are summarized as follows: The Cape Fear River Bridge is approximately two miles from Highway 87. The bridge is about 200 yards long, with two traffic lanes twelve feet each and a pedestrian walk approximately three feet wide on each side of the bridge. The trailer was approximately eight feet wide. When he arrived at the scene, the tractor-trailer was stopped about the center of the northbound lane and the Parker Ford was up against the rear of the trailer; from the rear tires of the Ford, he noticed two black skid marks leading southward for a length of 45 feet. The Ford was fully in the northbound lane immediately behind the trailer.

Plaintiff administrator testified that he went to the scene of the collision some thirty minutes after it occurred; that he later examined the Ford and found the grille pushed back into the motor, and the motor was broken loose from the chassis underneath.

Sheryl Ann Parker, six-year-old daughter of the decedent and who, along with her three-year-old sister, was riding with Mrs. Parker at the time of the collision, was called as a witness by plain-

tiff. She testified that she and her sister were riding in the back seat and that her mother was talking to her little sister when she ran into the truck. "When my mother was talking to her she turned around and looked in the back, and it was while she was looking in the back that the wreck occurred."

We think plaintiff's evidence in the instant case established contributory negligence as a matter of law as definitely as did the evidence in *Black v. Milling Co., supra,* and *Clontz v. Krimminger, supra.* The undisputed evidence clearly showed that Mrs. Parker had a clear, unobstructed view for at least one-half mile before reaching the point of the collision. Plaintiff's own evidence refutes his allegation of sudden stopping by the driver of the truck-trailer. The evidence when viewed in the light most favorable to the plaintiff compels the conclusion that unfortunately plaintiff's intestate did not act as a reasonably prudent person under the circumstances.

The judgment of nonsuit being fully justified because of contributory negligence on the part of plaintiff's intestate as a matter of law, we deem it unnecessary to consider and discuss other questions raised by this appeal.

Affirmed.

BROCK and PARKER, JJ., concur.

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

No. 6812SC376

(Filed 25 September 1968)

1. Negligence § 40— instruction on negligence — use of "prevision"

Trial court did not err in charging the jury that "the law does not require prevision of a person," when it is obvious from a reading of the charge contextually that the court used "prevision" in the sense of "omniscience" rather than "foreseeability."

2. Appeal and Error § 50— charge must be read contextually

It is axiomatic that the charge must be read and construed contextually.

3. Negligence § 40— instruction on proximate cause — foreseeability

Trial court's instruction on proximate cause *is held* not to have required

a jury finding that the defendants must have foreseen the injury in the exact form in which it occurred.

4. **Railroads § 6— crossing accidents — instruction on failure of automatic signal**

In an action to recover damages for personal injuries resulting from a grade crossing collision between the plaintiff and a railroad engine owned and operated by the corporate defendant, the trial court properly instructed the jury that proof of a failure of automatic signals to function at a given moment is not sufficient of itself to show negligence by a railroad, the plaintiff's evidence on this issue being to the effect that within a month or two prior to the date of the collision two witnesses had observed some irregularities in the operation of the electric signals at the crossing.

5. **Trial § 38— requests for instructions**

If a litigant desires a fuller or more detailed charge by the court to the jury, it is incumbent upon him to request it by way of prayers for special instructions.

APPEAL from *Braswell, J.*, 6 May 1968, Civil Session, CUMBERLAND County Superior Court.

This is a civil action to recover damages for personal injuries resulting from a grade crossing collision between plaintiff, who was operating a 1964 Ford truck loaded with 6,000 pounds of brick, and a railroad engine owned by the corporate defendant and operated by its agent, the individual defendant. Plaintiff was proceeding in a southerly direction on North Carolina Highway 59 in Cumberland County. The railroad engine, which was attached to a freight train, was being operated in an easterly direction. There were signaling devices consisting of red lights, bells and a crossarm located at the crossing. The evidence was sharply conflicting as to whether the signaling devices were operating. There was a violent impact which practically demolished the truck, and the plaintiff was severely injured. The collision occurred about 11:00 a.m. on a clear, warm day.

Four issues were submitted to the jury, namely: negligence of the corporate defendant; negligence of the individual defendant; contributory negligence; and damages. The jury answered the first two issues in the negative, and from a judgment denying any recovery, the plaintiff appealed.

Anderson, Nimocks & Broadfoot, and McCoy, Weaver, Wiggins, Cleveland & Raper by Richard M. Wiggins, Attorneys for plaintiff appellant.

Quillan, Russ, Worth & McLeod by Walker Y. Worth, Attorneys for defendant appellees.

CAMPBELL, J.

The plaintiff assigns as error the charge of the trial court in four particulars.

[1] One, the plaintiff asserts that the trial judge committed error by charging the jury that, "(t)he law does not require prevision of a person." The plaintiff states that "prevision is synonymous with foreseeability, which is an essential element of proximate cause." Another meaning of "prevision" is "prescience"; and when this portion of the charge is read in context, it is obvious that the court used "prevision" in the sense of "omniscience" which is not required of a person. *Clark v. Scheld,* 253 N.C. 732, 117 S.E. 2d 838. The trial judge instructed the jury:

> "Negligence is a failure to perform some duty imposed by law. It is also the failure to exercise due care and to do something which a reasonably prudent person would do or the doing of something which a reasonably prudent person would not do under circumstances similar to those shown by the evidence. This rule is constant, while the degree of care varies with the exigencies of the occasion. It is for you to determine how a reasonably cautious person would act under those circumstances. Negligence is not presumed from the mere fact of injury. The law does not require prevision of a person. It does require him to act as a reasonably careful and prudent person would act under those circumstances. To imply liability there must be proof of actionable negligence."

[2] This is a succinct and correct definition of negligence. "But it is axiomatic that the charge must be read and construed contextually." *Vincent v. Woody,* 238 N.C. 118, 76 S.E. 2d 356. This assignment of error is overruled.

[3] Two, the plaintiff asserts as error the following definition of "proximate cause" used by the trial court:

> "Now, when I use the expression, 'proximate cause,' I mean that cause which in natural and continuous sequence, unbroken by any new and independent cause produced the injury complained of and one from which a person of ordinary intelligence could have reasonably foreseen that such result or some similar result was likely to occur under the circumstances then existing, and that such act or omission actually did produce the injuries and damage complained of. It is sufficient if a reasonably cautious and prudent person could have foreseen that injury and damage might follow the breach of duty. Foreseeable injury is

> a requisite of proximate cause and proximate cause is a requisite of actionable negligence and actionable negligence is a requisite for recovery for any injury or damage negligently inflicted."

The plaintiff takes the position that this instruction informed the jury that the "defendants must have foreseen the exact events as they occurred, i.e., that the negligent act complained of 'actually did' produce the injuries of the plaintiff."

We do not agree with this contention of the plaintiff. This instruction did not require "that the defendant must have foreseen the injury in the exact form in which it occurred." On the contrary, this statement is in keeping with the view expressed by Parker, C.J., in *Williams v. Boulerice,* 268 N.C. 62, 149 S.E. 2d 590, where he stated:

> "The only negligence of legal importance is negligence which proximately causes or contributes to the death or injury under judicial investigation. . . . Proximate cause is a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed. . . . Foreseeability is an essential element of proximate cause. . . . This does not mean that the defendant must have foreseen the injury in the exact form in which it occurred, but that, in the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected."

Somewhat similar language was specifically approved by Barnhill, J., in *Ellis v. Refining Co.,* 214 N.C. 388, 199 S.E. 403, wherein he stated:

> "It must not only appear that the negligent act produced the result in continuous sequence, but it must further appear that the negligent act was such that any man of ordinary prudence could have foreseen that such a result, or some similar injurious result, was probable under all the facts as they then existed."

This assignment of error is overruled.

[4] Three and four. For his third and fourth assignments of error, the plaintiff asserts that the trial court committed error in instructing the jury "that proof of a failure of automatic signals to function at a given moment is not sufficient of itself, to show negligence by a railroad," and that the court failed to explain the law arising upon the evidence as required by G.S. 1-180.

The plaintiff offered testimony of two witnesses to the effect that within a month or two prior to the date of the collision they had observed some irregularities in the operation of the electrical signals at this crossing. The plaintiff states that in view of this evidence the court should have explained to the jury that the railroad knew, or in the exercise of due care should have known, that the signaling device was defective.

In connection with the electrical signaling devices, the court instructed the jury as follows:

> "When a railroad company has installed automatic electrical signalling devices for warning travellers approaching a railroad crossing, it is the company's duty after installation to exercise reasonable care in the operation of the devices, and in keeping it in good repair. The Court instructs you that proof of a failure of automatic signals to function at a given moment is not sufficient of itself, to show negligence by a railroad; however, the operation of a locomotive to and upon a blind crossing of a main highway with no notice whatever of its approach is a lack of due care for the safety of users of the highway. Where there has been a failure of automatic signal lights at a railroad crossing to work, this has the tendency to abate the ordinary caution of a traveller on the highway and he has the right to place some reliance on that failure. In the absence of other timely warning, it is an implied permission for the motorist to proceed, when he has taken reasonable precaution and made reasonable observations under the circumstances. If obstructions or the cut of the track made a blind crossing, they are factors in determining the duty which the defendant railroad owed the plaintiff. Obstructions, themselves, are not negligence, but if they exist and the railroad is aware of them it is then encumbent (sic) upon the railroad to take precautions to protect travellers who use the crossing and to warn them of the approach of the train. So, members of the jury, as you come finally to consider your answer to the first issue, the Court charges and instructs you that if the plaintiff, James Henry Jackson, has proven and fulfilled the responsibility cast upon him by the law to the extent that the evidence by its quality and convincing power has satisfied you by its greater weight that at the time and place complained of the defendant, Aberdeen and Rockfish Railroad Company was negligent, either in that there was no sounding of any bell, whistle or other signalling of the approach of the train to the crossing and a failure to give any notice of the approach of the train, or that the electrical signalling devices and system

maintained by the railroad at the crossing never became operative, because of the fact that it was defective, in a defective condition, and remained unrepaired and with knowledge of such condition, failed to give any timely and reasonable notice to the approaching plaintiff that the train was intending to cross the highway, or that the company operated its locomotive at a speed into a blind crossing faster than reasonable and prudent under the conditions then existing, among which was a crossing at which the automatic traffic control red lights and bells were not working or operating, I say, if plaintiff has proved any of those things and proved it by the greater weight of the evidence, and further proven by the greater weight of the evidence that the negligence of the defendant railroad in any one or more of those regards, not only existed, but that such negligence was one of the proximate causes of the injury and damages complained of, then it would be your duty to answer this first issue in the plaintiff's favor, that is 'yes.' "

As Lake, J., said in *Kinlaw v. R. R.*, 269 N.C. 110, 152 S.E. 2d 329:

"This Court has held that the proof of a failure of automatic signals to function at a given moment is not sufficient of itself to show negligence by a railroad."

[5] "If the plaintiff desired a fuller or more detailed charge it was incumbent upon him to have requested it by way of prayers for special instructions." *Woods v. Roadway Express, Inc.*, 223 N.C. 269, 25 S.E. 2d 856. *Simmons v. Davenport*, 140 N.C. 407, 53 S.E. 225; G.S. 1-181.

We think the instructions in this regard given by the trial court complied with the statute, G.S. 1-180. As stated by Barnhill, J., (later C.J.) in *Vincent v. Woody, supra:*

"Ordinarily the presiding judge must instruct the jury extemporaneously from such notes as he may have been able to prepare during the trial. To require him to state every clause and sentence so precisely that even when lifted out of context it expressed the law applicable to the facts in the cause on trial with such exactitude and nicety that it may be held, in and of itself, a correct application of the law of the case would exact of the *nisi prius* judges a task impossible of performance. The charge is sufficient if, when read contextually, it clearly appears that the law of the case was presented to the jury in such manner as to leave no reasonable cause to believe that it was misled or misinformed in respect thereto."

These assignments of error are overruled.

Paraphrasing from *Vincent v. Woody, supra,* in the final analysis, the case is one of fact. The evidence in many respects was in sharp conflict. The jury, having heard both sides, has decided the issues in favor of the defendants. The testimony was such that the jury might well have answered the issues in favor of the plaintiff. The weight and credibility of the testimony was for the jury and not for the court to decide. The plaintiff must now abide the result.

No error.

MALLARD, C.J., and MORRIS, J., concur.

STELLAR BUIE v. CECIL H. PHILLIPS AND BLANCHE B. PHILLIPS
No. 6812SC263

(Filed 25 September 1968)

1. Easements § 3— easement by implication or estoppel — adjoining properties — binding on grantees

Where adjoining properties of separate owners have been developed in relation to each other so as to create cross easements in the stairways, hallways, or other private ways serving both properties, such easements, if open, apparent and visible, pass as an appurtenant to the respective parties and are binding on grantees although not referred to in the conveyance.

2. Easements § 3— easement by implication or estoppel — sufficiency of complaint

Allegations that plaintiff bought property which bordered a road built upon the land of defendants' grantor, that defendants' grantor knew that the road was used by plaintiff and others for ingress and egress and by the general public, that defendants' grantor kept the road in repair by mutual agreement with plaintiff and other residents who used the road, that when defendants purchased property upon which a portion of the road had been built, the road was plainly visible and constantly in use, and that the properties of plaintiff and defendants had a common corner, *are held* insufficient to establish an easement by implication or estoppel, the properties of plaintiff and defendants not adjoining and plaintiff and defendants' grantor not having developed their property in relation to each other.

APPEAL by plaintiff from *Brewer, J.,* 25 March 1968 Civil Session, Superior Court of CUMBERLAND.

Plaintiff seeks a mandatory injunction compelling the defend-

ants to desist from obstructing an alley or passageway she denominates as Joyce Street in the city of Fayetteville and to remove therefrom all obstructions. Plaintiff also asks that she and her heirs and assigns be given the permanent and perpetual right to maintain Joyce Street so as to make the road passable for vehicular traffic. The complaint, in substance, alleges:

That the plaintiff is the owner of a certain described lot beginning at a point in the southern margin of an alleyway which point is 150 feet east from the intersection of said alley with the eastern margin of Murchison Road, the lot having a width on the alley of 50 feet and running back between parallel lines a depth of 50 feet; that the lot was acquired by plaintiff in 1955 by deed duly recorded; that the deed contains the following: "To have and to hold the aforesaid tract or parcel of land, and all privileges and appurtenances thereto belonging, to the said party of the second part, her heirs and assigns to their only use and behalf forever"; that the defendants own a certain described lot fronting 25 feet on the northeastern side of Murchison Road and running back between parallel lines a depth of 150 feet and being a portion of Lot 22 of the Jennie Wheller property, which lot was acquired by them in 1957 from Odell Garris; that both lots are portions of the Wheller Subdivision, a map of which is of record in Book of Plats 9, at page 76, Cumberland County Registry; that in 1952 Odell Garris purchased all of Lot No. 22 which lot fronts on Murchison Road 25 feet and is approximately 242.7 feet in length; that in 1953 Garris cut a road through his property from Murchison Road to Magnolia Avenue (now sometimes known as Slater Avenue); that the road cut by Garris was originally 8 feet wide and ran approximately along the northern line of Lot No. 22; that the road was widened by the use thereof by persons living on the street and is now commonly known as "Joyce Street"; that the road has been used since 1953 and until August 1967 when it was blocked by defendants; that the street was used by all persons living on it and by the general public; that the street known as "Joyce Street" runs along the front or southeastern side of plaintiff's lot and at the time she purchased it until the present a part of the street lies within the bounds of her lot; that when she purchased her lot "Joyce Street" was in existence and plainly visible and in use; that Odell Garris observed the home of plaintiff while it was being constructed in 1955, helped in the construction, and knew it was to front on "Joyce Street"; that at various times from 1953 through 1965, Odell Garris had house trailers on Lot No. 22 owned by him and the occupants thereof used "Joyce Street" as a means of ingress and egress; that in 1957 Odell Garris sold to C. H. Phillips

and wife, defendants herein, a portion of Lot No. 22; that at that time Joyce Street was in existence, plainly visible on the ground, used as a means of ingress and egress by all persons who lived on "Joyce Street", more particularly by the plaintiff, and was also used by the general public; that Odell Garris, by mutual agreement with residents on the street and more particularly with the plaintiff, has repaired said road on numerous occasions up to and including 1965, when he sold the remainder of Lot No. 22; that when defendants purchased the property from Odell Garris in 1957, the road was plainly visible on the ground, constantly in use, was partially situate on the land defendants bought from Odell Garris, and entered Murchison Road on the property purchased from Odell Garris.

Defendants demurred to the complaint. The demurrer was sustained, and plaintiff appealed.

Clark, Clark & Shaw by John G. Shaw for plaintiff appellant.

Carter & Faircloth by Cyrus J. Faircloth for defendant appellees.

MORRIS, J.

Plaintiff contends that she has a right to use Joyce Street as a means of ingress and egress to her home because there is an easement over the lands of defendants and that her complaint sufficiently alleges facts which, if proved, entitle her to the relief sought.

"Joyce Street", in which plaintiff alleges a right, runs along the southeasterly side of plaintiff's lot.

It is interesting to note that the description in plaintiff's deed calls for an alley on the northwesterly side of her lot which enters Murchison Road. The record is silent as to whether this alley actually exists. The record is also silent as to whether Odell Garris owned all of the 25-foot strip of land running from Murchison Road to Magnolia Street at the time the road was constructed or at the time plaintiff acquired her lot. Nor does the complaint identify plaintiff's grantor.

Plaintiff candidly admits that she does not purport to allege and, in truth, cannot allege facts sufficient to support an easement by grant, prescription, or dedication.

[1] She vigorously contends, however, that she has alleged facts sufficient to support an easement by estoppel. She relies on *Packard v. Smart,* 224 N.C. 480, 31 S.E. 2d 517, which, she says, should control this case because the facts alleged bring it within the rationale of the *Packard* case. We do not agree.

In the *Packard* case, heard on appeal from the overruling of a demurrer, the complaint alleged that the plaintiff and defendant owned *contiguous* lots, each fronting 20 feet on Main Street in the city of Hendersonville and having a depth of 103 feet; that in 1924 plaintiff and one B. L. Foster entered into a parol agreement to construct an Arcade Building on the entire length of both lots to be two stories in height, 40 feet in width, and to have an eight-foot hallway in the center of the first and second floors, *the center of the hallway to run with the boundary line between the two properties.* The stores, rooms, etc., on either side of the hallway were to be identical. The first floor was to consist of rooms or shops facing on Main Street or the arcade or hallway; the second floor of offices or apartments which were to open into the hallway. *It was agreed that the entire width of the hallway on both floors was to be for the use and benefit of both sides of the building and each party was to have the right to the full use, enjoyment and benefit of that part of each hallway lying on the land of the other.* The building was so erected at a cost of more than $50,000. The front and rear doors of the lower hallway were common doors and were locked and unlocked by common keys. The plaintiff and Foster *made the capital outlay by reason of their mutual promises and the agreement was to the mutual advantage of both.* The effect of the parol agreement was to create in equity reciprocal easements by estoppel in favor of each party against the half of each hallway on the land of the other and the estoppel would operate so long as the building remained on the property. Defendants acquired the Foster land in 1935. The complaint alleged that by accepting the deed, defendants became entitled to the mutual rights and obligated to perform the mutual burdens in the hallways. It also alleged that the construction was such as to indicate openly and visibly the existence of reciprocal easements and put prospective purchasers on notice of the benefits and burdens arising from the joint use of the property. Six years after defendants purchased the Foster land, they erected a wall about one inch thick and seven feet high extending the entire length of the hallway on both floors and just on their side of the division line. The complaint alleged that the estoppel created between him and Foster was binding on defendants and that he was entitled to a mandatory injunction to compel the removal of the walls. Our Supreme Court affirmed the trial court. The Court noted that for approximately 17 years the hallways, apparently a substitute for a party wall, were used as contemplated by the original builders and so used for six years by the defendants. Justice Denny (later C.J.), speaking for the Court, said:

"The greater weight of authorities seem to hold that no easement

or *quasi*-easement will be created by implication, unless the easement be one of strict necessity, but we think that means only that the easement should be reasonably necessary to the just enjoyment of the properties affected thereby, and it is so stated in Thompson on Real Property, Vol. 1, sec. 409 (369), p. 668, citing many cases, among them *Bowling v. Burton,* 101 N.C. 176, 7 S.E. 701. This is in accord with the decision of this Court in the case of *Ferrell v. Trust Co.,* 221 N.C. 432, 20 S.E. (2d) 329, in which we held: 'It is a general rule of law that where one conveys a part of his estate, he impliedly grants all those apparent or visible easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed, and which are reasonably necessary for the use of that part,' citing numerous authorities.

The fact that the title to the Foster property, now owned by the defendants, and the title to the property of the plaintiff, were not vested in a common owner at the time of the construction of the building involved herein, is immaterial. Easements created by implication or estoppel do not necessarily stem from a common ownership. *But where adjoining properties of separate owners have been developed in relation to each other, so as to create cross easements* in the stairways, hallways, or other private ways, serving both properties, such easements, if open, apparent and visible, pass as an appurtenant to the respective properties, and are binding on grantees, although not referred to in the conveyance. This view is in accord with many authorities from other jurisdictions." (Emphasis supplied.)

Cases from other jurisdictions were discussed, but all of them involved the creation of cross easements by *adjoining* property owners.

[2] In the case before us, title to the properties of the parties was not vested in a common owner at the time of the construction of the road. As stated in *Packard, supra,* this is immaterial. However, a fact which appears to us to be very material is lacking. The property of plaintiff and the property of defendants is not adjoining or contiguous property. This is apparent from the complaint. It is true that the southwest corner of plaintiff's property is a common corner with the northeast corner of defendant's property. Our view of the *Packard* case is that the rule therein enunciated applies *"where adjoining properties of separate owners have been developed in relation to each other, so as to create cross easements."* No case has been called to our attention which extends the rule to apply to the facts alleged in this case. We are not inadvertent to the fact that the

Court applied *Packard* in the case of *Neamand v. Skinkle,* 225 N.C. 383, 35 S.E. 2d 176, a case decided a year later. The facts of that case, however, clearly bring it within the *Packard* rationale.

Here it appears that Garris cut the road in 1953 for his own use. When the plaintiff purchased land partially bordering on the road built upon land owned by Garris, Garris did not object to plaintiff using the road. However, Garris and the plaintiff were not separate owners who had developed their property in relation to each other. The plaintiff was merely using the road with the permission of Garris. It would appear that Garris could have closed the road any time he wished. There being no easement which was binding upon Garris, there is no easement which is binding upon the defendant, the grantee of Garris.

With commendable candor, plaintiff admits that if the facts alleged in her complaint do not bring her within the framework of the facts alleged in *Packard,* the complaint is demurrable. While we agree that this is a hardship case, we are compelled to hold that the complaint fails to state a cause of action under the law of this State.

Affirmed.

MALLARD, C.J., and CAMPBELL, J., concur.

NORTH CAROLINA STATE HIGHWAY COMMISSION v. CORRINE ALLEN RANKIN AND HUSBAND, LEONARD RANKIN

No. 6817SC244

(Filed 25 September 1968)

1. **Appeal and Error §§ 26, 28— effect of exception to judgment — effect of failure to except to findings of fact**

An exception to the judgment does not present for review the findings of fact or the evidence on which they are based; when there is no exception to the findings of fact by the court, the facts found will be assumed correct and supported by the evidence.

2. **Appeal and Error § 26— effect of exception to judgment**

An exception to the judgment raises two questions of law, (1) whether the facts found are sufficient to support the conclusions of law and the judgment, and (2) whether there is error appearing on the face of the record proper.

3. Appeal and Error § 57— findings appealable — mixed questions of law and fact

Findings which present mixed questions of law and fact are reviewable on appeal.

4. Eminent Domain § 7— highway condemnation — issues determined by court

In a proceeding to condemn land for highway purposes, the court has authority under G.S. 136-108 to make a determination of fact and law as to whether defendants have suffered a loss of direct access to the highway system which would entitle them to compensation.

5. Eminent Domain § 2— reasonable access to highway — service road

Defendants have reasonable access to the primary highway system and are not entitled to compensation for loss of direct access to a main highway which was changed to a controlled access road where a paved service road extends across the entire front of defendants' property to a point .7 of a mile south of their property at which there is an entrance and access to both the northbound and southbound lanes of the main highway, defendants not being entitled to compensation merely because of the circuity of travel necessary to reach the main highway.

6. Eminent Domain § 2— reasonable access to highway — service road

When property owners are given access to the main highway by means of a service road abutting their property, the fact that the main highway is changed into a nonaccess highway does not constitute a "taking" of property either in depriving the owners of direct access to the highway or in diminishing the flow of traffic having direct access to their property, the inconvenience resulting from the necessity of using a more circuitous route and any diminution in value to such property being incident to the exercise of the police power and *damnum absque injuria.*

APPEAL by defendants from *Godwin, S.J.,* 4 March 1968 Session of Superior Court of ROCKINGHAM County.

This is a proceeding for condemnation of the described lands for highway purposes, instituted on 29 July 1966. Defendants, by failing to deny, admit all of the allegations in the complaint. By way of further answer, defendants assert that they are entitled to damages for the denial of direct access to the highway. Plaintiff asserts that defendants' property is served by a service road and that they have not been denied direct access.

Immediately prior to the taking, defendant Corrine Allen Rankin, whose husband is defendant Leonard Rankin, owned a 5.46-acre tract of land in Rockingham County with frontage and direct access to U. S. Highway #29 along the entire western margin of the property, a distance of 150.09 feet. After the taking U. S. Highway #29 became a controlled access road. Defendants' property, after the taking, consisted of 5.43 acres with frontage of 151.11 feet on a paved

service road running parallel with the northbound lane of U. S. Highway #29. This service road leads to an entrance to the north and southbound travel lanes of U. S. Highway #29. This entrance is located approximately seven-tenths of a mile South of defendants' property. This service road extends North of defendants' property a distance of approximately seven or eight hundred feet where it dead-ends.

At a hearing to determine the issues, as provided in G.S. 136-108, Judge Godwin concluded, among other things, after hearing the evidence that the establishment of a paved service road across the entire western front of the property of the defendants, with access thereon to the primary highway system at a point approximately seven-tenths of a mile South of their property, is reasonable access and does not constitute a taking of the right of direct access to the highway system. The defendants excepted to this conclusion and to the signing of the order and gave notice of appeal.

Attorney General Thomas Wade Bruton, Deputy Attorney General Harrison Lewis, Trial Attorney Robert G. Webb, and Benjamin R. Wrenn, Associate Counsel, for plaintiff appellee.

McMichael & Griffin by Jule McMichael for defendant appellants.

MALLARD, C.J.

Defendants make two assignments of error based upon two exceptions. The first is to the finding that the taking was not a denial of reasonable access, reached by Judge Godwin. The defendants' second exception is to the order signed after the hearing to determine the issues.

[1, 2] There was no exception taken to the findings of fact. "An exception to the judgment does not present for review the findings of fact or the evidence on which they are based. . . . When there is no exception to the findings of fact by the court, the facts found will be assumed correct and supported by the evidence. . . ." 1 Strong, N. C. Index 2d, Appeal and Error, § 28. It is also well settled that an exception to the judgment raises two questions of law, (1) whether the facts found are sufficient to support the conclusions of law and support the judgment and (2) whether there is error appearing on the face of the record proper. 1 Strong, N. C. Index 2d, Appeal and Error, § 26.

Defendants' assignment of error number one is to the following finding:

"That the establishment of a paved service road across the entire western front of defendants' property with access to the primary highway system at a point approximately .7 of a mile South of defendants' property is reasonable access and does not constitute taking and the defendants are not to be compensated for any loss of direct access to the Highway system."

[3, 4] Although the court in its order stated, with respect to the above finding, "the Court concludes as a matter of law," it is a mixed question of law and fact and is subject to review on appeal. *Brown v. Board of Education,* 269 N.C. 667, 153 S.E. 2d 335. It was proper for the judge under G.S. 136-108 to make such a determination of fact and law. The facts in this mixed question of law and fact are supported by the evidence. The findings support the conclusion of law. In *Highway Commission v. Nuckles,* 271 N.C. 1, 155 S.E. 2d 772, there is a good discussion by Justice Sharp of the law applicable to the taking of access in highway eminent domain cases.

[5] Appellants contend that the trial court committed error in holding that access to U. S. Highway #29 at a point approximately seven-tenths of a mile South of defendants' property is reasonable access. Appellants argue that the construction of an entrance from the service road only at the south end does not give appellants reasonable access.

In *Highway Commission v. Farmers Market,* 263 N.C. 622, 139 S.E. 2d 904, the Supreme Court said:

"If the abutting owner is afforded reasonable access, he is not entitled to compensation merely because of circuity of travel to reach a particular destination."

The main question involved in the case under consideration is that of reasonable access. We are of the opinion that the paved service road extending seven or eight hundred feet North of and seven-tenths of a mile South of defendants' property, where there is an entrance and access at this southern point to both the north and southbound lanes of U. S. Highway #29, is reasonable access. The defendants are therefore not entitled to compensation for the loss of direct access to Highway #29 where the highway abuts their property.

[6] The principle of law involved herein is stated as follows in 3 Strong, N. C. Index 2d, Eminent Domain, § 2:

"When plaintiffs are given access to the main highway by means of a service road abutting their property, the fact that the main highway is changed into a nonaccess highway does not

constitute a 'taking' of plaintiffs' property, either in depriving plaintiffs of direct access to the highway or in diminishing the flow of traffic having direct access to plaintiffs' property, the inconvenience resulting from the necessity of using a more circuitous route and any diminution in value to plaintiffs' property being incident to the exercise of the police power and damnum absque injuria."

Defendants cite the case of *Realty Co. v. Highway Commission,* 1 N.C.App. 82, 160 S.E. 2d 83, as authority for their contentions herein. That case is distinguishable from the case under consideration. The Realty Company case involved the interpretation of a right-of-way agreement which granted to the property owner the right of access at a specific point on the highway. This Court there held:

"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."

We have examined the record herein and find no prejudicial error appearing on the face of the record. The findings of fact and conclusions of law support the order entered herein.

Affirmed.

CAMPBELL and MORRIS, J., concur.

PAUL HARRISON DANIELS v. GENE AUTRY CAUSEY
No. 6822SC350

(Filed 25 September 1968)

Trial § 37— instruction on credibility of witnesses — intoxication of witness

In an action by plaintiff to recover for personal injuries sustained while a passenger in his automobile driven by defendant, the defendant did not plead the defense of contributory negligence or otherwise allege facts of plaintiff's intoxication, and the only evidence relating to plaintiff's consumption of beer and his possible intoxication on the night of the accident was elicited by defendant on cross-examination of plaintiff and his witnesses. *Held:* The testimony concerning plaintiff's consumption of alco-

hol was elicited solely for the purpose of discrediting plaintiff and his witnesses, and an instruction which fails to restrict the jury's consideration of this evidence for credibility purposes only is prejudicial.

APPEAL by plaintiff from *Gambill, J.,* April 1968 Civil Session, Superior Court of DAVIDSON.

This is a civil action instituted 10 June 1967, to recover damages for personal injuries resulting from an automobile accident.

The accident occurred about 10:30 p.m. on 8 April 1967, on the Hasty School Road, a rural paved road in Davidson County, at a point where the Hasty School Road intersects North Carolina Highway 109. The plaintiff was a passenger in his own automobile which was being operated by the defendant when the accident occurred. It appears from the evidence that the automobile was traveling in a westerly direction on the Hasty School Road and that just before coming to the point where the Hasty School Road intersects North Carolina Highway 109, the automobile operated by the defendant left the hard-surfaced portion of the road, crossed Highway 109, and collided with a bank on the west side of Highway 109.

Plaintiff alleged that the defendant was negligent in the operation of the automobile and that he suffered injuries as a direct and proximate result of this negligence. The defendant answered denying negligence. He did not set up the defense of contributory negligence. The following issues were submitted to the jury: (1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? (2) What amount, if any, is the plaintiff entitled to recover of the defendant? The jury answered the first issue "No". From a judgment entered on the verdict dismissing the action, plaintiff appeals.

Charles F. Lambeth, Jr. for plaintiff appellant.

Walser, Brinkley, Walser & McGirt by Walter L. Brinkley for defendant appellee.

MORRIS, J.

Plaintiff makes four assignments of error. The first two are directed to the court's charge to the jury. Assignments of error 3 and 4 relate to the failure of the court to set the verdict aside as against the greater weight of the evidence, and the signing of the judgment.

The first assignment of error relates to the following portion of the charge:

> "There was certain testimony with respect to alcohol. The credibility of that testimony you will draw from that testimony. You may draw your conclusion from it by using your common sense and experience."

We think this portion of the judge's charge constitutes prejudicial error.

The plaintiff testified and in addition offered four witnesses in his behalf. These were the highway patrolman, plaintiff's doctor, the Clerk of the Thomasville Recorder's Court, and Kenneth Byerly who was also a passenger in the automobile. The highway patrolman, on cross-examination, testified that he saw two unopened cans of beer in the car when he was investigating the accident; that he could not testify with respect to plaintiff's intoxication; that defendant told him he had consumed some beer earlier that day. The other passenger, Kenneth Byerly, testified on cross-examination by the defendant that he did not see the other two parties, the plaintiff and the defendant, purchase any beer and didn't remember seeing any in the car; that it was not true that plaintiff wanted someone else to drive because he was under the influence of an intoxicant.

The plaintiff, Paul Harrison Daniels, testified on cross-examination that he and the defendant had been drinking earlier in the evening at the plaintiff's house; that they left the plaintiff's house, and about an hour later drove over to Guilford County in order to purchase beer. From there, they returned to the Hasty School Store to shoot pool. The pool tables were full, and they did not stay. Up until this time the automobile had not been operated by the defendant. The plaintiff stated on cross-examination that after driving around for an hour or so, he realized he did not have his license with him, so he asked the defendant Causey to drive his automobile. Plaintiff denied that he was under the influence of alcohol at this time. He testified that they had 10 or 12 cans of beer in the car; that he had some change with which defendant bought some beer.

The defendant did not plead the defense of contributory negligence. There were no allegations of intoxication. The testimony concerning the drinking and purchasing of alcoholic beverages prior to the accident, solicited by the defendant on cross-examination, could only have been procured for the purpose of discrediting the testimony offered by the plaintiff and his witness Byerly. That is, it would tend to show their inability accurately to state the facts surrounding the accident. We do not think that the instruction given by the trial judge properly explained to the jury that they were to consider this evidence for credibility purposes only. The trial judge failed to ex-

plain the relationship of this evidence to the substantive evidence given by the witnesses. Rather, he said, "The credibility of that testimony you will draw from that testimony. You may draw your conclusion from it by using your common sense and experience." It cannot be said that the jury did not take this to mean that on the basis of the testimony relating to the purchase and drinking of alcoholic beverages they could deny the plaintiff the right to recover.

There are two types of charges which might be given. The first is general and does not relate to any specific testimony or witness. Such a charge is found in *Herndon v. R. R.*, 162 N.C. 317, 78 S.E. 287. There the Court approved the following instruction:

> "Weigh all of this evidence, gentlemen, in every way, and in weighing it you have a right to take into consideration the interest that the parties have in the result of your verdict, the conduct of the witnesses upon the stand and their demeanor, the interest that they may have shown, or bias, upon the stand, the means they have of knowing that to which they testify, their character and reputation, in weighing this testimony, so as to arrive at the truth of what this matter is."

Also, see *Styers v. Bottling Co.*, 239 N.C. 504, 80 S.E. 2d 253, where the Court approved substantially the same charge. In *Ferebee v. R. R.*, 167 N.C. 290, 83 S.E. 360, the Court discussed the instruction just quoted and commended it to trial judges as a "full and clear statement of duty of jurors in passing upon the evidence of parties when they are witnesses."

The other type of instruction which is given in relation to the credibility of witnesses is more specific in that it relates to specific testimony, or to the testimony given by certain witnesses who have an interest in the outcome of the action, or who, for some reason, may be unable to relate the events about which they are testifying. This type of instruction is given most often in criminal cases where the defendant's relatives have testified in his behalf. See *State v. Barnhill*, 186 N.C. 446, 119 S.E. 894, where the Court approved the following instruction:

> ". . . And the law says the close relations have that same temptation. Therefore, it is your duty to scrutinize their evidence before you accept it. But the law says that after having scrutinized their evidence, applied your common sense and reason to it, observed the demeanor of the witnesses on the stand, and considered their interest in the result of the trial, if you find that the evidence is entitled to be believed, that you have a right

to accept it and give it the same weight you would that of any disinterested witness."

Although in *Ferebee v. R. R., supra,* the Court commended the general type of instruction in *Herndon, supra,* to trial judges as being all that was required, it approved the following charge to the jury, ". . . that the plaintiff, 'as a party to this action, has an interest in the outcome of such a character that it is your duty to scrutinize his evidence with care and to give due consideration to the fact that he is interested.' " The Court went on to say, "That is the extent of your consideration, and I do this because the Supreme Court has held that it must be done. [Here the defendant had requested the instruction.] But after you have done so, and you shall conclude that he told the truth, you will give the same weight to the evidence that you would to that of any other credible witness."

Since we cannot say that from the portion of the court's charge before us, the jury clearly understood that the evidence with respect to alcohol was to be considered for credibility purposes only, we cannot say that plaintiff was not prejudiced by this portion of the charge.

There must be a new trial, and we do not, therefore, discuss appellant's remaining assignments of error.

New trial.

MALLARD, C.J., and CAMPBELL, J., concur.

STATE OF NORTH CAROLINA v. JASPER McLEAN
No. 6812SC308

(Filed 25 September 1968)

1. Robbery § 5— instructions — submission of a lesser degree of armed robbery

Where all the evidence tends to show that a completed robbery with firearms was committed upon the prosecuting witness and there is no contradictory evidence, the court is not required to submit the question of defendant's guilt of common law robbery.

2. Criminal Law § 115— instructions on lesser degrees of crime

G.S. 15-170 permits the conviction of a defendant of the crime charged in the bill of indictment "or of a less degree of the same crime," but it does not make mandatory the submission to the jury of a lesser included

offense where the indictment does not charge such offense and where there is no evidence of such offense.

3. Criminal Law § 113— instruction on law not supported by the evidence

It not only is unnecessary but it is undesirable for a trial judge to give instructions on abstract possibilities unsupported by evidence.

APPEAL from *Braswell, J.*, 19 February 1968, Criminal Session, CUMBERLAND County Superior Court.

The defendant was tried on a valid bill of indictment charging him with the felony of robbery with firearms on 15 December 1967. The defendant entered a plea of not guilty. The jury returned a verdict of guilty, and from an imposition of a sentence of fifteen years in the State's prison, the defendant appealed.

The attorney who represented plaintiff in the trial, for good cause shown, was permitted to withdraw from further representation of the defendant. The defendant filed an affidavit of indigency and the court appointed counsel to represent the defendant on this appeal.

The State introduced evidence to the effect that at about 11:30 p.m. on 15 December 1967, H. A. James, Jr., was working as the night manager of Western Union Telegraph Company in Fayetteville. In addition to Mr. James, another operator, Charlie Bishop, was on duty and the wife of Mr. James was waiting in the office. Mr. James testified:

". . . I looked up to the counter and he was middleway the counter, out in the lobby. At the time I first saw him he was right in the middle of the counter, right in the dead center. At that time I observed that Jasper McLean had what appeared to be a snubnose thirty-eight pistol in his right hand, and he had a pair of gloves with him and his left hand was gloved and his right hand was ungloved and he was holding the pistol in his right hand. And he had it clutched like this and was pointing it towards me as I was sitting there at the delivery desk. I will say that the end of the barrel of the pistol was about six feet from me at the time I first saw that pistol.

At that time that Jasper McLean stood there in that position he said, 'This is a hold-up; give me your money; give me all you have got.' At that time I said nothing. I immediately began to get my funds, which were in my cash department.

. . . I took the money from my drawer and carried it over and put it in the hands of Jasper McLean because he was hold-

ing a loaded gun on me, and I was afraid to do anything else but take it to him."

The testimony of Mrs. James was substantially in accord with that of her husband.

The defendant offered testimony to the effect that on the occasion in question, he was engaged in a poker game in another section of the City of Fayetteville and that the State's witnesses failed to identify the defendant in a police lineup. The defendant himself did not testify and his defense was that of mistaken identity and his presence elsewhere at the time of the crime.

Nance, Collier, Singleton, Kirkman & Herndon by James R. Nance, Attorneys for defendant appellant.

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

CAMPBELL, J.

[1] The defendant assigns as error the charge of the trial judge wherein he stated:

"Under the law and evidence in this case, you are to return one of two possible verdicts; that is to say, a verdict of guilty as charged of armed robbery, or a verdict of not guilty, depending upon how you shall have found the facts to be."

The defendant asserts that it was incumbent upon the trial judge, as provided by G.S. 15-170, to instruct the jury that the defendant could be convicted of a lesser included offense of common law robbery.

[2] G.S. 15-170 permits the conviction of a defendant of the crime charged in the bill of indictment "or of a less degree of the same crime." This statute, however, does not make mandatory the submission to the jury of a lesser included offense where the indictment does not charge such offense and where there is no evidence of such offense.

> "It is true that in a prosecution for robbery with firearms, an accused may be acquitted of the major charge and convicted of an included or lesser offense, such as common law robbery, or assault, or larceny from the person, or simple larceny, if a verdict for the included or lesser offense is supported by allegations of the indictment and by evidence on the trial." *State v. Bell,* 228 N.C. 659, 46 S.E. 2d 834.

[3] It not only is unnecessary, but it is undesirable for a trial judge to give instructions on abstract possibilities unsupported by evidence. The rule is succinctly stated by Bobbitt, J., in *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545:

> "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."

[1] In the instant case the evidence on behalf of the State establishes that a robbery with firearms was in fact committed. This is uncontradicted by the defendant's evidence, and as stated by Ervin, J., in *State v. Bell, supra:*

> "If the jury believed the testimony in the case under review, . . . it was its duty to convict the defendants of robbery with firearms because all of the evidence tended to show that such offense was committed upon the prosecuting witness, . . . as alleged in the indictment. There was no testimony tending to establish the commission of an included or lesser crime. The evidence necessarily restricted the jury to the return of one of two verdicts . . . namely, a verdict of guilty of robbery with firearms . . . or a verdict of not guilty. It follows that the court did not err in failing to instruct the jury that they might acquit the defendants of the crime of robbery with firearms charged in the indictment in question and convict them of a lesser offense."

To the same effect, see *State v. LeGrande,* 1 N.C.App. 25, 159 S.E. 2d 265.

Affirmed.

MALLARD, C.J. and MORRIS, J., concur.

STATE HIGHWAY COMMISSION v. THOMAS MODE AND WIFE, FANNIE MODE

No. 68SC60

(Filed 9 October 1968)

1. Eminent Domain § 7— highway condemnation — failure to allege prior good faith negotiation

A complaint in a G.S. Ch. 40 or G.S. Ch. 136 condemnation proceeding which fails to allege a prior good faith attempt by the condemnor to acquire the property by negotiation contains a defective statement of a good cause of action.

2. Eminent Domain § 5— compensation for land containing mineral deposits

The fact it is not known at the time of the taking that condemned land contains valuable minerals does not prevent the owner from recovering the value of the land as mineral land.

3. Eminent Domain § 5— compensation for land containing mineral deposits

In determining the compensation in eminent domain proceedings, the existence of valuable mineral deposits in the land taken constitutes an element which may be considered insofar as it influences the market value of the land, but the award may not be reached by separately evaluating the land and the deposits.

4. Eminent Domain § 6— compensation for land containing stone deposit

In determining the amount of compensation in a highway condemnation proceeding, the landowners are entitled to have the jury consider the existence of a stone deposit discovered on the land during construction of the highway insofar as it influenced the fair market value of the land at the time of the taking.

5. Eminent Domain § 6— testimony placing separate value on stone deposit

In a highway condemnation proceeding, the admission of testimony placing a separate valuation on a stone deposit on the property taken is error.

6. Eminent Domain § 6— opinion as to highest and best use

In a highway condemnation proceeding, the court committed error in admitting opinion testimony as to the highest and best use of the property at the time of the taking which was based partially on the "evidence in this case," the opinion invading the province of the jury and it not being known what evidence in the case the witness considered.

7. Eminent Domain § 6— special benefits

Where the grading contract with the Highway Commission granted the grading contractor all stone cut from the right of way not used in the highway project, payments made to the landowners under a contract in which the grading contractor agreed to pay the landowners for stone cut

from the right of way not used in the highway project do not constitute a special benefit to the landowners which may be considered by the jury in assessing damages against the Highway Commission for the property taken for the highway.

8. Eminent Domain § 6— general and special benefits defined

General benefits are those which arise from the fulfillment of the public object which justified the taking; special benefits are those which arise from the peculiar relation of the land in question to the public improvement.

9. Eminent Domain § 6— general or special benefits — increase in value of remaining property

In a proceeding to assess damages for property taken for highway purposes, the court erred in instructing the jury that it should not concern itself with general or special benefits where testimony was presented that the new highway increased the value of defendant's remaining property as a quarry site for a stone deposit discovered on the property during the highway construction, the existence of the stone deposit being considered by the jury in determining the fair market value of defendants' property at the time of the taking, and the Highway Commission being entitled to have the jury consider the evidence of increased value as a quarry site upon the question of general or special benefits.

APPEAL by plaintiff from *Bryson, J.*, November 20, 1967 Session of RUTHERFORD Superior Court.

This proceeding was instituted by plaintiff, the North Carolina State Highway Commission, on 3 January 1966 for the purpose of condemning a portion of defendants' land. The condemnation was made in connection with a project to relocate U. S. Highway 74 in Rutherford County, Highway Project # 8.188 3401. The plaintiff deposited $1,400 into Court as its estimate of just compensation.

The defendants' property affected by the taking consisted of 35.02 acres (including 4.43 acres subject to a railroad right of way) of farm and woodland on which was situate a house and other outbuildings. The tract was located in Rutherford County, North Carolina.

The State Highway Commission appropriated 7.66 acres (of which .47 acre was subject to the railroad right of way). The defendants' property remaining after the appropriation lay on both sides of the fully controlled access U. S. Highway 74. There was no direct access between the two remaining portions of the defendants' property after the taking. There was no evidence that any of the improvements on the land were destroyed by the appropriation.

During the construction of the highway on the appropriated land the grading contractor encountered stone at a depth of 20 to 25 feet below the surface. The grading of the highway bed on the appro-

priated property reached a maximum depth of more than 40 feet. Much of the material excavated from this cut was stone suitable for crushing.

In its contract with the grading contractor the Highway Commission granted to the grading contractor all of the stone cut from the right of way to the extent it was necessary to cut it for the purpose of lowering the grade for purposes of the roadbed, but excepted the stone necessary for use on the instant project. The grading contractor, independent of any contract with plaintiff and for reasons not explained by the record, the briefs, or argument, entered into a contract with defendants whereby the grading contractor agreed to pay to the defendants 4¢ per ton for all stone cut from the right of way and sold to parties for use other than on the instant project. The plaintiff's evidence tended to show that about 45,000 tons of stone were sold to parties for use other than on the instant project.

After construction on the project began defendants, for the sum of one dollar, executed an option to another contractor for a lease for three years. This lease would be for quarrying rights on the remainder of defendants' property. If the option to lease is exercised the lessee is to pay defendants $8,000.00.

No quarry existed on the property prior to the instant project, nor had the defendants ever had the property appraised for quarrying purposes. However, there was evidence that both parties knew that stone did exist below the surface of the land.

Defendants offered the testimony of various witnesses whose opinion evidence tended to show that prior to the appropriation the entire property had a fair market value of $100,000 to $115,500, and after the appropriation the remainder had a fair market value of $12,000 to $13,250. The Highway Commission offered the testimony of various witnesses whose opinion evidence tended to show that the fair market value of the property prior to the taking was $12,000 to $17,525 and that the value of the remaining portion after the taking was $10,600. The Highway Commission's witnesses assigned no separate valuation to the underlying stone deposit in arriving at their opinions as to the value of the property before and after the taking.

The jury returned a verdict of $30,000. From entry of the judgment in accordance with the verdict, the Highway Commission appealed.

T. W. Bruton, Attorney General, by Harrison Lewis, Deputy Attorney General, for Highway Commission, plaintiff appellant.

Hamrick and Hamrick, by J. Nat Hamrick, Attorneys for defendant appellees.

BROCK, J.

This case was first argued in this Court on 27 March 1968. Thereafter on 23 May 1968, and pursuant to the provisions of Rule 31 of the Rules of Practice in this Court, it was ordered by the Court that the case be set for reargument during the week of 2 September 1968 upon the following questions:

> "(1) Under G.S. Chaps. 40 and 136, is it necessary for the condemnor to make a good faith attempt to purchase the subject property; and to allege in the complaint, or the declaration of taking, the prior good faith attempt in order for a complaint in a condemnation proceeding to state a cause of action?
>
> "(2) If so, does the failure to so allege constitute a jurisdictional defect so as to require the court *ex mero motu* to take notice and dismiss; or may the defect be cured by amendment, if allowed in the discretion of the court?"

The questions which were before the Court on reargument during the week of 2 September 1968 have been exhaustively discussed in an opinion by Mallard, C.J., in *Highway Commission v. Matthis*, 2 N.C.App. 233, filed 18 September 1968.

[1] For the reasons stated in the opinion by Mallard, C.J., we hold that the complaint in this case alleges a defective statement of a good cause of action, but because of the admissions in the answer, it cannot now be attacked by the defendants herein, or anyone else.

We proceed now to a consideration of the questions raised upon the appeal which was argued before us upon the original arguments on 27 March 1968.

[4] Neither party has cited, and our research has not disclosed, a case in North Carolina which determines the question of whether mineral, ore, sand, gravel, or other deposits are to be considered in the valuation of land in condemnation proceedings, where such deposit was not disclosed until discovery by the condemnor in construction of the project but before an adjudication of just compensation. However, the general rule that prevails in this state would seem to encompass the right of the landowner to have his property valued with consideration given to a deposit of this nature. In holding that fair market value of land was not limited to its value as undeveloped land, our Supreme Court in *Barnes v. Highway Commission*, 250 N.C. 378, 109 S.E. 2d 219, stated the rule as follows:

"In estimating the fair market value of land before and after the appropriation of a portion thereon for public use, all the capabilities of the property, and all the uses to which it may be applied, or for which it is adapted, which affect its value in the market are to be considered. In short, everything which affects the value of the property taken in relation to the entire property affected must be considered, for compensation must be full and complete. But all the factors affecting value must be considered only with respect to their effect upon the fair market value of the property, as of the time immediately before and immediately after the taking in the then state of the property as a whole." It must be noted however that the last sentence in the above quoted rule constitutes a limitation upon the valuation of "capabilities" of the property, and this limitation is further clarified in *Barnes* as follows: "It is proper to show that a particular tract of land is suitable and available for division into lots and is valuable for that purpose, but it is not proper to show the number and value of lots as separated parcels in an imaginary subdivision thereof. In other words, it is not proper for the jury in these cases to consider an undeveloped tract of land as though a subdivision thereon is an accomplished fact. Such undeveloped property may not be valued on a per lot basis. The cost factor is too speculative."

[2, 3] In 27 Am. Jur. 2d, Eminent Domain, § 290, p. 93, the following is stated: "The fact that it is not known at the time of the taking that the land contains valuable minerals does not prevent the owner from recovering the value of the land as mineral land."

"The rule ordinarily applicable . . . is that in determining the compensation in eminent domain proceedings the existence of valuable mineral deposits in the land taken constitutes an element which may be considered insofar as it influences the market value of the land. The general rule has been applied indiscriminately to all forms of mineral deposits, such as coal, ore, gold, fire clay, sand and gravel, and stone or limestone. [H]owever, . . . the award may not be reached by separately evaluating the land and the deposits, since the latter, being only one element among many in determining the market value of the land, cannot be considered as an independent factor the value of which is to be added to the value of the land." 27 Am. Jur. 2d, Eminent Domain, § 290, p. 91. See also, 29A C.J.S., Eminent Domain, § 174, p. 735.

[4] The general rule, as gathered from other jurisdictions and quoted above, with respect to the existence of mineral deposits in land taken by condemnation, is consistent with the holdings of our

Supreme Court. We hold therefore that defendants were entitled to have the existence of the stone deposit on their land considered by the jury insofar as it influenced the fair market value of the land at the time of the taking.

[5] The Highway Commission assigns as error the admission of testimony from the landowners' witness, Bruce Hoyle, as follows:

"MR. HAMRICK: Mr. Hoyle, do you have an opinion satisfactory to yourself as to the fair market value of the merchantable stone in the ground of the Thomas Mode property on January 3, 1966, per ton?

"MR. HUDSON: Objection.

"THE COURT: Objection overruled, if he knows of his own knowledge. EXCEPTION No. 7.

"Answer: 5¢ a ton."

Previously, the landowners' witness, David Dunn, had been allowed to testify as follows:

"MR. HAMRICK: Let me ask him this. Do you have an opinion satisfactory to yourself, from your examination of the right of way of the road and your examination of the stone, how many tons of quartz monsonite stone could be removed from a 100 foot quarry?

"MR. HUDSON: Objection.

"THE COURT: Objection overruled.

"Answer: Yes. To a depth of 100 feet beneath the right of way of the highway, I calculate a quantity of stone at 2,458,000 tons. I made an exhibit showing the cut and showing the type of stone I found in the right of way."

It is quite obvious that the effect of this testimony was to separately value the stone deposit on a per ton basis. This the landowners were not entitled to do. See, 27 Am. Jur. 2d, Eminent Domain, § 290, p. 91; cf., *Barnes v. Highway Commission, supra.* This assignment of error is sustained.

[6] The Highway Commission assigns as error the admission of testimony from the landowners' witness Marion R. Griffin, as follows:

"MR. HAMRICK: Mr. Griffin, in your examination of the Mode property and evidence in this case, state whether or not you have an opinion satisfactory to yourself as to what the

highest and best use of the Mode property could have been put to on January 3, 1966, do you have such an opinion?

"MR. HUDSON: Objection.

"THE WITNESS: Yes, sir.

"THE COURT: Objection overruled. EXCEPTION No. 9.

"MR. HAMRICK: What is that opinion?

"THE WITNESS: Rock quarry, what it's being used for."

The witness may have been qualified to give his opinion from knowledge of the Mode property as to its highest and best use at the time of the taking, but it was improper for him to base his opinion even partially upon *the evidence in this case.* Aside from invading the province of the jury to determine the highest and best use from the evidence in the case, the vice in this testimony is that it is not known what evidence in the case he considered. This assignment of error is sustained.

[7] The Highway Commission excepts to the Court's instruction to the jury that there is no evidence of general or special benefits. The trial judge instructed the jury in part as follows:

". . . the Court instructs you, Members of the Jury, that there is no evidence of general or special benefits for your consideration under this rule of law, and you will not concern yourself with any benefits in arriving at the fair market value of the remainder of the property taken."

The Highway Commission argues that the evidence of landowners' contract with the grading contractor for payment to landowners at the rate of 4¢ per ton for all stone cut from the right of way and sold to parties for use other than on the instant project is competent to be considered by the jury as a special benefit.

The contract between the Highway Commission and the grading contractor granted to the grading contractor all the stone cut from the right of way which was not necessary to be used on the instant project. The reasonable assumption is that the Highway Commission received a more favorable bid from the grading contractor by reason of this provision. Having granted the stone to him, it became the property of the grading contractor. This was recognized by the Highway Commission by its purchase of some 20,000 tons of this very stone for use on other projects. If the stone belonged to the grading contractor, certainly he was free to dispose of it as he wished. As set out in the statement of facts, there has been no explanation by the record, the briefs, or argument of any reason why the grad-

ing contractor was willing to pay defendants the sum of 4¢ per ton for stone sold; during argument we posed the precise question to counsel on both sides but all disclaimed any knowledge. There is nothing in the record to support a conclusion, or inference, that the construction of the highway gave the defendants the right to receive 4¢ per ton from the grading contractor, and it cannot therefore be said that construction of the highway bestowed this as a special benefit. It appears to be a special benefit bestowed upon defendants by the grading contractor, and we see no reason under the law that the Highway Commission has the right to claim this payment as a set off against damages which might be assessed against the Highway Commission for the taking of a portion of defendants' property.

Insofar as the judge's charge to the jury relates to payments under the contract between the grading contractor and defendants, we hold it was not error.

[9] The Highway Commission further argues that the charge was erroneous because the evidence of increased value of the remainder of defendants' property after the taking was competent for the jury to consider as a special benefit.

[8] "The most satisfactory distinction between general and special benefits is that general benefits are those which arise from the fulfillment of the public object which justified the taking, and special benefits are those which arise from the peculiar relation of the land in question to the public improvement. Ordinarily the foregoing test is a satisfactory one, though sometimes difficult to apply. In other words, the general benefits are those which result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment. The special benefits are ordinarily merely incidental and may result from physical changes in the land, from proximity to desirable object, or in various other ways." *Templeton v. Highway Commission,* 254 N.C. 337, 118 S.E. 2d 918.

[9] Having held that defendants are entitled to have the existence of the stone deposit on their land considered by the jury insofar as it influenced the fair market value of the land at the time of the taking, it follows that it is competent for the Highway Commission to show what, if any, effect the construction of the highway had upon the land with respect to its value as a quarry.

One of defendants' witnesses, Robert Burns, testified, among other things, as follows: "Aside from the instant highway project — the relocation of U. S. 74 — I would not have considered the Mode property a feasible quarry site." And later on redirect exam-

ination he stated: "Since this road is through there, I think there is a good market for the stone as long as the road is there. When the road is completed I don't think then it is justifiable on the market." Another of defendants' witnesses, Marion R. Griffin, testified that in giving his opinion that the highest and best use of the property was for a quarry, that the highway going through the property "would increase the land tremendously."

The jury should have been allowed to consider this testimony in determining what general or special benefits, if any, the defendants received by reason of the construction of the highway. *Templeton v. Highway Commission, supra.* It was therefore error for the judge to rule out consideration of this evidence by his instruction that they were not to concern themselves with any benefits in arriving at the fair market value of the remainder of the property.

There are other assignments of error which may have merit, but because the case must be tried again we refrain from discussing them; they probably will not arise again upon a new trial.

New trial.

MALLARD, C.J., and PARKER, J., concur.

ATLANTIC DISCOUNT CORPORATION v. MANGEL'S OF NORTH CAROLINA, INC.

No. 681SC353

(Filed 9 October 1968)

1. Landlord and Tenant § 8— lessor's covenant to repair — destruction of premises by fire

Lessor's general covenant to repair the leased premises, in the absence of other controlling language in the lease or competent proof of circumstances compelling an opposite conclusion, extends to the restoration or rebuilding of structures on the premises if they are destroyed by fire; however, the use of language which can be construed only to limit or make specific the lessor's duty to repair may prevent an extension of the duties so as to embrace an obligation to restore or rebuild in case of substantial or total destruction by fire.

2. Landlord and Tenant § 8— lease covering portion of building — lessor's duty to repair entire building

If the lease covers only a part of the building, an agreement to repair the building or keep it in repair will not impose a duty upon the landlord to rebuild in case the whole building is destroyed by fire.

3. Landlord and Tenant § 6— construction of lease terms

A construction of the terms of a lease which would be unreasonable or unequal should be avoided, if it can be done consistently with the tenor of the agreement; and a construction which is most obviously just is to be favored as being most in accordance with the presumed intention of the parties.

4. Landlord and Tenant § 8— covenant to repair — duty to rebuild premises destroyed by fire

Lease prepared by lessee which covered only a portion of the building and which contained a provision that landlord agrees to "make all repairs and replacements which may be necessary to maintain the demised premises in a safe, dry and tenantable condition and in good order and repair" does not impose obligation on the lessor to rebuild in case the entire building is destroyed by fire.

5. Landlord and Tenant § 8— covenant to rebuild improvements — duty to rebuild premises destroyed by fire

Lessor's covenant to rebuild and repair improvements within the demised premises cannot be extended to impose upon lessor a duty to rebuild an entire building destroyed by fire of which the demised premises is only a portion.

6. Landlord and Tenant § 8— covenant to maintain fire insurance — duty to rebuild

Lessor's covenant to maintain fire insurance for "the restoration and rebuilding of the improvements" in the demised premises will not be construed as a covenant to maintain insurance on the entire building.

7. Landlord and Tenant § 6— construction of lease terms

Construction of a lease contract leading to an absurd, harsh or unreasonable result should be avoided if possible.

APPEAL by defendant from *Cowper, J.*, 29 April 1968 Session (2nd week), PASQUOTANK Superior Court.

On 25 September 1953, plaintiff was the owner of The Carolina Building, located on the north side of East Main Street in Elizabeth City, North Carolina. The Carolina Building extended from McMorrine Street on the east to Martin Street on the west, having a frontage of approximately 200 feet on East Main Street, and extended northward between McMorrine and Martin Streets for a depth of approximately 100 feet. The ground level of the building had eight retail store sections of approximately 23 feet each fronting on East Main Street, and a center corridor (or arcade) 16 feet in width. The second, third, and fourth floor levels were devoted primarily to office space for rent to various tenants.

By instrument dated 25 September 1953, plaintiff leased to the defendant, for a term beginning 1 October 1953 and expiring 30 September 1973, two of the retail store sections on the ground level,

plus an area for storage space on the second floor. The defendant occupied the two retail store sections and made improvements therein.

On 1 March 1967 The Carolina Building was wholly destroyed by fire.

Plaintiff claims the lease was terminated by the complete destruction of the building which contained the leased premises. Defendant claims the lease was not terminated, and that plaintiff is under duty to restore the leased premises for defendant's use during the remaining term of the lease. This action was instituted by plaintiff under the Uniform Declaratory Judgment Act (G.S. 1-253 through 1-267) for a determination of the rights of the parties under their lease agreement.

Judge Cowper heard the cause upon the pleadings and concluded that:

> "1. The lease agreement between the parties dated September 25, 1953, attached to the complaint in two parts as Exhibit A and Exhibit B, was terminated by the fire which occurred on March 1, 1967 which completely destroyed the building of which the lease (sic) premises was a part.
>
> "2. The land upon which the leased premises was situated is free and clear of any claim by the defendant, the plaintiff being under no duty to restore or rebuild the leased premises, the improvements therein, nor any part thereof."

From entry of the judgment, defendant appealed.

Worth and Beaman, and Leroy, Wells, Shaw and Hornthal, by L. P. Hornthal, Jr., for plaintiff appellee.

J. W. Jennette for defendant appellant.

BROCK, J.

Those sections of the lease which are pertinent to the controversy between the parties are as follows:

> "4.(a) The Tenant may, by giving written notice to the Landlord one hundred eighty (180) or more days before the last day of the term hereof extend such term to and including the thirtieth of September, (1978) upon the same covenants and agreements as are herein set forth."
>
> "5. The Tenant at its own expense may from time to time during the term of this lease make any alterations, additions

and improvements in, on and to the demised premises which it may deem necessary or desirable and which do not adversely affect the structural integrity thereof but it shall make them in a good and workmanlike manner and in accordance with all valid municipal and State requirements applicable thereto. All salvage from such work shall belong to the Tenant but all permanent structural improvements shall belong to the Landlord and become part of the premises subject to this lease."

"7. If at any time after the execution hereof the improvements then included within the demised premises in whole or in part are destroyed or damaged by fire, the elements, or casualty, the Landlord, at its expense, shall promptly restore or rebuild them as nearly as practicable to the condition existing just prior to such destruction or damage, but the Landlord shall not be required to restore any part of any air conditioning system in the demised premises except ducts and casings; except that if said improvements are destroyed or damaged during the last two (2) years of the term hereof (and if said term shall have been extended then this provision shall apply only to the last two (2) years of the latest extension of said term) to the extent of fifty per cent (50%) or more of the then value of said improvements, then either party may terminate this lease as of the date of such damage or destruction by giving written notice to the other party within thirty (30) days thereafter of its election so to do. . . .

"If, as a result of damage to or destruction of such improvements due to fire or the elements, or casualty, the whole or any part of the premises shall become untenantable, dangerous or unfit for the Tenant's use or the Tenant lose the use of all or any part of the premises, rent shall abate justly and proportionately during the continuance of such condition."

"8. At all times after the execution hereof the Landlord shall carry fire insurance with Extended Coverage Endorsement on the improvements then included in the demised premises (or if any such improvements are part of a larger building, then on such larger building) in solvent and responsible companies authorized to do business in the State where the demised premises are located and equal in amount to not less than 80% of the full insurable value of the improvements or building required to be insured hereunder. Certified copies or certificates of all such insurance policies shall be deposited with the Tenant. Any proceeds under such insurance policies shall be held by the

Landlord as a trust fund and applied and disbursed by it toward the restoration and rebuilding of the improvements pursuant to Section 7 hereof."

"9. . . . The Landlord shall promptly make all repairs and replacements (other than those herein required to be made by the Tenant) which may be necessary to maintain the demised premises in a safe, dry and tenantable condition and in good order and repair."

The defendant urges that Section 9 of the lease constitutes a general covenant to repair, and that this covenant imposes upon the landlord the duty to rebuild the building.

[1] "The rule has become well settled that the duty created by a lessor's general covenant to repair the leased premises shall, in the absence of other controlling language in the lease or competent proof of circumstances compelling an opposite conclusion, be construed to extend to the restoration or rebuilding of structures on the premises if they are destroyed by fire." Annot., 38 A.L.R. 2d 682, at 703 (1954); see also, 32 Am. Jur., Landlord and Tenant, § 709, p. 586.

[1] However, it is also well settled that "the use of language which can be construed only to limit or make specific the duty of a lessor to repair structures on the leased premises may prevent an extension of the duties so as to embrace an obligation to restore or rebuild in case of substantial or total destruction by fire." Annot., 38 A.L.R. 2d 682, at 705 (1954).

[2] Also, "the view is taken that if the lease covers only a part of the building, an agreement therein to repair the building or keep it in repair will not be interpreted as imposing a duty upon the landlord to rebuild in case the whole building is destroyed by fire; such situation is said to call for an application of the principle under which the performance of a contract is excused where through no fault of the parties the subject matter without which the contract cannot be executed has ceased to exist." 32 Am. Jur., Landlord and Tenant, § 709, p. 586.

The defendant relies partially upon *Chambers v. North River Line,* 179 N.C. 199, 102 S.E. 198, to support its contention that a general covenant to repair imposes a duty to rebuild in case of total destruction. However, that case is distinguishable from the case at hand both on the facts and the principles of law involved. *Chambers* was concerned with a tenant's covenant to repair contained in the lease of a wharf which was destroyed by the freezing of a river.

The Supreme Court held the tenant's duty to repair was not relieved by G.S. 42-9, because the provisions of that Statute were limited to a destruction of a house by fire. Also, in *Chambers* the lease was for the entire wharf, and the Court had no reason to discuss the common law rule applicable to the destruction of a building of which the leased premises covers only a portion.

Our research discloses no North Carolina case defining the duty of the lessor under a general covenant to repair in a lease of only a portion of a building, where the entire building is destroyed by fire. In *Saylor v. Brooks,* 114 Kan. 493, 220 P. 193, the Court held that an agreement by the landlord in a lease of the first floor and basement of a two-story concrete building that the premises should be "kept in good repair" does not obligate him to restore it where without his fault the building is entirely destroyed by fire. The opinion states: "We do not think the fact that a lease covering a part of a building contains the statement that the landlord agrees to keep it in repair has any fair tendency to indicate that the parties actually contemplated an obligation on his part to rebuild in case the whole house should be destroyed, and we see no sufficient grounds to interpret the language as imposing that duty upon him. The situation impresses us as one for the application of the principle under which the performance of a contract is excused, where, through no fault of the parties, its subject matter, without which it cannot be executed has ceased to exist."

[3, 4] A construction of the terms of a lease which would be unreasonable or unequal should be avoided, if it can be done consistently with the tenor of the agreement; and a construction which is most obviously just is to be favored as being most in accordance with the presumed intention of the parties. 32 Am. Jur., Landlord and Tenant, § 127, p. 130. The defendant lessee in this case prepared the lease which covers a little over seventeen pages of the Record on Appeal. It seems to be detailed as to the rights and obligations of the parties. If the parties had intended to obligate the lessor to rebuild in case of destruction of this entire building by fire, it would have been a simple matter to so provide. Instead he now seeks to impose such an obligation by asserting the provisions of Section 9 of the lease. We hold that this lease covering only a portion of a building and containing a provision that the landlord agrees to "make all repairs and replacements which may be necessary to maintain the demised premises in a safe, dry and tenantable condition and in good order and repair" does not fairly indicate, without more specific language, that the parties contemplated an obligation on the lessor to rebuild in case the entire building should be destroyed.

[5] The defendant lessee further asserts that Section 7 of the lease constitutes a specific covenant to rebuild and repair in case the premises are destroyed by fire. A reading of Section 7 discloses that it is specifically applicable to *improvements* within the demised premises. It is also clear that the word *improvements* is given a distinct meaning throughout the lease as opposed to the meaning of the *demised premises.* A covenant to rebuild and repair improvements within the demised premises cannot be extended to impose a duty to rebuild an entire building of which the demised premises is only a portion.

[6] The defendant further urges that Section 8 of the lease constitutes a covenant to maintain insurance on the entire building, and that the proceeds from the insurance constitutes a trust fund for the benefit of the lessee, and that under this Section 8 the lessor is obligated as trustee to apply the proceeds towards rebuilding the building. Once again we note that defendant lessee prepared the lease in question, and if such was the intent of the parties it would have been a simple matter to make such a provision in Section 8. However, Section 8 specifically provides for the "restoration and rebuilding of the improvements" in the demised premises; it does not mention rebuilding the building.

[7] It would be harsh and unreasonable to require the lessor to restore and rebuild the *improvements* as they were in the demised premises, when the demised premises was only a portion of a building which has been entirely destroyed by fire. A construction of a contract leading to an absurd, harsh or unreasonable result should be avoided if possible. 51C C.J.S., Landlord and Tenant, § 232(4), p. 594.

The judgment entered by Judge Cowper is affirmed, and this cause is remanded for a determination of the rights of the parties to an adjustment of percentage rental under Sections 19(a) and 19(b) of the lease agreement, in accordance with paragraphs 3, 4 and 5 of Judge Cowper's judgment.

Affirmed and remanded.

BRITT and PARKER, JJ., concur.

JOHNNY THOMAS CLEMMONS, D/B/A CLEM'S TEXACO v. GLENS FALLS INSURANCE COMPANY

No. 6813SC371

(Filed 9 October 1968)

1. Insurance § 6— construction of policy

Insurance policies must be given a reasonable interpretation, and where there is no ambiguity they are to be construed according to their terms.

2. Insurance §§ 6, 141— construction of unambiguous terms favoring the insurer

Where provisions favoring the insurer in a burglary insurance policy are not ambiguous, the rule requiring construction in favor of the insured is inapplicable.

3. Insurance § 6— construction of unambiguous words

Unambiguous words in a policy of insurance should be accorded their ordinary meaning.

4. Insurance § 142— action on burglary policy — insufficiency of evidence to show physical damage

Evidence that the only mark of any kind found within burglarized premises was a scratch on the paint of an inside window frame which would be made by lifting the latch of the window in a normal manner *is held* insufficient to show a loss within the terms of a burglary insurance policy requiring that felonious exit from the premises be evidenced by physical damage to the interior of the premises at the place of such exit.

APPEAL by defendant from *Clark, J.*, 27 May 1968 Session, BRUNSWICK Superior Court.

The defendant having denied liability, plaintiff brings this action to recover for loss of merchandise and money as a result of a burglary committed upon his premises during the night of 16 March 1967, or the early morning of 17 March 1967.

On or about 22 August 1966 the defendant issued its policy No. BR 4-43-29 insuring the plaintiff for the period 22 August 1966 to 22 August 1967 against loss of merchandise and damage to his premises by burglary.

Plaintiff operates a combination service station and grocery store on Highway 17, about one mile north of Shallotte, North Carolina. It is generally a one-man operation with either the plaintiff, his wife, or his brother in charge. Plaintiff had been in business at this location for thirteen years, and had constructed a new store and service station on the premises into which he moved on 1 August 1966. The new building was constructed of concrete block, with one or more metal frame windows at the rear. The bottom one-third

of the window is stationary, and the top two-thirds is hinged to swing outward and upward from the bottom. A latch attached to the bottom of the top section (two-thirds) fits over the metal frame across the top of the bottom section (one-third) to secure the top section from opening. This latch operates by lifting it upward to clear the top of the stationary metal frame of the bottom section and the window will then open by pushing outward on the bottom of the top two-thirds section. The latch cannot be lifted from the outside of the building, but it is accessible to anyone inside of the building; and at times the plaintiff left the store building unattended, with persons in the store building, while plaintiff serviced automobiles on the outside.

Before moving into the new building the metal frames of the windows were painted dark green, and the latch itself was painted a dark green. After the painters completed the painting of the inside of the building, plaintiff moved into the building and has never opened the window. The building is heated and air conditioned, and the window was closed and locked at all times. The plaintiff at no time unlatched the window, and at no time did he authorize anyone else to unlatch it.

On the morning of 17 March 1967 plaintiff opened his store at approximately seven o'clock and discovered merchandise and money missing. He found the top two-thirds of the metal frame window open, and merchandise scattered on the floor just inside the window. Plaintiff immediately notified a deputy sheriff and defendant's agent. An agent of the State Bureau of Investigation assisted the deputy sheriff in the investigation, but no evidence of forcible entry to the building from the outside was found. The green paint on the inside of the metal along the stationary top of the lower one-third of the window was "scarred off" just under where the window latch fits down over it. With respect to the window the deputy sheriff testified, among other things as follows: "We checked the window and there was no evidence of forcible entry at that time as far as using any kind of burglary tools . . . I am talking about the outside . . . Nothing on the window that could be determined they used a pry bar or anything to open the window." In testifying about the inside of the window the deputy sheriff stated: "The onlyest thing on the window, there was a scratch on the window that at that time we couldn't determine what it was unless it was the lock when it was in the position when the lock come down and locked it in position . . . We closed the window and opened it, after we dusted for prints, to see if the lock was defective, and it locked itself right in position."

By stipulation the case was heard by Judge Clark sitting as judge and jury. From a judgment that plaintiff recover the sum of $746.75 for merchandise stolen, the sum of $10.00 for currency stolen, and the sum of $30.00 for damages to the premises and other merchandise, the defendant appealed.

Herring, Walton, Parker and Powell, by William A. Powell for plaintiff appellee.

Marshall and Williams, by A. Dumay Gorham, Jr., for defendant appellant.

BROCK, J.

Plaintiff's theory of trial and argument in his brief is that someone unlatched the window from the inside of the building while the store was open for business, and came back later to gain entry and exit through the unlatched window. Defendant argues that plaintiff has failed to prove a loss coming within the terms of the policy. Therefore, the only question presented by this appeal is whether plaintiff's evidence, considered in the light most favorable to him, is sufficient to support a finding that his loss was covered by the insurance contract.

[1] "Insurance policies must be given a reasonable interpretation and where there is no ambiguity they are to be construed according to their terms." *Insurance Co. v. Insurance Co.*, 266 N.C. 430, 146 S.E. 2d 410.

The only portions of the policy which are germane to this controversy are as follows:

> "Glens Falls Insurance Company, Glens Falls, New York, agrees with the insured, Johnny Thomas Clemmons, D/B/A Clem's Texaco, P. O. Box 38, Brunswick, North Carolina, . . . subject to the . . . exclusions, conditions and other terms of this policy:
>
> "INSURING AGREEMENTS
>
> "To pay for loss by burglary, . . . while the premises are not open for business, of merchandise, . . . within the premises . . . To pay for damages to the premises . . . , and to the insured property within the premises . . . by such burglary . . .

"SPECIAL PROVISIONS
Applicable to this Insurance

"2. *Definitions:*

"(a) . . .

"(b) *'Burglary'* means the felonious abstraction of insured property (1) . . . , or (2) . . . , or (3) from within the premises by a person making felonious exit therefrom by actual force and violence as evidenced by visible marks made by tools, explosives, electricity or chemicals upon, or physical damage to, the interior of the premises at the place of such exit." (Emphasis in printed policy.)

[2, 3] It is not uncommon for insurance companies to include in their burglary or theft policies a provision that there must exist visible marks or visible evidence of force and violence in effecting a felonious entry. Such a provision is inserted for the protection of the insurer against fraud and false claims, and clearly favors the insurer over the insured. However, since such provisions are not ambiguous, the rule requiring construction in favor of the insured does not apply. Annot. 99 A.L.R. 2d 129, at 131; Annot. 169 A.L.R. 224; 10 Couch, Cyclopedia of Insurance Law 2d, Sec. 42:129, p. 762; 5 Appleman, Insurance Law and Practice, Sec. 3176, p. 311. And, although the policy in suit concerns a provision relative to an exit by force and violence, the same general principles apply, and the words of the provision being unambiguous, should be accorded their ordinary meaning.

We hold that clause 2(b)(3) quoted above reasonably means that the plaintiff must show exit by force and violence either by *visible marks made by tools, etc.,* or by *physical damage* to the interior of the premises. Obviously the plaintiff's evidence does not tend to show visible marks made by tools, or explosives, or electricity or chemicals; and therefore he proceeds upon the theory of physical damage to the interior of the premises at the place of such exit.

The testimony of the deputy sheriff with respect to the condition of the inside of the window has been set out in the statement of facts. The only other evidence in the record concerning the condition of the inside of the window is the testimony of the plaintiff. On three occasions during his testimony he described the inside of the window as he observed it after discovering the burglary. On direct examination he testified as follows:

"Q. What, if anything, did you notice on that part of the window over which this latch fits?

"A. The paint was off. Certainly scarred off of it, right down to the metal."

Then on cross-examination he testified as follows:

"Q. Am I correct, Mr. Clemmons, there was no damage with respect to the window itself that you had to have repaired?

"A. No, sir. The onlyest mark there was on the window was where that lock went up and down on the other piece of metal. It rubbed the paint off of it when it was opened. That window hadn't been opened since I moved in there."

Later, upon questioning by Judge Clark the plaintiff testified:

"THE COURT: This condition of the scarring of the paint or removal of the paint from the latch and catch was observed by you after you noticed the merchandise was gone?

"A. Yes, sir."

[4] The problem presented to us then is to determine whether plaintiff's evidence satisfies the requirement of showing *physical damage* to the interior of the premises at the place of exit.

Physical is defined as "material, substantive, having an objective existence, as distinguished from imaginary or fictitious." Black's Law Dictionary, 4th Ed. And according to Webster's Third New International Dictionary (1968) physical is "of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary."

Damage is defined as "Loss, injury, or deterioration, caused by the negligence, design, or accident of one person to another, in respect of the latter's person or property." Black's Law Dictionary, 4th Ed. And, according to Webster's, *supra,* damage is "loss due to injury: injury or harm to person, property, or reputation."

In this case the only mark of any kind is the natural mark which would be made by lifting the latch of the window from the inside in a normal manner. We have no fault to find with Mr. Clemmons' assertion that someone obreptitiously unlatched the window while the premises was open for business and then came back under cover of night to burglarize his store. But to hold that this mark from unlatching the window from the inside in the manner in which it was designed to be unlatched comes within the definition of *physical damage* to the interior of his premises would place an unjust strain on the English language. But more than writing into this insurance contract a coverage which was clearly not intended, the interpretation asked by plaintiff would apply with equal force to the normal

wear and tear from the turning of a key in a latch, the working of a bolt, the wear on the hinges and door frame from the opening and closing of a door in the manner in which it was designed to operate.

We think also that plaintiff, as the insured, has the duty to make a reasonable effort to secure the premises when he closes for the day. The contract of insurance by its terms is applicable only "while the premises are not open for business," and the reasonable construction of this term is that when not open for business, the premises shall be locked. By plaintiff's own testimony and theory of his claim, when he left the premises on 16 March 1967 he left the window unlocked; surely, had he left the premises with the front door unlocked and entry and exit had been gained thereby, this contract of insurance would not cover his loss.

For the reasons stated we hold that plaintiff's evidence fails to show that his loss was covered by his contract, and that the trial judge erred in denying defendant's motion for judgment of nonsuit.

Reversed.

BRITT and PARKER, JJ., concur.

WILLIAM M. YORK, JR., AND FRANK W. YORK v. GEORGE F. NEWMAN, JR., TRUSTEE

No. 6818SC339

(Filed 9 October 1968)

1. Quieting Title § 1— what constitutes cloud on title

A cloud on title may be created by anything that may be a muniment of title or constitute an encumbrance.

2. Quieting Title § 1— nature of former remedy in equity

In the old equity action of removing a cloud upon title to real property, the proceeding was an equitable one and was intended to remove a particular instrument or documentary evidence of title or encumbrance against the title which was hanging over or threatening a plaintiff's rights therein.

3. Quieting Title § 2— nature of statutory remedy under G.S. 41-10

In suit to quiet title to real property under G.S. 41-10, the proceeding is designed to provide a means for determining all adverse claims, equitable or otherwise; it is not limited to a particular instrument, bit of evidence or encumbrance but is aimed at silencing all adverse claims, documentary or otherwise.

4. Quieting Title § 1— nature of remedy

Any action that could have been brought under the old equitable proceeding to remove a cloud upon title may now be brought under G.S. 41-10.

5. Quieting Title § 2— action to remove cloud on title — sufficiency of the complaint

Complaint properly states a cause of action for removing cloud on title where there are allegations that (1) the plaintiffs purchased an undivided interest in real property from the defendant who was acting individually and as trustee for his minor children, (2) the defendant by letter and through his attorney asserts that he now has the legal right and duty, individually and as a trustee, to rescind the deed or sue for damages on the ground that the consideration paid to him was grossly inadequate, and that (3) defendant's threats of legal action constitute a cloud upon their title. G.S. 41-10.

6. Quieting Title § 2; Declaratory Judgment Act § 1— action for declaratory judgment

A declaratory action is an appropriate remedy to perform the function of the customary action to quiet title.

7. Declaratory Judgment Act § 1— justiciable controversy under the Act — action to quiet title

A liberal construction of a complaint, wherein plaintiffs seek declaratory judgment that they obtained good title to lands deeded to them by the defendant, requires the conclusion that respective legal rights and liabilities mentioned in the complaint accrued under the deed and that this, if raised by answer, *is held* to constitute an actual controversy and is a proper subject for action under the Uniform Declaratory Judgment Act.

8. Parties § 1; Quieting Title § 2— necessary parties in quieting title action

Where it appears on face of the complaint in action for removing cloud on title conveyed to plaintiffs by defendant that defendant, acting as trustee for his minor children, is the only person asserting a claim adverse to the interests of plaintiff, and it does not appear that other parties are necessary to determine defendant's claim to have the deed rescinded, defendant's demurrer to the complaint for fatal defect of parties is properly overruled.

9. Declaratory Judgment Act § 2— provision for jury trial

G.S. 1-261 provides for a jury trial to determine issues of fact in cases brought under the Uniform Declaratory Judgment Act.

ON *certiorari*, allowed 17 May 1968 on petition of the defendant to review a judgment entered by *Crissman, J.*, 11 March 1968 Civil Session of GUILFORD Superior Court, Greensboro Division, overruling a demurrer to the complaint.

Plaintiffs in their complaint allege, in substance, except where quoted:

That on 6 February 1959 they purchased from the defendant, for value, a sixty-five per cent undivided interest in certain real property in Greensboro, North Carolina, which was leased to Newman Machine Company, Inc., and Guilford Foundry Company. On the same day the defendant sold all of his stock in Newman Machine Company, Inc., to that corporation. It is further alleged that on 24 March 1966 the defendant's attorney, Mr. Welch Jordan, of Greensboro, wrote a letter to William M. York, Sr., as President of Newman Machine Company, as follows:

> "We have completed an analysis of our notes on the financial information which you permitted us to examine on November 17, 1965, and we have also examined certain public records in the Guilford County Courthouse. In addition, Mr. Newman has delivered to us, and we have studied, all documents in his possession relating to the transactions in early 1959 under which Newman Machine Company, its affiliates, and members of your family acquired all interests of Mr. Newman in these companies and all interests of Mr. Newman, as Trustee for his minor children, in these companies and in the land and buildings in which these companies conducted their operations. Based upon the foregoing information, we have concluded that, in our opinion, the consideration paid to Mr. Newman, individually and as Trustee, for the properties acquired by Newman Machine Company, et al, was grossly inadequate and represented only a minor fraction of the fair market value of the properties. We have so advised Mr. Newman.
>
> In view of the facts and circumstances attendant upon and inherent in the transactions, including the financial and other information in documentary form and the facts as related to us by Mr. Newman, we have further concluded that, in our opinion, Mr. Newman, individually and as Trustee for his minor children, has the legal right to either disaffirm and rescind the transactions or to sue for damages, and we have advised Mr. Newman accordingly. Moreover, we are of the opinion that Mr. Newman, in his capacity as Trustee for his minor children, is legally obligated by reason of his duty as a fiduciary to assert his claim as Trustee and that his failure to do so would amount to a breach of his obligations as a fiduciary, for which he could later be held personally liable. We have stated this opinion to Mr. Newman.
>
> Mr. Newman, individually and as Trustee, has requested that we take appropriate and prompt action to enforce his rights

arising out of the transactions mentioned above. Before commencing legal action or actions for the enforcement of these rights we will be glad to discuss, without prejudice, the entire matter with you or your attorneys, preferably the latter, if you wish to explore the possibilities of a mutually satisfactory compromise settlement of the claims of our client. Please let us hear from you within ten days."

Thereafter, the defendant, through his attorneys, continued to make demands upon the plaintiffs and to threaten legal action against them. That these threats of litigation have hampered the plaintiffs in the management and use of the interest in the real property described in the complaint as having been conveyed to them by defendant and constitute a cloud upon their title. That "(t)he plaintiffs bring this action under applicable laws of North Carolina for a judgment declaring that the sale by the defendant to the plaintiffs was an arms-length transaction, that the defendant had full knowledge concerning the value of the real estate which he conveyed to the plaintiffs; that the plaintiffs obtained good title to the lands conveyed to them by deed from the defendant and that the defendant has no further rights therein and the plaintiffs have no further obligations to the defendant."

Plaintiffs' prayer for relief is:

"WHEREFORE, THE PLAINTIFFS PRAY THE COURT that it enter Judgment declaring that the plaintiffs have good title to the real estate deeded by the defendant to the plaintiffs on February 6, 1959, and more fully described in the deed, a copy of which is attached hereto as Exhibit F, that the costs of this action be taxed against the defendant and that the plaintiffs have such other relief as the Court may deem just and proper."

Defendant filed a demurrer, in writing, to the complaint asserting, among other things, that it does not state facts sufficient to constitute a cause of action, that it is not a proper action for declaratory judgment or to quiet title, or to determine the validity of title, that the entire controversy cannot be resolved and finally determined by this action, and that there is a fatal defect of parties.

From the order of Judge Crissman overruling the demurrer, the defendant in apt time petitioned the Court of Appeals for a writ of *certiorari*, which was allowed.

Adams, Kleemeier, Hagan & Hannah by Charles T. Hagan, Jr., and Smith, Moore, Smith, Schell & Hunter by McNeill Smith for plaintiffs.

McLendon, Brim, Brooks, Pierce & Daniels by Hubert Humphrey for defendant.

MALLARD, C.J.

[1] Defendant asserts in his brief that the question presented by this record is: "Did the Court below err in overruling the Demurrer based upon the grounds that the Complaint does not state a proper action for removing a cloud on title or for declaratory relief and that there is a defect of parties?"

> "A cloud upon title is in itself a title or encumbrance, apparently valid, but in fact invalid. It is something which, nothing else being shown, constitutes an encumbrance upon it or a defect in it — something that shows *prima facie* the right of a third party either to the whole or some interest in it, or to a lien upon it." *McArthur v. Griffith,* 147 N.C. 545, 61 S.E. 519.

"A cloud may be created by anything that may be a muniment of title or constitute an encumbrance." Annot. 78 A.L.R. 24, 29 (1932).

[2-4] The distinction between a suit to remove a cloud upon title and an action to quiet title under G.S. 41-10 is clear. In the old equity action, to remove a cloud upon title to real property, the proceeding was an equitable one and was intended to remove a particular instrument or documentary evidence of title or encumbrance against the title, which was hanging over or threatening a plaintiff's rights therein. *Castro v. Barry,* 79 Cal. 443, 21 P. 946; *McGuinness v. Hargiss,* 56 Wash. 162, 105 P. 233. In a suit to quiet title to real property under G.S. 41-10, the proceeding is designed and intended to provide a means for determining all adverse claims, equitable or otherwise. It is not limited to a particular instrument, bit of evidence, or encumbrance but is aimed at silencing all adverse claims, documentary or otherwise. Any action that could have been brought under the old equitable proceeding to remove a cloud upon title may now be brought under the provision of G.S. 41-10. This statute has been liberally construed. *Lumber Co. v. Pamlico County,* 242 N.C. 728, 89 S.E. 2d 381.

G.S. 41-10 reads in part:

> "An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims."

[5] In the case under consideration, the plaintiffs contend, and we agree, that the letter from the defendant's lawyer, Mr. Jordan,

is an assertion by the defendant of a claim to an interest in the real property described in the deed to the plaintiffs referred to in the complaint. The defendant claims, through his attorney in the letter, that he has the legal right to rescind the deed or sue for damages. He asserts that not only does he have the right to do so, but he has the legal duty to do so because of his fiduciary relationship as Trustee. If he has the right to rescind the deed, and he claims he has in the letter, that is certainly such interest in the real property described therein as to bring this case within the provisions of G.S. 41-10 permitting an action to be brought by any person against another who claims an interest in real property adverse to him for the purpose of determining such adverse claim. If the defendant in his answer disclaims an interest in the described real property, or suffers judgment to be taken against him without answering, under another provision of G.S. 41-10, the plaintiffs cannot recover costs herein. We conclude that the complaint filed herein meets the minimum requirements of G.S. 41-10 in that it alleges that the plaintiffs own the described land and that the defendant *claims* an interest therein adverse to them.

[6] In 2 Anderson 2d, Declaratory Judgments, § 604, p. 1354, it is said:

> "A declaratory action is an appropriate remedy to perform the function of the customary action to quiet title."

The Supreme Court of North Carolina, in *Insurance Co. v. Roberts,* 261 N.C. 285, 134 S.E. 2d 654, held:

> "The Superior Court has jurisdiction to render a declaratory judgment only when the pleadings and evidence disclose the existence of a genuine controversy between the parties to the action, arising out of conflicting contentions as to their respective legal rights and liabilities under a deed, will, contract, statute, ordinance, or franchise. G.S. §§ 1-253 to -267; *Trust Co. v. Barnes,* 257 N.C. 274, 125 S.E. 2d 437; *Greensboro v. Wall,* 247 N.C. 516, 101 S.E. 2d 413; *Lide v. Mears,* 231 N.C. 111, 56 S.E. 2d 404. When jurisdiction exists, a contract may be construed either before or after there has been a breach of it. G.S. § 1-254. The purpose of the Declaratory Judgment Act is, 'to settle and afford relief from uncertainty and insecurity, with respect to rights, status, and other legal relations. . . .' *Walker v. Phelps,* 202 N.C. 344, 349, 162 S.E. 727, 729; *Little v. Trust Co.,* 252 N.C. 229, 113 S.E. 2d 689. It is to be liberally construed and administered."

[7, 8] Applying the foregoing principles of law to the complaint here, we are of the opinion that a liberal construction of the complaint requires the conclusion that the respective legal rights and liabilities mentioned in the complaint relating to these plaintiffs and this defendant accrued under the deed mentioned therein and that this, if raised by answer, constitutes an actual controversy and is a proper subject for an action under the Uniform Declaratory Judgment Act.

> "All persons having any claim or interest in the subject matter of the action whose rights would be affected by the judgment and who are necessary for a final adjudication of the matters involved are necessary parties. A necessary party is one whose rights must of necessity be affected by a judgment in the cause, and is therefore one who must be brought in before the court can proceed to final judgment." 6 Strong, N. C. Index 2d, Parties, § 1.

On the face of the complaint, the only person asserting a claim against the plaintiffs concerning the real property mentioned therein is the defendant. It is alleged that the defendant, as Trustee, conveyed the lands to the plaintiffs. The defendant, as Trustee, asserted his claim and duty to rescind, or sue for damages. It does not appear that other parties are necessary to determine the asserted claim of the right to a rescission of the deed. The subject matter relates to a rescission of the deed on the grounds of the inadequacy of the purchase price. The controversy alleged can be settled in this action, and no one is affected except the parties to the present action.

[9] Defendant's contention that the demurrer should be sustained because the complaint shows that issues of fact are involved is without merit. G.S. 1-261 provides for a jury trial to determine issues of fact in cases brought under the Uniform Declaratory Judgment Act.

The judgment of the Superior Court overruling the demurrer is affirmed. We do not know at this time if the defendant will file answer, or if he does, whether he will thereby raise a controversy justiciable under the Uniform Declaratory Judgment Act.

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

NEWMAN MACHINE COMPANY, INC. v. GEORGE F. NEWMAN, JR., TRUSTEE

No. 6818SC338

(Filed 9 October 1968)

1. Declaratory Judgment Act § 1— nature of remedy — presence of genuine controversy

The court will not entertain a proceeding under the Uniform Declaratory Judgment Act which lacks the essentials of an actual controversy; the presence of a genuine controversy is a jurisdictional necessity. G.S. 1-253.

2. Declaratory Judgment Act § 1— grounds for the remedy — threat of unavoidable litigation

A mere fear or apprehension that a claim may be asserted in the future is not ground for issuing a declaratory judgment; before granting such relief, the court must be convinced that litigation sooner or later appears to be unavoidable.

3. Declaratory Judgment Act § 1— grounds for remedy — threat to rescind sale of personalty

The mere threat of an action to rescind a sale of personal property, namely, the shares of capital stock in a corporation, or to sue for damages, is not sufficient to constitute such an actual controversy as is cognizable under the Uniform Declaratory Judgment Act.

4. Quieting Title § 1— no remedy for adverse claims in personalty

There is no statute providing a means for determining adverse claims in personal property.

ON *certiorari*, allowed 17 May 1968 on petition of the defendant to review a judgment entered by *Crissman, J.*, 11 March 1968 Civil Session of GUILFORD Superior Court, Greensboro Division, overruling a demurrer to the complaint.

This case was heard with case No. 6818SC339, *William M. York, Jr., and Frank W. York v. George F. Newman, Jr., Trustee,* decided 9 October 1968. The facts are almost identical, with the main exception being that case No. 6818SC339 concerns a deed and real property, and this case is concerned with personal property, to wit, shares of stock in corporations.

Plaintiff in its complaint alleges, among other things, in substance, except where quoted:

That on 6 February 1959 George F. Newman, Jr., was president of the plaintiff and owned individually 53.299% of the outstanding shares of the capital stock of the plaintiff and that he also owned 11.477% of said stock as Trustee for his children. That on 6 Febru-

ary 1959 George F. Newman, Jr., sold to the plaintiff all of its shares of capital stock that he owned, both individually and as trustee. It is also alleged that this stock was sold as the result of negotiations between the defendant and W. M. York, Sr. On 24 March 1966 Mr. Welch Jordan of Greensboro, attorney for defendant, wrote W. M. York, Sr., as President of Newman Machine Company, that the price plaintiff paid for the stock "was grossly inadequate and represented only a minor fraction of the fair market value of the properties," that the trustee "has the legal right" and the duty "to either disaffirm and rescind the transactions or to sue for damages," and that Mr. Newman, individually and as trustee, had requested that appropriate legal action be taken to enforce his right.

The complaint also alleges that "(t)he defendant, through his attorneys, continues to make demands on the plaintiff and to threaten legal action against the plaintiff"; that these threats of litigation "seriously affects the plaintiff in the conduct of its business"; that "(t)he plaintiff brings this action for the purpose of having this controversy determined and the cloud on its title removed as speedily as possible." Plaintiff also asserts that defendant has been guilty of laches and that if he ever had any cause of action, it is barred by the statute of limitations.

Plaintiff's prayer for relief is:

> "WHEREFORE, THE PLAINTIFF PRAYS THE COURT that it enter judgment declaring that the plaintiff has good title to the shares of stock which it purchased from the defendant, that the costs of this action be taxed against the defendant, and that the plaintiff have such other relief as the court may deem just and proper."

Defendant filed a demurrer, in writing, to the complaint asserting, among other things, that it does not state facts sufficient to constitute a cause of action, that it is not a proper action for declaratory judgment or to quiet title or to determine the validity of title, that the entire controversy cannot be resolved and finally determined by this action, and that there is a fatal defect of parties.

From the order of Judge Crissman overruling the demurrer, the defendant in apt time petitioned the Court of Appeals for a writ of *certiorari*, which was allowed.

Adams, Kleemeier, Hagan & Hannah by Charles T. Hagan, Jr., and Smith, Moore, Smith, Schell & Hunter by McNeill Smith for plaintiff.

McLendon, Brim, Brooks, Pierce & Daniels by Hubert Humphrey for defendant.

MALLARD, C.J.

Defendant asserts in his brief that the question presented by this record is: "Did the Court below err in overruling the Demurrer based upon the grounds that the complaint does not state a proper action for removing a cloud on title or for declaratory relief and that there is a defect of parties?"

We are of the opinion and so decide that the complaint does not allege a cause of action for removing a cloud on title to personal property. See decision in the companion case, *William M. York, Jr., and Frank W. York v. George F. Newman, Jr., Trustee,* filed by this Court on 9 October 1968 for a discussion of what constitutes a cloud on title to real property.

We are of the opinion and so decide that the complaint is not sufficient to allege a cause of action under the Uniform Declaratory Judgment Act.

G.S. 1-253 reads as follows:

> "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree."

[1] This statute is broad in its terms, but it has been consistently held that under it, the court will not entertain a proceeding which lacks the essentials of an actual controversy. The presence of a genuine controversy is a jurisdictional necessity. *Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404. In *Tryon v. Power Co.*, 222 N.C. 200, 22 S.E. 2d 450, it is said:

> "In marginal cases the rule may be difficult to apply, because it involves a definition, or at least an appraisal, of the term 'controversy,' which must, perhaps, depend upon the individual case; but in the case at bar, the Court does not feel that such embarrassment exists. A mere difference of opinion between the parties as to whether plaintiff has the right to purchase or condemn, or otherwise acquire the utilities of the defendant — without any practical bearing on any contemplated action — does

not constitute a controversy within the meaning of the cited cases."

[2] In 22 Am. Jur. 2d, Declaratory Judgments, § 11, appears the following principle of law: "To constitute an actual controversy there need not exist an actual right of action in one party against the other in which consequential relief might be granted. But a *mere fear or apprehension that a claim may be asserted in the future* is not ground for issuing a declaratory judgment; before granting such relief, the court *must be convinced that litigation sooner or later appears to be unavoidable.* Consequently, where it appears that the facts alleged disclose that either the statute of limitations or the doctrine of laches is applicable thereto, there is no justiciable controversy as contemplated by the Declaratory Judgments Act." (emphasis added)

In an Annotation in 12 A.L.R. 52, 74, there appears the following:

> "In North Eastern Marine Engineering Co. v. Leeds Forge Co. [1906] 1 Ch. 324, 94 L.T.N.S. 56, 75 L. J. Ch. N.S. 178, 54 Week Rep. 370, 22 Times L.R. 178, it is held that a declaration will not be made to the effect that the plaintiffs have a good ground of defense if the defendant should sue them for damages for the infringement of a certain patent. The court said that the mere fact that A. is supposed to contemplate bringing an action against B., or that A. may have stated that he has ground for such an action, does not entitle B. to bring an action against A. to have it declared that A. has not a cause of action against B."

[3] Applying these principles of law to the facts in the case under consideration, we conclude that the mere threat of an action to rescind a sale of personal property, or to sue for damages, is not sufficient to constitute such an actual controversy as is cognizable under the Uniform Declaratory Judgment Act.

"The essential distinction between an action for declaratory judgment and the usual action is that no actual wrong need have been committed or loss have occurred in order to sustain the declaratory judgment action, but there must be no uncertainty that the loss will occur or that the asserted right will be invaded." 22 Am. Jur. 2d, Declaratory Judgments, § 1. In the instant case there is no certainty that the defendant will bring the action that is threatened in the letter written by his attorney. There is therefore no certainty that a loss will occur or that a right will be invaded.

"It would appear that declaratory relief was unknown at common law, inasmuch as the common-law conception of courts was that they were a branch of the government created to redress private wrongs and punish the commission of crimes and misdemeanors. The courts took no official interest in the affairs of civil life until one person had wronged another; then the object was to give relief for the injury inflicted." 22 Am. Jur. 2d, Declaratory Judgments, § 3.

[4] The main distinction in the law between this case concerning personal property and the law in the companion case of *William M. York, Jr., and Frank W. York v. George F. Newman, Jr., Trustee,* concerning real property is that there is no statute in North Carolina giving rise to a cause of action for simply claiming an interest in personal property. We find no statute giving rise to a cause of action to determine adverse claims against one who may threaten to sue another for damages to rescind a sale of personal property. In the York case concerning real estate, the applicable statute, G.S. 41-10, provides that "an action may be brought by any person against another who claims an estate or interest in *real property* adverse to him for the purpose of determining such adverse claims." The statute provides that the claiming of an interest in real property adverse to another gives rise to the cause of action. The General Assembly could have but did not include personal property under the provisions of this statute.

We are of the opinion that the complaint does not allege a justiciable cause of action and that the demurrer should have been allowed. The judgment of Judge Crissman overruling the demurrer is

Reversed.

CAMPBELL and MORRIS, JJ., concur.

STATE v. JAMES LESTER WOODLIEF

No. 6810SC289

(Filed 9 October 1968)

1. Appeal and Error § 30— necessity for objection to admission of evidence

The admission of evidence will not be reviewed on appeal unless timely and proper objection was made in the trial court.

2. Automobiles § 46— opinion testimony as to speed

A person of ordinary intelligence who has had a reasonable opportunity

to observe a vehicle in motion may give his estimate as to the speed at which it was moving.

3. Automobiles §§ 46, 112— manslaughter prosecution — opinion testimony as to speed

In a prosecution for manslaughter growing out of an automobile accident, it is competent for a witness who was a passenger in defendant's automobile to give his opinion that at the time of the accident defendant was driving his vehicle "faster than 100 miles an hour," and an additional statement by the witness that he could not swear that defendant was driving over 100 miles per hour does not render incompetent his previous testimony, the testimony being a colloquial way of expressing an opinion, and inconsistencies in the testimony being a question of credibility within the province of the jury.

4. Criminal Law § 104— motion to nonsuit — consideration of evidence

On motion to nonsuit, the evidence is to be considered in the light most favorable to the State, and the State is entitled to every inference of fact which may reasonably be deduced from the evidence, contradictions and discrepancies being for the jury to resolve and not warranting nonsuit.

5. Criminal Law § 109— motion for directed verdict

The motion for a directed verdict of not guilty, like the motion of nonsuit, challenges the sufficiency of the evidence to go to the jury.

6. Criminal Law § 158— charge presumed correct when not in record

Where the charge of the court is not in the record, it is presumed that the jury was charged correctly on all aspects of the case.

7. Automobiles § 113— manslaughter — culpable negligence — sufficiency of evidence

In a prosecution for manslaughter, defendant's motions for nonsuit and directed verdict were properly denied where the State's evidence tended to show that deceased was a passenger in an automobile driven by defendant at more than 100 miles per hour, that defendant ignored pleas by deceased and another passenger to slow down, and that the automobile wrecked, resulting in the death of the deceased, the evidence being sufficient to support a finding that defendant driver was guilty of an intentional, wilful or wanton violation of a safety statute or an inadvertent violation of such statute accompanied by recklessness or probable consequences of a dangerous nature amounting to a thoughtless disregard of consequences or heedless indifference to the safety and rights of others, and that such conduct proximately caused the passenger's death.

APPEAL from *Bickett, J.*, April 1968 Session, WAKE County Superior Court.

The defendant was tried on a proper bill of indictment charging him with the felonious killing of Larry Booth, on 2 March 1968. The defendant through his personally-employed attorney entered a plea of not guilty. The jury returned a verdict of guilty of involuntary

manslaughter and the court imposed a sentence of not less than four years, nor more than seven years, with recommendation that he be confined in a youthful offenders camp and with an opportunity to serve under the work release program.

The defendant took an appeal and brings forward for review two questions: one involving the admission of evidence and the other directed to the trial court's failure to sustain a motion of nonsuit at the conclusion of the State's evidence and to direct a verdict of not guilty at the conclusion of all of the evidence.

Earle R. Purser and Carl E. Gaddy, Jr., Attorneys for defendant appellant.

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

CAMPBELL, J.

[7] The evidence on behalf of the State tends to show that on 2 March 1968 Tim Douglas Lee, a 21-year old member of United States Navy, Larry Booth, the deceased, and the defendant met at a filling station in Raleigh "where everybody hangs out." The defendant was the owner of a 1967 Chevelle automobile. The three, who were all acquaintances of a year or more, rode around in the front seat of the defendant's automobile. Lee drove the automobile in the country; then Booth wishing to drive the automobile began to do so. At an intersection Booth stopped the automobile since the defendant wanted "to drive his car." Lee testified: "So we pulled off on the shoulder of the road and Jimmy Woodlief started driving. He started off spinning the tires. We were on the Falls of Neuse Road when Jimmy started driving the car. We were approximately a mile from that Catholic Church on the Falls of Neuse Road where we had the wreck at when Jimmy started driving the car. When Jimmy Woodlief started driving he started off spinning tires and he didn't slow up until we had the wreck. No other cars were involved. We tried to get him to slow down, and he just kept right on going. Larry Booth told Jimmy Woodlief he ought to slow down and Jimmy didn't do anything, didn't say anything or nothing. He just kept right on going, and I told him he ought to slow down and me and Larry got down in the floorboard of the car because Larry told him he knowed he couldn't make the curve. I was not familiar with the road. Larry did not live out there anywhere. Jimmy Woodlief was driving and he just went right on and me and Larry got down in the floorboard, and the next thing I know I heard gravel and all going up under the

car. I don't remember anything else until he hit all the trees and all. . . ."

The deceased, Larry Booth, was thrown out of the car on the passenger's side. The defendant was thrown out of the car on the driver's side. The witness Lee was thrown partially through the windshield and was hanging in that position.

T. C. Cherry, a member of the North Carolina State Highway Patrol, investigated the wreck. He arrived at the scene at 10:10 p.m., 2 March 1968, and found a blue 1967 Chevelle automobile in the yard at Raphael Church. The church and the automobile were located on the westerly side of the road. The automobile had been going in a southerly direction. There was a curve in the road to the east and the automobile, instead of going around the curve to the east, had gone straight ahead off the westerly shoulder of the road. The officer testified that he measured marks from the automobile in a northerly direction for 700 feet. Starting at the automobile the marks went 100 feet to a tree, then another 122 feet to a hedge. The marks were not continuous, there being skips in them. The marks went straight off the road while the curve in the road was to the left. The hedge was approximately six feet tall and was damaged slightly in the top. The entire motor of the automobile was found approximately forty feet away from the automobile. The officer testified that he went about a mile north of where the automobile was found to the point where the witness Lee told him the defendant had started driving. There he found "approximately thirty foot of marks, started on the edge of the right shoulder, come back in the road at an angle and then got straightened up before it stopped. It's what we commonly refer to as 'scratch off' marks, a rubber mark. I found these marks that I have described exactly one mile from where I found the automobile." With regard to the automobile, the officer stated: "The car was a total loss, both sides and the top were entirely demolished. The motor was some forty feet from the automobile towards the road at an angle. The door, chrome and all kinds of parts of the car were scattered over the area from the hedge to the car."

[3] The defendant assigns as error the following testimony of the witness Lee: "Sir he was driving it faster than 100 miles an hour."

The record of the direct examination of the State's witness Lee discloses the following:

"Q. Do you have an opinion satisfactory to yourself as to how fast the defendant was driving his car at the time of the wreck, or just before it happened?

A. Yes sir.

Q. All right, in your opinion, approximately how fast was the defendant driving his car just before and at the time of the wreck?

A. Sir he was driving it faster than 100 miles an hour.

Objection and motion to strike.

COURT: Overruled (Without further questioning, the witness continued)

I couldn't swear he was driving it over 100 miles an hour, but he was driving well over the speed limit. I did not look at the speedometer. I just glimpsed the speedometer one time when he was driving that night and it was moving over and that's all."

[1] The defendant had the burden of interposing a timely objection, but no objection was made until after the question was answered. Stansbury, N. C. Evidence 2d, § 27. It is well established that "an objection to testimony not taken in apt time is waived." *State v. Hunt*, 223 N.C. 173, 25 S.E. 2d 598; *State v. Merrick*, 172 N.C. 870, 90 S.E. 257. "The admission of evidence will not be reviewed on appeal unless timely and proper objection was made in the trial court." Stansbury, *supra.*

[2, 3] Not only was the objection not timely made, but the testimony itself was competent. The witness Lee had operated the vehicle a short time prior to the accident and was, thus, familiar with it. At the time of the accident, he was still a passenger in the vehicle, hence, he had ample opportunity to observe and judge the speed. "A person of ordinary intelligence who has had a reasonable opportunity to observe a vehicle in motion may give his estimate as to the speed at which it was moving." *State v. Clayton*, 272 N.C. 377, 158 S.E. 2d 557. The additional statement by the witness to the effect that he could not swear that the defendant was driving over a 100 miles an hour, while somewhat inconsistent with his previous answer, does not have the effect of nullifying the testimony. It is simply a question of credibility which is within the province of the jury. Stansbury, N. C. Evidence 2d, § 46. It would all come within the "colloquial way of expressing an estimate or opinion." *State v. Clayton, supra.*

This assignment of error is overruled.

[4] The second assignment of error was to the denial of the motion for judgment as in case of nonsuit entered at the close of the State's evidence and the failure to direct a verdict of not guilty at the close of all of the evidence.

"The practice is thoroughly settled in this jurisdiction that on a motion to nonsuit, the evidence is to be considered in its most favorable light for the State, and the State is entitled to every inference of fact which may reasonably be deduced from the evidence, and contradictions and discrepancies in the State's evidence are for the jury to resolve and do not warrant the granting of the motion of nonsuit." *State v. Carter,* 265 N.C. 626, 144 S.E. 2d 826.

[5] Like the motion of nonsuit "(t)he motion for a directed verdict of not guilty challenges the sufficiency of the evidence to go to the jury." *State v. Wiley,* 242 N.C. 114, 86 S.E. 2d 913; *State v. Glover,* 270 N.C. 319, 154 S.E. 2d 305.

An appraisal of the record discloses evidence sufficient to withstand the motion for nonsuit and to support a denial of a motion for a directed verdict. *State v. Ward,* 258 N.C. 330, 128 S.E. 2d 673; *State v. Macon,* 252 N.C. 333, 113 S.E. 2d 426.

The defendant himself did not testify, but he offered testimony from witnesses tending to show the possibility that the defendant was not the driver of the vehicle at the time of the wreck.

[6] The charge of the court to the jury was not brought forward in the record and, therefore, it is presumed that the jury was charged correctly on all aspects of the case and that the jury was properly instructed as to any violation of the statutes designed for the protection of human life or limb. *State v. Cooper,* 273 N.C. 51, 159 S.E. 2d 305.

[7] "There is ample evidence revealed on this record to take the case to the jury and to support the verdict rendered." *State v. Bryant,* 250 N.C. 720, 110 S.E. 2d 319. The evidence supports either a finding "that defendant . . . was guilty of an intentional, wilful or wanton violation of a statute designed for the protection of human life and limb . . . or (that defendant was) guilty of an inadvertent violation of such statute accompanied by recklessness or probable consequences of a dangerous nature amounting altogether to a thoughtless disregard of consequences or heedless indifference to the safety and rights of others, and . . . that such violation and conduct was the proximate cause of the injury and resulting death of deceased." *State v. Hewitt,* 263 N.C. 759, 140 S.E. 2d 241; *State v. Cope,* 204 N.C. 28, 167 S.E. 456; G.S. 20-140; G.S. 20-141. Without question, the defendant's "conduct violated statutes enacted for the safety of the traveling public and was incompatible with a proper

regard for human life." *State v. Narron,* 257 N.C. 771, 127 S.E. 2d 551.

The record in this case reveals no prejudicial error.

Affirmed.

MALLARD, C.J. and MORRIS, J., concur.

BESSIE B. LANIER v. ROSES STORES, INC.
No. 6811SC266

(Filed 9 October 1968)

1. Negligence § 57— proprietor's duty to invitee — oiled floors — sufficiency of evidence

Plaintiff's evidence that she was a customer in defendant's store, that she slipped and fell in an excessive amount of oil on the wooden floor, that the entire floor looked as if it had been treated with the same substance, and that there was a film or wet place approximately one foot by two feet in size where plaintiff slipped, *is held* sufficient to establish a *prima facie* case of defendant's negligence for the jury; the doctrine of *res ipsa loquitur* is inapplicable to this situation.

2. Negligence § 1— negligence defined

The failure to exercise that degree of care which a reasonable and prudent man would have exercised under like circumstances is negligence, and this may consist of acts of commission or omission.

3. Negligence § 53— proprietor's duty to customer

Those entering a store during business hours to purchase or to look at goods do so at the 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, 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.

4. Negligence § 57— sufficiency of evidence that proprietor or his agent applied oil to floor

In plaintiff's action to recover for injuries resulting from a fall on store owner's oiled floor, evidence that the floor was slick and of an appearance indicating the recent and improper application of oil in areas where customers were likely to go, *is held* sufficient to support an inference that the oil was applied by the owner or its agents.

APPEAL by plaintiff from *Cohoon, J.,* at the 18 March 1968 Civil Session of HARNETT Superior Court.

Plaintiff's complaint alleges that on 6 November 1962 plaintiff entered defendant's store in Dunn, N. C., as an invitee for the purpose of buying merchandise; that the floor of the store was coated with a slippery substance not discernible to the plaintiff; that the defendant was negligent in failing to provide a safe area for customers entering and leaving the premises and in failing to warn the plaintiff of the dangerous condition of which defendant had actual or constructive notice; and that the plaintiff slipped, fell and was injured as a result of defendant's negligence.

The defendant answered, denying the material allegations of the complaint and pleading contributory negligence.

The evidence favorable to the plaintiff tended to show the following: That the plaintiff and her daughter entered the store at 9:30 a.m. on a Tuesday and proceeded in the direction of the bedspread counter, which was some 30 feet from the door and somewhat to one side; as they neared the bedspread counter, the plaintiff slipped suddenly in an excessive amount of oil on the wooden floor, the whole of which looked as if it had been treated with the same substance. There was a film or wet place approximately one foot by two feet in size where plaintiff slipped. After the plaintiff fell, her coat was smeared with oil where it had been under her knee and leg as she fell. Oil was also on her sleeve and glove. Several witnesses testified to establish these facts. In addition, there was extensive evidence of plaintiff's injuries and treatment.

At the close of plaintiff's evidence, the court granted defendant's motion for nonsuit. Plaintiff appealed.

Bryan, Bryan & Johnson and Morgan & Jones by Robert H. Jones for plaintiff appellant.

Maupin, Taylor & Ellis by Armistead J. Maupin for defendant appellee.

BRITT, J.

[1] Plaintiff's evidence, when considered in the light most favorable to her, and giving her the benefit of every reasonable inference of fact, as we are required to do, was sufficient to establish a prima facie case of actionable negligence for the jury.

[2] The failure to exercise that degree of care which a reasonable and prudent man would have exercised under like circumstances is negligence, and this may consist of acts of commission or omission.

3 Strong, N. C. Index, Negligence, § 1, p. 442, and cases cited therein. *Forrest v. Kress & Co.*, 1 N.C. App. 305, 161 S.E. 2d 225.

[3] Those entering a store during business hours to purchase or look at goods do so at the 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. *Lee v. Green & Co.*, 236 N.C. 83, 72 S.E. 2d 33; *Bowden v. Kress*, 198 N.C. 559, 152 S.E. 625.

[1] The defendant is not an insurer of the safety of his premises, *Bowden v. Kress, supra;* nor does the doctrine of res ipsa loquitur apply. *Harris v. Montgomery Ward & Co.*, 230 N.C. 485, 53 S.E. 2d 536. Moreover, the doctrine of negligence *per se* is inapplicable to this situation. *Lee v. Green & Co., supra.*

[4] This case is governed by the case of *Lee v. Green & Co., supra,* wherein, after noting that the plaintiff therein had offered no direct testimony as to when, how, or by whom the oil dressing had been applied, it is stated:

> "However, where, as here, a complaining party offers evidence tending to show a slick, oily floor condition, existing under circumstances pointing to some general type of previous oil treatment, showing fresh oil in some places and dry in others, thus indicating the application or accumulation of more oil in some places than others, we think the case may not be withdrawn from the jury simply because the plaintiff or her witnesses did not see the oil applied or know when or by whom it was applied or relate the precise details respecting the kind and quantities of oil applied or the mode of procedure followed in applying it. Where the facts in respect to these things are reasonably inferable from the plaintiff's evidence, as in the present case, it is not imperative, under pain of suffering a nonsuit, that the plaintiff go further and indulge in the exploratory procedure of looking for bystanders who were present when the floor was oiled, or calling to the stand employees of the defendant who may have first-hand knowledge of the method followed in applying the oil. The essentials of a *prima facie* case do not require any such intensity of proofs nor precision as to details, 38 Am. Jur., Negligence, Sec. 333; 65 C.J.S., Negligence, Sec. 243, pp. 1068 and 1074; *Hulett v. Great Atlantic & P. Tea Co.*, 299 Mich 59, 299

N.W. 807; *Benesch & Sons v. Ferkler*, 153 Md. 680, 139 A. 557, cited in *Bowden v. Kress & Co.* [sic], *supra.*"

Here, as in the *Lee* case, there was evidence of a slick floor, with an appearance indicating the recent application of oil, dry in most areas, but still wet in others, which would justify the jury finding an application of excessive amounts of oil in areas where customers might be expected to go. There was no evidence of a warning of this condition. The facts are sufficient to support the inference of application of oil by the defendant or its agents. Defendant is deemed to have knowledge of its own acts or the acts of its agents. *Lee v. Green & Co., supra.*

In its answer, defendant pled contributory negligence on the part of plaintiff; however, it did not argue this question in its brief. We hold that the evidence does not disclose contributory negligence as a matter of law.

The judgment of the Superior Court granting defendant's motion for judgment as of involuntary nonsuit is

Reversed.

BROCK and PARKER, JJ., concur.

ELLA COLCLOUGH v. THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.

No. 6814SC382

(Filed 9 October 1968)

1. Negligence § 53— duty of store owner to invitee

While not an insurer of invitee customer's safety while she is on the premises, a store proprietor does owe to her, as it does to all of its invitee customers, the duty to exercise ordinary care to keep its premises and the facilities which it furnishes for their use in reasonably safe condition, which duty includes the obligation (1) to exercise ordinary care in making such inspections to ascertain that the premises and facilities are being maintained in reasonably safe condition and (2) to give warning of and to eliminate any hidden dangers or unsafe conditions of which defendant knows or in the exercise of reasonable supervision and inspection should know.

2. Negligence § 57— invitee's injury on store premises — sufficiency of evidence

Plaintiff's evidence tending to show that her left little finger was in-

jured when the wheel of defendant's grocery cart became jammed while she was pushing the cart on defendant's premises, plaintiff and her husband testifying that a dirty string resembling a mop string was wrapped around the inside of the wheel, is insufficient and too speculative to support a jury finding of defendant's negligence.

3. Negligence §§ 31, 57— inapplicability of res ipsa doctrine to show proprietor's negligence

Doctrine of *res ipsa loquitur* is inapplicable to carry to jury the issue of store proprietor's negligence in furnishing to plaintiff a defective grocery cart, when (1) plaintiff's own evidence offered an explanation as to the cause of her injury, (2) there was nothing in plaintiff's evidence to permit as a reasonable inference that her injury would not have occurred but for some negligence on defendant's part, and (3) at the time of plaintiff's injury the grocery cart had been within her control for some 20 to 25 minutes.

APPEAL by plaintiff from *Hall, J.*, March 1968 Civil Session of DURHAM Superior Court.

This is a civil action commenced 26 November 1965 in which plaintiff seeks to recover damages for personal injuries suffered by her on 1 December 1962 while she was a customer in defendant's self-service store in Chapel Hill, North Carolina. Plaintiff alleged that a wheel on a shopping cart furnished by defendant for her use in collecting groceries from the shelves in defendant's store became jammed while she was pushing it, causing the cart to stop suddenly and thereby inflicting injuries to plaintiff's left little finger.

In her complaint plaintiff alleged her injuries were caused by defendant's negligence in failing to keep the shopping cart in good condition and repair; in failing to keep the wheels of the cart free from debris, strings, and other matter that could restrict the motion of the cart; in failing properly to inspect the cart; and in furnishing for plaintiff's use a defective cart when defendant knew, or in the exercise of due care should have known, that the cart was in defective condition. Defendant filed answer denying negligence on its part and pleading contributory negligence on the part of the plaintiff.

At the trial plaintiff testified that on the date in question she was a customer in defendant's self-service store, that she got a grocery cart from among approximately 25 or 30 of such carts made available by defendant, and that she started selecting groceries from the counters. Plaintiff testified:

". . . From the time I first got the cart, I did not notice anything unusual about it. I did not notice anything unusual

about it mechanically or anything when I first started pushing it up and down the aisles.

"After I had been up three or four counters and selected several items and started around another counter, the carriage just stopped all of a sudden and the left wheel on the carriage jammed — and I was in a hurry because it was late — and it just jammed my hand back real sudden. I heard my finger pop, and I felt it, and I turned sick on my stomach as if I was going to faint.

"I had been in the store at that time approximately 20 or 25 minutes and during said time I did not notice anything unusual about the cart. The cart moved freely as I went from counter to counter. At the time the cart suddenly stopped, I had approximately 25 to 30 items in the cart. . . .

"I observed the wheels on the cart shortly after I heard my finger snap. It looked like a string — it was a black, dirty-looking thing wrapped around the inside of the wheel."

Plaintiff's husband testified:

"I was with my wife at the Eastgate A & P Store in Chapel Hill on December 1, 1962, while she was doing this shopping. I looked at the cart and it looked like a dirty mop string wrapped around the right rear wheel of it. I would describe this cart as an aluminum product with solid rubber wheels on it, and two front wheels will turn, and has a bottom compartment and a top compartment. . . ."

There was evidence of plaintiff's injury and treatment but no evidence other than the testimony of plaintiff and her husband as to the events which occurred while plaintiff was in defendant's store.

At the close of plaintiff's evidence the court allowed defendant's motion for nonsuit and plaintiff appealed.

Blackwell M. Brogden for plaintiff appellant.

Spears, Spears, Barnes & Baker, by Marshall T. Spears, Jr., for defendant appellee.

PARKER, J.

[1, 2] Defendant was not an insurer of plaintiff's safety while she was on its premises. *Smithson v. Grant Co.*, 269 N.C. 575, 153 S.E. 2d 68. Defendant did owe to the plaintiff, as it did to all of its invitee customers, the duty to exercise ordinary care to keep its

premises and the facilities which it furnished for their use in reasonably safe condition. Included in this duty was the obligation to exercise ordinary care in making such inspections as might be reasonably required to ascertain that the premises and facilities were being maintained in reasonably safe condition. Included also was the obligation to give warning of and to eliminate any hidden dangers or unsafe conditions of which defendant knew or in the exercise of reasonable supervision and inspection should have known. *Lanier v. Roses Stores, Inc.*, 2 N.C. App. 501, 163 S.E. 2d 418. In the present case plaintiff's evidence, even when considered in the light most favorable to her, is not sufficient to support a permissible inference that defendant breached any duty owed by it to the plaintiff, and the judgment of nonsuit was properly entered.

Plaintiff offered no evidence to show any defect in the construction or mechanism of the grocery cart. She testified that the left wheel — her husband said it was the right wheel — suddenly jammed, causing her injury, and that when she examined the cart shortly thereafter she observed a string wrapped around the inside of the wheel.

Plaintiff's evidence leaves in the realm of sheer speculation the answer to such questions as:

When and how the string became entangled in the wheel; if this occurred before plaintiff selected and started using the cart, whether for a brief or substantial period of time; whether the string became entangled in the wheel by having been dropped on it from above or by being picked up from the floor; if from the floor, in what manner the string got there and for how long it had been there. On all of these questions there was simply no evidence from which the jury might make even a rational guess as to the answer.

Plaintiff's husband testified that the string "looked like a dirty mop string." Even should it be permissible for the jury to assume from the descriptive words used that the string had actually come from a mop and that in the ordinary course of events no one other than an employee of the defendant would be likely to use a mop in defendant's store, there was still no evidence as to how or when the mop had been so used and no evidence whatsoever that it had been employed in a negligent manner. For the jury to have been able to find from plaintiff's evidence in this case that her injury was caused by the actionable negligence of the defendant would have required the linking together of too long a chain fabricated from speculations linked to inferences drawn from suppositions founded on other speculations.

The case of *Lee v. Green & Co.*, 236 N.C. 83, 72 S.E. 2d 33, relied on by plaintiff, is distinguishable. In that case the plaintiff offered evidence tending to show that the slick substance on the floor of defendant's store which caused her to slip and fall was the same type of substance which had been used to treat the entire floor. A majority of the Supreme Court held that such evidence was sufficient to support the inference that the hazardous condition complained of had been created by or under the direction or sufferance of the defendant in connection with a general application of floor oil on its entire floor. If such permissive inference should be drawn by the jury, it followed as a necessary corollary that knowledge of the hazardous condition so created by defendant would be inferred. In the case now before us there was no evidence sufficient to support an inference that any hazardous condition had been created by or under the direction or sufferance of the defendant and nothing to support an inference that the defendant had any knowledge or in the exercise of due care could have had any knowledge of the existence of any hazardous condition.

[3] Nor does the doctrine of *res ipsa loquitur* apply. Plaintiff's evidence offered an explanation as to the cause of her injury, to wit: the jamming of the wheel on the cart as a result of the string becoming entangled therein. Nothing in the circumstances disclosed by her evidence would permit as a reasonable inference that this would not have occurred but for some negligence on the part of the defendant. Furthermore, at the time plaintiff's injury occurred the cart was not in the exclusive control of the defendant but for some 20 to 25 minutes had been within the control of the plaintiff.

The defendant's motion of nonsuit was properly allowed and the decision of the superior court is

Affirmed.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. HUBERT THOMPSON

No. 6814SC333

(Filed 9 October 1968)

1. Criminal Law § 16— jurisdiction of District Court — misdemeanors

Except as provided in Article 22, G.S. Ch. 7A, the District Court has original, exclusive jurisdiction for the trial of criminal actions below

the grade of felony, such crimes being declared by the Legislature to be petty misdemeanors. G.S. 7A-272.

2. Criminal Law §§ 16, 18; Shoplifting— jurisdiction of shoplifting prosecution — District Court — Superior Court on appeal

The District Court has exclusive original jurisdiction in a prosecution for a violation of the shoplifting statute, G.S. 14-27.1; therefore, the jurisdiction of the Superior Court on appeal from a shoplifting conviction in the District Court is entirely derivative.

3. Criminal Law § 18— criminal appeal from District Court to Superior Court

Upon appeal from a criminal conviction in the District Court, trial in the Superior Court shall be *de novo*, with jury trial as provided by law, G.S. 7A-196(e), G.S. 7A-288, and without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon. G.S. 15-177.1.

4. Criminal Law § 18— criminal appeal in Superior Court — trial upon original accusation

Upon appeal from a criminal conviction in the District Court, defendant may be tried in the Superior Court upon the original accusation of the District Court and without an indictment by a grand jury.

5. Criminal Law §§ 18, 138— criminal appeal in Superior Court — severity of sentence

In an appeal from a conviction in the District Court, the Superior Court may impose a lighter or heavier sentence than that imposed by the District Court provided it does not exceed the limit of punishment which the District Court could have imposed.

6. Shoplifting; Criminal Law § 138— punishment for shoplifting

Sentence of twelve months imposed in the District Court upon defendant's conviction of shoplifting was excessive, the maximum punishment for the offense being a fine of not more than $100 or imprisonment for not more than six months or both. G.S. 14-72.1.

7. Criminal Law § 18— criminal appeal to Superior Court — amendment of warrant

Upon an appeal from a misdemeanor conviction in the District Court, the Superior Court has power to allow an amendment to the warrant provided the charge as amended does not change the offense with which defendant was originally charged.

8. Shoplifting; Criminal Law § 18— appeal of shoplifting conviction to Superior Court — amendment of warrant to charge second offense

Where defendant was convicted in the District Court upon a warrant charging him with shoplifting, a violation of G.S. 14-72.1, the Superior Court upon appeal had no authority to allow the State to amend the warrant to charge defendant with a second offense of shoplifting, the amendment substantially changing the offense with which defendant was charged and a longer sentence being permissible for a second offense.

9. Criminal Law § 34— evidence of other offenses

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.

10. Shoplifting; Criminal Law §§ 18, 34, 167— appeal of shoplifting conviction to Superior Court — amendment of warrant to charge second offense — prejudicial error

In an appeal from a conviction in the District Court upon a warrant charging defendant with shoplifting, error by the Superior Court in allowing the State to amend the warrant to charge defendant with a second offense of shoplifting is not rendered harmless by the fact defendant was sentenced in the Superior Court to a term within the maximum authorized for a first offense of shoplifting, the amendment permitting the State to introduce evidence of a prior shoplifting conviction which would not have been admissible in a trial under the original warrant since its only effect would have been to assail the character of the nontestifying defendant and to show his disposition to engage in shoplifting.

APPEAL by defendant from *Copeland, S.J.*, at the 3 June 1968 Session of DURHAM Superior Court.

Defendant was tried in the District Court in Durham County on a warrant charging him with shoplifting, a violation of G.S. 14-72.1. He pleaded not guilty, was found guilty, and was sentenced to twelve months in jail by the district court judge. Defendant appealed to the superior court, where he was tried *de novo* before a jury. Upon the call of the case and before the defendant had entered a plea, the solicitor moved to be permitted to amend the warrant so as to charge the defendant with a second offense of willful concealment of goods as defined in G.S. 14-72.1. The court allowed the solicitor's motion over defendant's objection. Defendant then pleaded not guilty, the jury returned a verdict of guilty as charged in the amended warrant, and the judge entered judgment sentencing defendant to jail for a term of not less than 21 nor more than 24 months, to be assigned to work under the supervision of the North Carolina Department of Correction. Prior to the end of the two weeks session of superior court at which defendant was tried, the judge, in the presence of defendant and his attorney, modified the judgment so as to reduce the sentence to six months, and from the judgment as so modified defendant appealed.

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

W. Paul Pulley, Jr., for defendant appellant.

PARKER, J.

[1-6] Except as provided in Article 22, Chapter 7A, of the General Statutes, the district court has original, exclusive jurisdiction for the trial of criminal actions below the grade of felony, and the same are declared by the Legislature to be petty misdemeanors. G.S. 7A-272. The offense with which defendant was here charged comes within the classification for the trial of which the district court has exclusive original jurisdiction. Therefore, the jurisdiction of the superior court on appeal to it from the judgment of the district court was entirely derivative, *State v. White,* 246 N.C. 587, 99 S.E. 2d 772. Upon appeal to superior court, trial shall be *de novo,* with jury trial as provided by law, G.S. 7A-196(e), G.S. 7A-288, and without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon. G.S. 15-177.1. In the superior court the defendant may be tried upon the original accusation of the district court and without an indictment by a grand jury, *State v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283. Since the trial in the superior court is without regard to the proceedings in the district court, the judge of the superior court is necessarily required to exercise his own independent judgment, and hence his sentence may be lighter or heavier than that imposed by the district court, provided, of course, it does not exceed the limit of punishment which the district court could have imposed, *State v. Meadows,* 234 N.C. 657, 68 S.E. 2d 406. In the present case the maximum punishment which could have been imposed upon the defendant upon conviction of the offense for which he was tried in the district court would have been a fine of not more than $100.00 or imprisonment for not more than six months or by both such fine and imprisonment. G.S. 14-72.1. Manifestly, therefore, the twelve months sentence imposed by the district court judge was excessive. Upon appeal, the judge of superior court allowed the State, over defendant's objection, to amend the warrant so as to charge the defendant with a second offense of shoplifting, under the provisions of the second paragraph of G.S. 14-72.1 which is as follows:

> "Any person found guilty of a second or subsequent offense of willful concealment of goods as defined in the first paragraph of this section shall be guilty of a misdemeanor and shall be punished in the discretion of the court."

[7, 8] If the amendment was properly allowed then the judgment as originally entered by the judge of superior court imposing a sentence of not less than 21 months nor more than 24 months would have been lawful. G.S. 14-3(a). However, since the district court had ex-

clusive original jurisdiction for the trial of criminal cases for the offense here involved, and since the jurisdiction acquired by the superior court upon appeal was entirely derivative, the superior court lacked power to allow amendment to the warrant so as to charge the defendant with a different offense from that for which he was tried in the district court. *State v. White, supra.* As a general proposition the superior court, on an appeal from an inferior court upon a conviction of a misdemeanor, has power to allow an amendment to the warrant, provided the charge as amended does not change the offense with which defendant was originally charged. *State v. Fenner,* 263 N.C. 694, 140 S.E. 2d 349; *State v. Wilson,* 227 N.C. 43, 40 S.E. 2d 449. In the present case, however, the amendment to the warrant did substantially change the offense with which defendant was charged. To convict defendant of the offense charged in the amended warrant it was necessary for the State not only to allege in the warrant but to offer evidence to prove the facts showing that the offense charged was the commission of a second or subsequent crime within the contemplation of the statute, *State v. Miller,* 237 N.C. 427, 75 S.E. 2d 242. The case of *State v. Broome,* 269 N.C. 661, 153 S.E. 2d 384, is distinguishable from the present case. In that case the defendant had pleaded guilty in the county court to a warrant charging him with unlawfully and willfully operating a motor vehicle on the public highways of the State while under the influence of intoxicating liquor, "this being his 3rd such offense. (1st offense Sampson County Superior Court Feb. 11, 1960, 2nd offense Sampson County Superior Court Oct. 28, 1960)." In the superior court on appeal the court allowed an amendment to the warrant to insert in place of the matter shown in parenthesis the following:

> "(H)e having previously been convicted on a charge of operating a motor vehicle on public highways under the influence of intoxicating liquor in the Superior Court of Sampson County on Feb. 11, 1960 and again on Oct. 28, 1960."

Clearly the amendment did not change the nature of the offense charged, since the original warrant, though perhaps inartfully drawn, charged the commission of the third offense of driving under the influence of intoxicating liquor and included allegation of the dates and courts in which conviction of the first and second offenses had occurred.

[9, 10] In the present case the State, in its brief, contends that while there may have been error in permitting the amendment to the warrant in the superior court, such error was rendered harmless when the judge modified his judgment to reduce the sentence imposed upon

defendant to six months, since G.S. 14-72.1 authorizes such a sentence upon conviction of a first offense under its terms. We do not agree that the error was non-prejudicial to the defendant in this case. The amendment permitted the State to introduce evidence concerning defendant's prior conviction in Durham Superior Court of a similar crime of shoplifting. In the present case the defendant did not testify nor otherwise place his character in evidence. 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. *State v. Branch,* 1 N.C. App. 279, 161 S.E. 2d 492. Obviously, if the warrant had not been amended, the only effect of the testimony as to defendant's prior conviction would have been to assail the character of the defendant and show his disposition to engage in shoplifting. Such evidence was prejudicial to the defendant and entitles him to a new trial.

We find it unnecessary to pass upon defendant's remaining assignments of error, which will probably not arise upon another trial.

New trial.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. CECIL LOVEDAHL AND EDWARD NOLAN

No. 6810SC329

(Filed 9 October 1968)

1. Criminal Law § 98— segregation of witnesses

The segregation of witnesses during the course of a trial is a matter of discretion on the part of the trial judge, and the exercise of such discretion is not reviewable on appeal except in case of abuse.

2. Criminal Law § 98— segregation of witnesses

In the trial of two prison inmates for felonious assault, trial court did not abuse its discretion in denying defendants' motion that their witnesses, all of whom were fellow inmates, be present in the courtroom during the course of the trial.

3. Criminal Law § 113— instructions on defense of alibi

In prosecution for felonious assault, the evidence of defendants having raised the defense of alibi, the instructions of the trial court *are held* to have properly instructed the jury on the law of alibi and to have applied

the law to defendants' evidence with sufficient particularity for the jury to have obtained a clear understanding of its significance.

APPEAL by defendants from *Bickett, J.*, 22 April 1968 Regular Criminal Session of WAKE Superior Court.

Defendants were tried on a bill of indictment charging them with an assault with a deadly weapon with intent to kill one Terry Lufsey inflicting serious injuries not resulting in death. They pleaded not guilty. The felonious assault for which they were tried took place at Central Prison in Raleigh, where both defendants and the victim of the assault were inmates. At the trial Terry Lufsey testified for the State that at about 4:30 p.m. on 25 October 1966 he was in the corridor leading from his cellblock to the prison dining hall when the two defendants assaulted him with a knife, cutting him on his back, arm and shoulder. Both defendants took the witness stand, denied any connection with the stabbing, and testified that at the time referred to by Lufsey they were in the prison dining hall eating their evening meal; that upon hearing a commotion outside the dining hall, they and several other inmates emptied their trays and went into the corridor to learn the reason for the disturbance; that they then learned from other prisoners that Terry Lufsey had been stabbed. The defendants called as their witnesses certain of their fellow prisoners who testified in support of their alibi.

The jury found both defendants guilty as charged. From judgment imposing prison sentences, defendants appeal.

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

John R. Jordan, Jr., for defendant appellants.

PARKER, J.

Defendants subpœnæd as witnesses seven of their fellow prisoners from the State's Central Prison. These witnesses were kept by the Sheriff's deputies in a room separate from the courtroom until each was called in turn to testify. At the commencement of the trial counsel for defendants moved that these witnesses be brought into the courtroom where they might hear the evidence. Defendants assign as error the court's refusal to grant this motion.

[1, 2] In this State the segregation of witnesses during the course of a trial is a matter of discretion on the part of the trial judge, and the exercise of such discretion is not reviewable on appeal except in case of abuse. *State v. Clayton*, 272 N.C. 377, 158 S.E. 2d 557; *State*

v. Spencer, 239 N.C. 604, 80 S.E. 2d 670. This question is most frequently presented when one party makes a motion to have his adversary's witnesses excluded or to have the witnesses "put under the rule," as the procedure is sometimes termed. In the present case the defendants' witnesses, being in the custody of the State, were already being held segregated from the courtroom, and the question of whether they should be present in the courtroom throughout the course of the trial was presented by defendants' motion that they be brought in. The fact that the question arose in a slightly different manner in this proceeding than is usually the case in no way changes the rule that the matter is one to be left within the sound discretion of the trial judge and is not reviewable except for abuse of discretion. There was here no abuse of the trial judge's discretion. The record shows that after denying defendants' motion the court allowed ample time and opportunity for the defendants and their counsel to confer with each other and to confer with their witnesses. The segregation of these witnesses in no way handicapped defendants in fully presenting their testimony before the jury. Furthermore, in exercising his discretion the trial judge could properly consider the security problem which would have been created had he permitted such a large number of the State's prisoners to be present in the courtroom at one time.

[3] Defendant's second assignment of error is that the court's charge to the jury was deficient, particularly as it related to the defense of alibi. In this connection, the court charged:

> "Now, the defendants by their plea of not guilty, and their testimony, say that they are not guilty but they are also relying in part on what is known as an alibi; that is, which means literally, elsewhere; and when an accused or a defendant relies on an alibi he does not have the burden of proving it. It is incumbant (sic) upon the State to satisfy the jury beyond a reasonable doubt on the whole evidence, that such defendant is guilty. If the evidence of alibi in connection with all the other testimony in the case, leaves the jury with a reasonable doubt of the guilt of the accused, the State fails to carry the burden of proof imposed upon it by law, and the accused and each of them, of course, is entitled to an acquittal, that is a verdict of not guilty."

This charge was almost verbatim in the form approved by the North Carolina Supreme Court in the case of *State v. Spencer,* 256 N.C. 487, 124 S.E. 2d 175. Defendants concede this, but nevertheless contend that the charge was here deficient in that the court did not

apply the law of alibi to the defendants' evidence with sufficient particularity. This contention is without merit. In addition to the above-quoted portion of the charge, the court in its recapitulation of the defendants' evidence, pointed out that defendant Lovedahl had testified:

> ". . . that he was not, had not assaulted Mr. Lufsey, at any time, and that on this particular occasion when the yelling took place that he was in another place, that he was up in the mess hall."

With reference to the testimony of defendant Nolan, the court charged:

> "And Mr. Edward Nolan testified in his own behalf, that he was in there in prison, as the court recalls, for some felony, armed robbery as the court recalls; and that on this particular occasion he was in C block and that he and Cecil Lovedahl and several others went down to supper about 4:30 that afternoon; and that they seated themselves at the first table in the white side, and that they were sitting there when they heard a commotion or somebody screaming; and that after they heard the screams that he, Mr. Nolan, Mr. Lovedahl got up and started down the hall towards C and D block and that there were ten or twelve inmates in the hall at that time; and he named the people that were sitting at the table with him or close to him, . . ."

In addition to denying vigorously that they had in any way participated in the assault on Terry Lursey, defendants sought to create in the minds of the jurors a reasonable doubt as to their guilt, by testifying that they were not in the corridor when the assault occurred but at that time were seated in the prison dining hall eating supper. Their witnesses testified to the same effect. The defendants are dissatisfied that the jury did not believe them or their witnesses. An examination of the entire charge of the court, however, reveals that the jury was correctly instructed on the law of alibi and that this law was related to the defendants' evidence with sufficient particularity for the jury to have obtained a clear understanding of its significance in the case before them.

In the entire trial we find

No error.

BROCK and BRITT, JJ., concur.

MARVIN YANCEY PURYEAR v. RAYMOND EARL COOPER, MINOR, W. C. HARRIS, JR., GUARDIAN AD LITEM FOR RAYMOND EARL COOPER AND CHARLES DUE COOPER

No. 6810SC278

(Filed 9 October 1968)

1. Trial § 21— motion for nonsuit — consideration of evidence

Upon motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff, giving plaintiff the benefit of every fact and inference of fact which is reasonably deducible from the evidence.

2. Automobiles §§ 73, 94— contributory negligence — equal opportunity to see intervening action of third party

In an action for personal injuries, plaintiff's evidence tended to show that when defendant's vehicle ran out of gas he parked it partly on the right shoulder of the highway and partly on the hard surface without leaving at least 15 feet upon the main traveled portion of the highway, that there was still space between the right edge of defendant's vehicle and the ditch, that the lights of defendant's vehicle were off, that another vehicle was stopped in front of defendant's vehicle with its lights shining on defendant's vehicle, that plaintiff was standing on the bumper of defendant's vehicle pouring gas into the carburetor, and that a third vehicle struck the rear of defendant's vehicle, resulting in personal injuries to plaintiff. *Held:* Even if plaintiff's evidence is treated as sufficient to support a finding that negligence of defendant in parking his vehicle in violation of G.S. 20-161(a) and G.S. 20-134 was a proximate cause of the collision, the evidence disclosed that plaintiff was contributorily negligent in that he knew the manner in which defendant's vehicle was standing and had equal opportunity reasonably to foresee the intervening action of the driver of the third vehicle; therefore, defendant's motion for nonsuit was properly allowed.

APPEAL by plaintiff from *Hobgood, J.*, 2 March 1968, Civil Session, WAKE County Superior Court.

Civil action for damages on account of personal injuries, resulting from alleged negligence of defendants. At close of plaintiff's evidence, a judgment of involuntary nonsuit was entered. This is assigned as error.

Yarborough, Blanchard, Tucker & Yarborough by Alexander B. Denson, Attorneys for plaintiff appellant.

Holding, Harris, Poe & Cheshire by W. C. Harris, Jr., Attorneys for defendant appellees.

CAMPBELL, J.

[1] Upon a motion to nonsuit, "(t)he evidence must be considered in the light most favorable to the plaintiffs, giving them the

benefit of the most liberal interpretation of which it is reasonably susceptible." *Wilder v. Harris,* 266 N.C. 82, 145 S.E. 2d 393. The plaintiff is to have the benefit of every fact and inference of fact which is reasonably deducible from the evidence. *Gibbs v. Light Co.,* 268 N.C. 186, 150 S.E. 2d 207. Whether there is legal evidence sufficient for jury consideration is a question of law. *Wilder v. Harris, supra.*

Between the hours of midnight and 2:00 a.m. on 26 July 1964, the defendant Raymond Earl Cooper, the eighteen year old son of the defendant Charles Due Cooper, with permission, was driving his father's 1953 Chevrolet automobile on a rural paved road going north from Wendell towards Lizard Lick. The automobile ran out of gasoline and young Cooper stopped it on the right or easterly side of the road partly on and partly off the hard surface. Young Cooper and his companion Bobby Williams took a gallon jug and started walking towards Lizard Lick. The plaintiff, a twenty-three year old man, was on his way to his home in Wendell from Raleigh. He was riding in an automobile owned and operated by Tommy Dean. The plaintiff and Dean went through Lizard Lick and were headed south towards Wendell when they observed young Cooper, whom they knew, and Williams walking towards Lizard Lick. The plaintiff testified: "We picked them up and they got in the car and we went back up to Lizard Lick. They had a gas can, a gallon jug in their hand and we took them back to Lizard Lick to get some gas and we was bringing them back to the car to put gas in the car. Raymond Cooper asked me would I help him crank his car. I told him yes and they got in the car." After getting the gasoline, the four of them had returned in Dean's car to the Cooper car. On arriving at the Cooper car, the plaintiff observed it "sitting on the — parked on the road, partly on the road and partly off the road. The lights was off the car. . . . And I poured most of the gas into the tank of the car and I told Raymond if we pour some in the carburetor, it might crank quicker. Dean was holding the hood up while I was pouring it in the carburetor and then he hollered, told me to get out of the way, looks like a car is coming by and it might accidently (sic) hit us and I was caught between the car. The following car hit the back and I was caught between the two cars."

The evidence for the plaintiff further reveals that when the four of them were returning with the gasoline in Dean's automobile, the Dean automobile had its bright lights on and was going in a southerly direction. The Cooper automobile was on the easterly side of the road headed in a northerly direction. On arriving at the Cooper automobile, Dean pulled over in front of it and stopped some two or

three feet from the Cooper automobile. The Dean automobile was headed in a southeasterly direction at an angle towards the Cooper vehicle. The right rear of the Dean automobile was out into the road farther than the Cooper automobile so that the lights of the Dean automobile did not shine directly down the highway to the south but were shining at an angle so that they would illuminate the Cooper vehicle and enable the plaintiff "to look and see how to pour the gas in the carburetor", and at the same time not blind a driver approaching from the south. The plaintiff got up on the bumper of the Cooper automobile to pour gas into the carburetor under the hood and young Cooper got in the Cooper vehicle in the driver's seat for the purpose of starting the vehicle. While they were thus occupied, a third automobile approached from the south going in a northerly direction. This automobile ran into the rear of the Cooper vehicle. The plaintiff sustained serious injuries, having both legs broken, and his jaw fractured. The plaintiff testified that after being warned by Dean, he did not have sufficient time to get off of the bumper and away from the Cooper automobile. Dean safely reached the ditch.

The plaintiff's evidence further shows that the Cooper automobile was on the hard surface for at least two feet and that the hard surface portion of the road was not over sixteen feet in width. While the Cooper automobile was partially on the shoulder, there was still space between the right edge of the automobile and the ditch on the right or easterly side of the road.

Plaintiff bases his action upon the alleged negligence of young Cooper in parking and leaving standing the Cooper automobile in violation of G.S. 20-161(a) which provides that no person shall park or leave standing any vehicle upon the paved portion of any highway, outside of a business or residence district, when it is practicable to park or leave the vehicle standing off of the paved or main traveled portion of the highway, and in no event, unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of the highway opposite such standing vehicle shall be left for free passage of other vehicles thereon, and G.S. 20-134 which provides that, when a vehicle is parked or stopped upon the highway in the nighttime, it must display a red light visible from a distance of five hundred feet to the rear.

[2] An analysis of the evidence in the light of the above-mentioned elementary principles discloses that the plaintiff knew the manner in which the Cooper automobile was standing on the highway and had equal if not better opportunity reasonably to foresee the intervening action on the part of the operator of the third automobile.

We think this case is controlled by the doctrines enunciated by Bobbitt, J., in *Basnight v. Wilson,* 245 N.C. 548, 96 S.E. 2d 699, as follows:

> "The evidence strongly supports the view that negligence on the part of the operator of the [third] car was the sole proximate cause of the collision. But, apart from that view, if plaintiff's evidence is treated as sufficient to support a finding of negligence on the part of defendants, such uncontradicted evidence suffices to show conclusively that plaintiff, with knowledge of all the facts, was in like manner contributorily negligent. In either event, the judgment of involuntary nonsuit was proper."

To like effect, see *Rowe v. Murphy,* 250 N.C. 627, 109 S.E. 2d 474.

In the trial below, there is no error in law.

Affirmed.

MALLARD, C.J., and MORRIS, J., concur.

CORINE S. WILLIAMS v. PYRAMID LIFE INSURANCE COMPANY

No. 6811SC397

(Filed 9 October 1968)

1. Insurance § 6— construction of policy — unambiguous language

Where the language of a policy is clear and unambiguous, the courts must give the language used its plain, natural and obvious meaning.

2. Insurance § 67— action on accidental death policy — burden of proof

In order to establish a *prima facie* case in an action on policy of insurance providing benefits for accidental injury or death, plaintiff must prove the existence of the policy sued on, death of the insured under conditions covered by the policy, and required notice to the insurer; insurer then has the burden to prove the existence of factors excluding the insured from coverage.

3. Insurance § 67— accidental death policy — failure to show coverage

When the plaintiff (1) fails to show coverage under the insuring clause or (2) establishes an exclusion while making out his *prima facie* case, nonsuit is proper.

4. Insurance § 67— action on accidental death policy — sufficiency of evidence

Evidence that five hours after deceased had been seen operating a trac-

tor which pulled and powered a hay baler his body was found on the ground with an entire arm and a portion of the shoulder caught in the bailing mechanism and that the switch of the tractor was turned on but the machine had choked down, *is held* insufficient to show that the death occurred within coverage of policy providing benefits if deceased at the time of the accident was "riding in or on a motor driven or animal-drawn farm machine (including farm tractor)."

APPEAL by plaintiff from *Carr, J.*, at the 12 August 1968 Civil Session of HARNETT Superior Court.

Plaintiff filed complaint in Harnett County Recorder's Court on 17 December 1963, alleging that on 25 August 1963 defendant executed a policy of insurance against accidental injury or death, subject to the terms and conditions of the policy, to Robert Strange Williams, with plaintiff as beneficiary in case of death; that on 25 September 1963, Robert S. Williams was riding a farm tractor pulling a hay baler and accidentally fell from the tractor into the path of the hay baler, resulting in his death; that the policy was in full force and effect at the time of the accident.

Defendant answered, admitting the execution of the policy with plaintiff as beneficiary and the payment of the premiums but denying that insured's death came within the coverage of the policy.

At trial, plaintiff offered evidence that the deceased was operating one of the largest International tractors, with the seat located over or slightly behind the rear axle, and that the baler was operated by a power takeoff from the tractor; that it was a one-man operation where the operator, leaving the throttle at or near the maximum, would proceed along the windrow until the baler gave a click, signaling the formation of a bale, after which the operator would take the tractor out of gear and allow the motor to race in order to speed the tying of the bale, at the completion of which the baler would click and eject the completed bale; that the operator would then put the tractor back in gear and proceed along the windrow gathering up hay for the next bale. With the throttle remaining at the maximum, this was of necessity a jerky operation.

The plaintiff offered evidence that the deceased was seen operating the baler with no trouble around 12:30 p.m. and that the deceased was found about 5:30 p.m. with his entire arm and a portion of his shoulder up to his head caught in the baling mechanism. The switch key was turned on and the machine had choked down on the body of the deceased. He was dead when found.

The pertinent portions of the policy are as follows:

"FARM MACHINE AND FARM ANIMAL ACCIDENTS

The Company will pay the indemnity specified * * * if such injury shall be sustained:

(a) While riding in or on a motor driven or animal-drawn farm machine (including farm tractor) or farm implement of a type designed to be ridden upon while in use, and while such machine or implement is being used on or about the farm or public highway; * * *

"EXCEPTIONS

This Certificate does not cover accidents, injury, death, disability, or other loss caused or contributed to directly or indirectly, wholly or partly: * * * (13) while adjusting, repairing, working on, loading or unloading an automobile, truck, or other vehicle * * *."

The case was submitted to the jury in the Recorder's Court, and verdict and judgment were returned and rendered in favor of plaintiff in the policy amount of $2,250.00. Defendant appealed to the Superior Court, which ruled that the Recorder's Court had erred in refusing to grant a motion for nonsuit at the close of the evidence. Plaintiff appeals from this ruling.

Morgan & Jones by R. H. Jones for plaintiff appellant.

Cansler & Lockhart and Bryan, Bryan & Johnson by J. Shepard Bryan for defendant appellee.

BRITT, J.

The question presented by this appeal is whether the evidence offered by plaintiff, when viewed in the light most favorable to her, established a prima facie case of coverage under the policy, requiring submission to the jury. We are impelled to answer in the negative.

[1] Where the language of a policy is clear and unambiguous, the courts must give the language used its plain, natural, and obvious meaning. *Setzer v. Insurance Co.*, 258 N.C. 66, 127 S.E. 2d 783.

[2] In order to establish a prima facie case in this action, it was necessary for plaintiff to prove the existence of the policy sued on, death of the insured under conditions covered by the policy, and required notice to the insurer. The burden then would have been upon the defendant to prove the existence of factors excluding the insured

from coverage. *Langley v. Insurance Co.*, 261 N.C. 459, 135 S.E. 2d 38; *Kirk v. Insurance Co.*, 254 N.C. 651, 119 S.E. 2d 645; *Slaughter v. Insurance Co.*, 250 N.C. 265, 108 S.E. 2d 438; *Fallins v. Insurance Co.*, 247 N.C. 72, 100 S.E. 2d 214.

[3] When the plaintiff fails to show coverage under the insuring clause or establishes an exclusion while making out his prima facie case, nonsuit is proper. *Setzer v. Insurance Co., supra; Kirk v. Insurance Co., supra; Slaughter v. Insurance Co., supra.*

[4] Here, plaintiff established the existence of the policy, death of the insured and due notice; however, plaintiff failed to offer any evidence tending to show that the deceased, at the time of the accident, was "riding in or on a motor driven or animal-drawn farm machine (including farm tractor) or farm implement of a type designed to be ridden upon while in use." This is the insuring clause, and there must be some evidence placing the accident within its terms. The fact that the switch was found turned on tends neither to prove or disprove that the deceased fell from the tractor. He could just as easily have been attempting to unclog the baler. There was no evidence as to the position of the gears on the tractor which would have been some evidence of whether the deceased was "in or on the vehicle" at the time of the accident.

To permit this case to go to a jury was to permit the jury to speculate as to whether the accident occurred within the insuring clause or within the exclusion.

The judgment of the Superior Court reversing the judgment entered in the Harnett County Recorder's Court and dismissing the action is

Affirmed.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. WILBERT RICHARDSON

No. 6811SC281

(Filed 9 October 1968)

1. Criminal Law § 104— motion for nonsuit — consideration of evidence

On motion to nonsuit in a criminal prosecution, the evidence must be taken in the light most favorable to the State, giving the State the benefit of every inference fairly deducible therefrom, and if when so taken there is any competent evidence to support the allegation in the indictment, the case is one for the jury.

2. Robbery § 4— sufficiency of evidence

The evidence *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of robbery with firearms.

APPEAL by defendant from *Canaday, J.*, February 1968 Session of JOHNSTON Superior Court.

Defendant was tried under a valid bill of indictment charging him with armed robbery. The jury returned a verdict of guilty, and from judgment entered on the verdict, the defendant appealed.

Paul D. Grady, Jr., for defendant appellant.

Attorney General T. W. Bruton by Deputy Attorney General James F. Bullock for the State.

MORRIS, J.

Defendant brings forward as his assignment of error the failure of the court to grant his motion to dismiss at the end of the State's evidence. He contends that there was not sufficient evidence of robbery by firearms to justify submission of the case to the jury.

Ivey James McCullen testified for the State, in substance, as follows: That he is a cab driver for Selma Cab Company; that on 13 January 1968, he was seated in the driver's seat of his cab which was parked near the cab stand in a well-lighted area; that the defendant came up and motioned for him to come out; that he picked up defendant who told the witness that he wanted to go to Ray's Pure Oil on Highway 70; that when they got there, defendant told him to go up 70; that when they had gone a short distance, the defendant directed him to turn left on a dirt road; that he kept asking defendant "how much further do you want to go"; that defendant replied "oh, right down the road here, my daddy lives right down the road; it isn't far"; that after they had proceeded down the dirt road a mile or so, defendant told him "this is a hold up; stop and you won't get hurt"; that this was about 8 o'clock at night; that he stopped the car, left the headlights on and the motor running; that defendant cracked the door to the car; that defendant pulled a pistol from his right hand pocket and told the witness to let him, the defendant, have the money, saying "now go in your pocket and don't start nothing, ease in your pocket"; that after the witness handed defendant the currency from his billfold, defendant asked if he had any change; that witness then gave him the change he had in his pocket; that defendant asked if witness had any more money; that when witness replied that he did not, defendant said "If I knew you

were telling me a lie I would shoot you right now"; that the total amount of money was between $70.00 and $75.00; that after defendant got the money, he continued to hold the gun on witness, "eased the right hand door open and got out and said 'Now, drive and don't look back' "; that at that time defendant had the gun in his hand pointing it at the witness; that witness drove off as quickly as he could get away, went out to another road and stopped at a house to ask directions to get back to the highway; that he came upon two highway patrolmen who told him to go back to Selma and report the robbery to the deputy sheriff, which he did; that he next saw defendant on the next day when Mr. Cobb brought the defendant to his home. On cross-examination the witness testified that defendant was riding in the front seat with the witness; that he had seen defendant before in passing but did not know his name; that it was light in the cab when the door was opened; that he knew defendant was the man he picked up because he knew him when he saw him; that he did not recall defendant's having been in his cab before; that he told Mr. Cobb what the man looked like but not his name because he didn't know his name; that he told the officers what kind of coat defendant had on and that defendant had on the same clothes when he saw him the next day; that he knew the man's face and knew how he talked; that he saw the man's face the night of the robbery; that he didn't know how long the gun was but that it was a "shiny looking pistol", medium size; that "I know his finger from the gun, I think; I think I would"; that he told Mr. Cobb that defendant was the same man who robbed him.

Mr. Braxton Hinton, deputy sheriff, testified that Mr. McCullen described the man who had robbed him.

Mr. Tom Greene testified that he lives about a hundred yards off Highway 70; that he knows the defendant and had known him for 15 years; that on 13 January 1968, defendant came to his home about 8:30 and paid him $3.00 to carry him to Smithfield; that he did carry him to Smithfield; that defendant had on an overcoat, cap, white shirt and tie.

[1] The well-settled rule on motion to nonsuit in a criminal prosecution is that "the evidence must be taken in the light most favorable to the State, and if when so taken there is any competent evidence to support the allegation of the bill of indictment, the case is one for the jury. And, on such motion the State is entitled to the benefit of every reasonable inference that may be fairly deduced from the evidence." *State v. Block*, 245 N.C. 661, 663, 97 S.E. 2d 243.

[2] The court correctly denied defendant's motion. The evidence was plenary to justify submission to the jury.

No error.

MALLARD, C.J., and CAMPBELL, J., concur.

STATE OF NORTH CAROLINA v. WALTER THANIEL PEGUISE
No. 6814SC372

(Filed 9 October 1968)

1. Criminal Law § 149— former jeopardy — right of State to appeal

The State has no right to appeal from a judgment allowing a plea of former jeopardy or acquittal.

2. Criminal Law § 125— special verdict defined

A special verdict is that by which the jury finds the facts only, leaving the judgment to the court. G.S. 1-201.

3. Criminal Law §§ 125, 149— allowance of plea of former jeopardy — not special verdict — right of State to appeal

An order allowing defendant's plea of former jeopardy and dismissing the charge against defendant does not constitute a special verdict from which the State may appeal pursuant to G.S. 15-179.

APPEAL by the State from *Clark, J.*, July 1968 Regular Criminal Session of DURHAM Superior Court.

Defendant was tried on two separate warrants. The first charged him with an assault on G. E. Lee "by striking him with his fists and hands and by climbing on his back." The second charged him with resisting, delaying and obstructing a public officer, G. E. Lee, in the discharge of his duty, namely, attempting to arrest one Howard Lamar Fuller, "by striking him with his fists and hands and by climbing on his back." Defendant pled not guilty to both charges and the two cases were consolidated for trial. In the assault case, the jury returned a verdict of not guilty. In the other case, the jury stated "that they were unable to agree on a verdict." Thereupon, the presiding judge withdrew a juror and declared a mistrial as to the second case, that of resisting a public officer.

Counsel for defendant then interposed a plea of double jeopardy as to the charge of resisting a public officer. The court entered an

order dismissing the charge; but, in entering the order, Judge Clark declared: "This, Mr. Solicitor, is a special verdict. * * * I am making this in the form of a special verdict so that the State may appeal to the Appeal Court." The State duly entered its exception and appealed.

Attorney General T. Wade Bruton and Staff Attorney Andrew A. Vanore, Jr., for the State.

Pearson, Malone, Johnson & DeJarmon by W. G. Pearson, II, and C. C. Malone, Jr., for defendant appellee.

BRITT, J.

G.S. 15-179 provides those instances in which the State may appeal:

"* * * Where judgment has been given for the defendant—

(1) Upon a special verdict.
(2) Upon a demurrer.
(3) Upon a motion to quash.
(4) Upon arrest of judgment.
(5) Upon a motion for a new trial on the ground of newly discovered evidence, but only on questions of law.
(6) Upon declaring a statute unconstitutional."

[1] The Supreme Court of North Carolina has specifically held that the State has no right to appeal from a judgment allowing a plea of former jeopardy or acquittal. *State v. Reid,* 263 N.C. 825, 140 S.E. 2d 547; *State v. Ferguson,* 243 N.C. 766, 92 S.E. 2d 197; *State v. Wilson,* 234 N.C. 552, 67 S.E. 2d 748.

G.S. 1-201 provides as follows: "A general verdict is that by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. *A special verdict is that by which the jury finds the facts only, leaving the judgment to the Court.*" (Emphasis added.)

General and special verdicts are discussed in 2 McIntosh, N. C. Practice 2d, § 1562, pp. 75 and 76. See also *State v. Ellis,* 262 N.C. 446, 137 S.E. 2d 840.

The order of Judge Clark did not constitute a special verdict from which an appeal by the State could be taken.

Appeal dismissed.

BROCK and PARKER, JJ., concur.

ESTHER V. SHELTON, EMPLOYEE v. SPIC AND SPAN DRY CLEANERS, EMPLOYER AND GREAT AMERICAN INSURANCE COMPANY, CARRIER

No. 6810IC370

(Filed 9 October 1968)

Master and Servant § 97— newly discovered evidence — new trial

Upon appeal from a decision of the Industrial Commission denying compensation to plaintiff on the ground the claim was not filed in apt time as required by G.S. 97-24, plaintiff having alleged the accident occurred "on or about the middle" of a certain month, plaintiff's motion for a new trial on the ground of newly discovered evidence as to the correct date of the accident which was not divulged to plaintiff until after the opinion of the Industrial Commission, is allowed by the Court of Appeals.

APPEAL by plaintiff employee from an opinion and award by the North Carolina Industrial Commission dated 14 May 1968.

Plaintiff alleges that she sustained injury to her spine as a result of a fall in January 1964 while in the course of her employment with defendant employer. On 11 January 1966 plaintiff filed notice of claim with the Industrial Commission, alleging that the accident occurred "on or about the middle of January, 1964."

The hearing commissioner found that plaintiff sustained an injury by accident arising out of and in the course of her employment with the defendant employer, and that the accident occurred on or about 6 January 1964. The hearing commissioner awarded compensation.

Upon appeal by defendants to the full commission the full commission found substantially the same facts as the hearing commissioner, except the full commission found that the date of the accident was 6 January 1964, that plaintiff's claim was filed 11 January 1966, and that the filing of the claim was not in apt time as required by G.S. 97-24. The full commission denied compensation, and the plaintiff appealed.

Boyce, Lake and Burns, by Robert E. Smith, for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey and Clay, by G. S. Patterson, Jr., for defendant appellees.

BROCK, J.

After the Record on Appeal and the briefs of both parties had been filed in this Court, plaintiff filed a motion for a new trial on the ground of newly discovered evidence, based upon the affidavits

of plaintiff and her husband in which it is alleged that evidence bearing upon the correct date of the accident can now be obtained from plaintiff's employer, which evidence was not divulged to plaintiff until after entry of opinion and award by the North Carolina Industrial Commission.

After due consideration of the motion and affidavits, and after due consideration of the answer filed thereto by defendants; and without any intimation as to the sufficiency or the probative effect of the evidence, we are of the opinion that a new trial should be awarded by reason of newly discovered evidence.

In accord with the rule of our Supreme Court as recognized in *Brantley v. R. R.*, 211 N.C. 454, 190 S.E. 731, the facts on the motion are not discussed.

Remanded to the North Carolina Industrial Commission for a new hearing.

Remanded.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. HERMAN MANN
No. 6815SC403

(Filed 9 October 1968)

PURPORTED appeal by defendant from *Bowman, S.J.*, January 1968 Criminal Session of ALAMANCE Superior Court.

Defendant was before the Superior Court, upon appeal from the Graham Municipal Court, under two warrants, one charging him with public drunkenness on 7 December 1967 and the other charging him with a second offense of public drunkenness on 8 December 1967. When his cases were called, defendant, without legal counsel, pled guilty to the charges. The cases were consolidated for judgment, and the court directed that the defendant be committed to the Director of Prisons for a period of not more than six months, said sentence to begin at the expiration of sentences being activated in cases Nos. 83, 84 and 92 imposed at the 12 June 1967 Session of the Court on three charges of public drunkenness but which sentences were suspended. Judgment by Judge Bowman was entered on 26 January 1968.

On 6 July 1968, Carr, Resident Judge of the Fifteenth Judicial District, entered an order in which he found that the defendant, within ten days after 26 January 1968, gave notice of appeal from the judgment of Judge Bowman and, upon a further finding that defendant was indigent, appointed Attorney Herbert F. Pierce to perfect the appeal for the defendant.

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

Herbert F. Pierce for defendant appellant.

BRITT, J.

Our rules require that an appeal to this Court be docketed within ninety days after the entry of judgment, unless an extension of time not to exceed sixty additional days is obtained from the trial tribunal. The record on appeal in this case was not filed in this Court until 3 September 1968, therefore, we will treat said record as a petition for certiorari.

The only assignment of error appearing in the record is that "[t]he trial court erred in entering judgment as it did and in imposing the sentence set forth in said judgment." We have reviewed the record and find that the defendant pled guilty to warrants valid on their face and that the sentence imposed was within statutory limits. The record discloses no reason for us to grant certiorari.

The petition for certiorari is

Denied.

BROCK and PARKER, JJ., concur.

TRACTOR AND AUTO SUPPLY COMPANY, INC. v. FAYETTEVILLE TRACTOR AND EQUIPMENT COMPANY, INC., ORIGINAL DEFENDANT, AND ADDITIONAL DEFENDANT FIRST-CITIZENS BANK & TRUST COMPANY

No. 6812SC358

(Filed 16 October 1968)

1. Appeal and Error § 40— record on appeal

The brief is not a part of the record on appeal. Rule of Practice in the Court of Appeals No. 19.

2. Pleadings § 32— motion to be allowed to amend

A motion to amend, after the beginning of the trial, is addressed to the discretion of the trial court, and its decision is not appealable.

3. Receivers § 10— motion to amend proof of claim

On hearing in the Superior Court upon exception of creditor-bank to receiver's report denying its claim for preference over unsecured creditors in the distribution of the assets of an insolvent corporation, trial court did not abuse its discretion in denying creditor's motion, which was made more than two years after receiver's report and ruling, to amend its proof of claim so as to allege the fraudulent issuance of checks by the corporation.

4. Receivers § 10— time to file proof of claim

The court has authority to limit the time within which creditors may present and prove to the receiver their respective claims against the insolvent corporation and may bar all creditors and claimants failing to do so within the time allotted from participating in the distribution of the assets of the corporation. G.S. 1-507.6.

5. Fraud § 1— elements of fraud

The essential elements of fraud are: (1) that defendant made a representation relating to some material past or existing fact; (2) that the representation was false; (3) that when he made it defendant knew that the representation was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that defendant made the representation with intention it should be acted upon by plaintiff; (5) that plaintiff reasonably relied and acted upon the representation; and (6) that plaintiff thereby suffered injury.

6. Fraud § 9— pleadings — failure to allege reasonable reliance

In order to allege fraud by a corporation in knowingly issuing worthless checks, creditor-bank's proof of claim against insolvent corporation in receivership proceedings must allege as an element of fraud that the creditor-bank reasonably relied upon some representation by the corporation.

7. Receivers § 12— preference

Preferences are not favored and can arise only by reason of some definite statutory provision or some fixed principle of common law.

8. Receivers § 12— nature of preferred claim

A preferred claim is one which, because of some equity peculiar to it,

is granted preference over claims of the same class or an otherwise superior class of claims; it may be established or recognized by statute or, in some instances, it may be recognized and enforced by courts of equity independently of statute.

9. Property § 2— possession of money — presumption of title

The possession of money by a person, nothing else appearing, entitles a third person dealing with him, in the ordinary course of business, to assume that he has the title thereto.

10. Trusts § 14— creation of constructive trust

A constructive trust arises where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.

11. Trusts § 14; Property § 2— constructive trust — fraudulent obtaining of money

Corporation which obtained money from creditor-bank by knowingly issuing worthless checks *is held* to have acquired title to the money, but a constructive trust in the money arises in favor of the bank to prevent the unjust enrichment of the corporation and entitles the bank to follow the money wherever the bank can trace it and reclaim it from any person who has not given value in good faith therefor.

12. Receivers § 12; Trusts § 14— creditor's claim for preference on ground money was fraudulently obtained

Creditor-bank of insolvent corporation does not have a preferred claim against the insolvent's assets in the hands of a receiver on the ground that money obtained from the bank by the insolvent through the fraudulent issuance of worthless checks is now held by the receiver on a constructive trust, since the creditor neither alleged nor proved that the funds fraudulently obtained actually constitute part of the assets in the hands of the receiver.

13. Receivers § 10— proof of claim in writing

Claimant's proof of claim is required to be in writing. G.S. 1-507.6.

14. Pleadings § 19— liberal construction of pleadings

All pleadings shall be liberally construed with a view to substantial justice between the parties. G.S. 1-151.

15. Appeal and Error § 26— exception to signing of the judgment

An exception to the signing and entry of the judgment presents the face of the record proper for review and is limited to the question of whether error of law appears on the face of the record.

APPEAL by Additional Defendant First-Citizens Bank & Trust Company from *Braswell, J.*, 6 May 1968 Civil Session of Superior Court of CUMBERLAND County.

This case was consolidated in this Court for hearing with case

No. 6812SC359 entitled *First-Citizens Bank & Trust Company v. H. Dolph Berry, Receiver of Fayetteville Tractor and Equipment Company, Inc., et al.*

The following is stipulated:

"It is hereby stipulated and agreed that the Superior Court of Cumberland County, before which this action was held during its May 6, 1968, Civil Session, was duly and properly organized, commissioned and held; that the matters herein were heard by the court without a jury; that the receiver was duly appointed by the court and was directed by the court to defend this appeal; that the receiver does defend this appeal in the interest of all creditors of Fayetteville Tractor and Equipment Company, Inc.; that all creditors were duly served in this receivership action.

It is further stipulated that the record on appeal shall consist of so much of the record proper as pertains to the claim of the appellant First-Citizens Bank and Trust Company, . . ."

This suit was instituted by Tractor and Auto Supply Company, Inc., (Tractor and Auto) on 27 May 1967 against Fayetteville Tractor and Equipment Company, Inc. (Fayetteville Tractor). Plaintiff alleged Fayetteville Tractor was indebted to it in the sum of $8,529.77. Fayetteville Tractor admitted the indebtedness in its answer and asserted that the defendant was unable to pay its debts in the ordinary course of its business. Defendant further requested that the court appoint receivers to liquidate the assets of the corporation as provided by law. By order dated 31 May 1965, H. Dolph Berry was appointed temporary receiver for the defendant Fayetteville Tractor, and the appointment was made permanent on 17 June 1965.

The appellant, First-Citizens Bank & Trust Company (First-Citizens), was made an additional party defendant in this action on 3 June 1965, upon motion of H. Dolph Berry, Receiver of Fayetteville Tractor and Equipment Company, Inc., along with over two hundred and ninety other persons and corporations. First-Citizens filed a Proof of Claim herein on 22 October 1965 in words as follows:

"M. J. McSorley, a cashier of First-Citizens Bank and Trust Company, being first duly sworn, deposes and says:

That Fayetteville Tractor and Equipment Company, Inc., is now justly indebted to First-Citizens Bank and Trust Company in the sum of Forty-Seven Thousand Five Hundred Sixty-Four and 79/100 Dollars ($47,564.79).

That said claim or indebtedness arose from Fayetteville Tractor and Equipment Company, Inc., making and delivering to Four County Tractors, Inc., a series of checks drawn on Southern National Bank of North Carolina and payable to the order of Four County Tractors, Inc., with the said checks being numbered, dated and in amounts as follows:

Check Number	Date of Check	Amount
12714	4/16/65	$ 8,961.15
12715	4/16/65	9,826.50
12716	4/17/65	7,316.20
12717	4/19/65	3,485.20
12718	4/20/65	7,129.86
13016	4/21/65	9,831.20
13017	4/22/65	10,061.87
13018	4/23/65	14,593.50
13019	4/19/65	7,122.60
13020	4/20/65	8,318.89
13021	4/21/65	9,062.30
13022	4/21/65	8,868.20
13023	4/22/65	9,389.08
	Total	$113,966.55

The aforesaid checks totaling $113,966.55 were deposited by Four County Tractors, Inc., in a checking account maintained by the said Four County Tractors, Inc., at the Dunn, North Carolina, branch of First-Citizens Bank and Trust Company. The said checks were promptly forwarded by First-Citizens Bank and Trust Company to Southern National Bank of North Carolina on which they were drawn, but the said checks were returned to First-Citizens Bank and Trust Company unpaid. Upon notification that the Southern National Bank would not honor the aforesaid checks, First-Citizens Bank and Trust Company refused to allow further withdrawals by Four County Tractors, Inc., but the sum of $60,267.01 had already been paid out of the aforesaid account. The original indebtedness of $60,267.01 was reduced to $47,564.79 by a series of setoffs.

That there are no offsets, credits, or counterclaims due to Fayetteville Tractor and Equipment Company, Inc., against the undersigned claimant:

That a copy of any unpaid checks or of any written documentation of this claim is attached hereto."

Under date of 16 December 1965, pursuant to the provisions of G.S. 1-507.7, H. Dolph Berry, Receiver of Fayetteville Tractor, reported to the Superior Court his findings on the claim of First-Citizens filed herein. The Receiver found as a fact and concluded as a matter of law that First-Citizens was a holder in due course of the checks listed in its Proof of Claim to the extent of $60,267.01 and allowed the claim of First-Citizens to the extent of $47,564.79. The Receiver also found that the claim was a general unsecured claim and denied the claim of First-Citizens for a preference in the payment thereof.

On 23 December 1965 First-Citizens excepted to the report of the Receiver wherein the Receiver found as a fact and concluded as a matter of law that the claim for the $47,564.79 was not a preferred claim and demanded a jury trial. The Superior Court by judgment entered as of 13 May 1968, after a hearing found:

"(1) That First-Citizens Bank and Trust Company filed its proof of claim with H. Dolph Berry, Receiver of Fayetteville Tractor and Equipment Company, Inc., on October 22, 1965, as appears of record.

(2) That H. Dolph Berry, Receiver of Fayetteville Tractor and Equipment Company, Inc., filed his report with this Court with respect to the claim of First-Citizens Bank and Trust Company on December 16, 1965, which report of the Receiver was referred to the January 3, 1966 Civil Session of the Superior Court of Cumberland County, North Carolina, which report appears of record.

(3) That First-Citizens Bank and Trust Company on December 23, 1965, filed certain exceptions to the report of the Receiver, which written exceptions appear of record.

(4) That First-Citizens Bank and Trust Company received the report of the said Receiver on December 21, 1965, and that the written exceptions of First-Citizens Bank and Trust Company thereto were filed within ten (10) days after notice of the findings by the Receiver.

(5) That the written exceptions filed by First-Citizens Bank and Trust Company contain a demand for jury trial.

(6) That no issues arise upon the written exceptions filed by First-Citizens Bank and Trust Company to be submitted to a jury.

(7) That the conclusions of law as set forth by the Receiver

in his report on the claim of First-Citizens Bank and Trust Company are correct and are affirmed by the Court.

(8) That the claim of First-Citizens Bank and Trust Company in the amount of Forty-Seven Thousand Five Hundred Sixty-Four and 79/100 ($47,564.79) Dollars is a general unsecured claim against Fayetteville Tractor and Equipment Company, Inc., to be paid pro rata along with other general unsecured claims against said corporation.

(9) That the written exceptions filed by First-Citizens Bank and Trust Company to the report of the Receiver are overruled as a matter of law."

On the same date, 13 May 1968, the Superior Court, in the exercise of its discretion, denied the motion of First-Citizens for an order allowing it to amend its Proof of Claim previously filed so as to allege a fraudulent kiting of checks by Fayetteville Tractor.

First-Citizens excepts to the denial of its motion to amend and the entry of the judgment, assigns error, and appeals to the Court of Appeals.

Jordan, Morris & Hoke by William R. Hoke for First-Citizens Bank & Trust Company, appellant.

J. Duane Gilliam for H. Dolph Berry, Receiver of Fayetteville Tractor and Equipment Company, Inc., appellee.

MALLARD, C.J.

First-Citizens makes and brings forward four assignments of error as follows:

(1) "The Court erred in overruling the appellant's motion to amend its Proof of Claim so as to allege a fraudulent 'kiting' of checks by Fayetteville Tractor and Equipment Company, Inc."

(2) "The Court erred in failing to find as a fact that there are issues of fact which arise upon the written exceptions filed by the appellant. . . ."

(3) "The Court erred in concluding as a matter of law that the receiver's report on the claim of the appellant should be affirmed. . . ."

(4) "The Court erred in signing and entering the Judgment dated 13 May 1968, for that the Judgment contains errors on its face in that it is not properly supported by findings of fact and conclusions of law."

MOTION TO AMEND

From this record, we do not know when or in what manner First-Citizens made its motion to amend. First-Citizens filed its Proof of Claim on 22 October 1965 after having been made an additional party defendant on 3 June 1965.

[1] On 2 November 1965 the Receiver, in his answer in case No. 6812SC359, requested that plaintiff's complaint and amendment thereto be treated as a verified proof of claim in this case. First-Citizens did not join in this request and made no motion to amend until 13 May 1968, which is the same date that the Superior Court approved the report of the Receiver denying a preferential status to its claim. The order of Judge Braswell denying the motion to amend is dated 13 May 1968, but it was not filed until 15 May 1968. The following appears on page seven of appellee's brief:

> "The order of the trial Court in denying the motion of First-Citizens Bank and Trust Company *made orally at the hearing on May 13, 1968,* to amend its proof of claim, was fully justified in law and upon the facts and should be affirmed." (emphasis added)

It should be noted that a brief is not a part of the record on appeal. See Rule 19 of the Rules of Practice in the Court of Appeals. However, in view of the filing date and the date of the order, we assume that the motion to amend was made at the time appellee contends. On the record here, there is nothing to show when the motion was made. However, appellant says on page eleven of its brief that the motion was made after the trial court dismissed First-Citizens' action in No. 6812SC359, which occurred under date of 13 May 1968.

[2] With respect to motions to amend, we find in 6 Strong, N. C. Index 2d, Pleadings, § 32, at page 356, the following:

> "The trial judge in term, in his discretion, may allow amendments.
>
> A motion to amend, after the beginning of the trial, is addressed to the discretion of the trial court, and its decision is not appealable. . . ."

[3, 4] We are of the opinion that First-Citizens did not make timely motion to amend its proof of claim as a matter of right. Over two years had passed since the Receiver had ruled on the claim filed by First-Citizens. G.S. 1-507.6 authorizes the court to limit the time within which creditors may present and prove to the re-

ceiver their respective claims against the corporation and may bar all creditors and claimants failing to do so within the time allotted from participating in the distribution of the assets of the corporation. First-Citizens in its "Exception To Report of Receiver," dated 23 December 1965 asserts, among other things, that the "funds represented" by its claim were "wrongfully and unlawfully obtained" from First-Citizens. The record shows that the notice of the Receiver to present claims to him indicated that the court ordered that all claims must be presented on or before 1 November 1965, and upon a failure to do so the notice would be pleaded in bar thereof. The report of the Receiver on the claim of First-Citizens was made, as required by the statute, to the 3 January 1966 Civil Session of the Superior Court of Cumberland County. The record does not reveal what, if anything, was done about the report until 13 May 1968.

Under the circumstances of this case, we conclude that Judge Braswell did not abuse his discretion by refusing to permit First-Citizens to amend its Proof of Claim in the Superior Court on 13 May 1968, the date of the hearing on the report of the Receiver.

In its exception to the report of the Receiver dated 23 December 1965, First-Citizens contended that its claim was a preferred claim "for the reason that the funds represented by said claim were wrongfully and unlawfully obtained."

However, it does not assert therein any factual basis for its conclusion that the funds were wrongfully and unlawfully obtained, other than by the use of the checks as set out in its Proof of Claim.

First-Citizens' oral motion to amend on 13 March 1968 was, according to the order of Judge Braswell, "for an Order allowing it to amend its Proof of Claim previously filed herein so as to allege a fraudulent 'kiting' of checks by Fayetteville Tractor and Equipment Company, Inc." Even if such motion had been allowed, it could not have changed the result reached herein.

In connection with its motion to amend, appellant in its brief asserts:

> "Although the receiver's answer in First-Citizens' action asked that the complete allegations of fraud as contained in the complaint be incorporated in First-Citizens' Proof of Claim in the instant receivership proceedings, the trial Court dismissed First-Citizens' action on the receiver's plea in bar and made no reference to such an incorporation. First-Citizens then moved the Court for permission to amend its Proof of Claim so as to in-

clude therein the complete allegations of the complaint, but the motion was denied. This denial by the Court is the basis of one of the appellant's exceptions in this appeal."

The record, as shown by appellant's assignment of error No. 1, does not support appellant's contention that its motion was for permission to include in its Proof of Claim the complete allegations of the complaint. However, even if such motion had been made, and allowed, it could not have changed the result reached herein.

ISSUE OF FACT

Appellant contends that a liberal construction of the complaint filed in case No. 6812SC359, and the claim filed herein, reveals that it is based on a fraud perpetrated upon it by Fayetteville Tractor because Fayetteville Tractor caused the checks, which were worthless, to be put into circulation when it delivered them to Four County Tractors, Inc. (Four County).

[5] In *Cofield v. Griffin,* 238 N.C. 377, 78 S.E. 2d 131, the Supreme Court said that the essential elements of fraud are:

"(1) That defendant made a representation relating to some material past or existing fact; (2) that the representation was false; (3) that when he made it, defendant knew that the representation was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that defendant made the representation with intention that it should be acted upon by plaintiff; (5) that plaintiff reasonably relied upon the representation, and acted upon it; and (6) that plaintiff thereby suffered injury."

The verified complaint alleges in substance that John A. McLamb, while acting as President of Fayetteville Tractor, signed the thirteen checks totaling $113,966.55 drawn on Southern National Bank in Fayetteville, payable to Four County. We assume, therefore, that he put these checks, knowing them to be worthless, into circulation by delivering them to himself in his capacity as President of Four County. Four County took these checks and deposited them to the account of Four County in First-Citizens' Dunn branch. Thereafter, checks by Four County were issued to Fayetteville Tractor and were paid by First-Citizens in the total sum of $50,963.18 before the checks of Fayetteville Tractor had been returned unpaid by Southern National.

[6] There is no allegation specifically or by inference in the claim filed herein, other than the issuance of checks, that First-Citizens

reasonably relied upon any representation by Fayetteville Tractor, which is one of the necessary elements of fraud. In fact, the allegations in the Proof of Claim are to the effect that Four County deposited the checks in a checking account it maintained in the Dunn branch of First-Citizens and that First-Citizens paid Four County's checks drawn on this deposit before it had collected the Fayetteville Tractor checks.

The allegations in the complaint in the other case, which is No. 6812SC359, were not and are not incorporated in appellant's Proof of Claim; however, we have carefully examined the complaint and the amendments thereto and do not find any specific allegation, or one by inference, that First-Citizens reasonably relied upon any representation of Fayetteville Tractor, one of the essential elements of fraud.

With respect to the element of reasonable reliance, Justice Sharp, in *Johnson v. Owens,* 263 N.C. 754, 140 S.E. 2d 311, said:

> "Just where reliance ceases to be reasonable and becomes such negligence and inattention that it will, as a matter of law, bar recovery for fraud is frequently very difficult to determine. This case presents that difficulty. In close cases, however, we think that a seller who has intentionally made a false representation about something material, in order to induce a sale of his property, should not be permitted to say in effect, 'You ought not to have trusted me. If you had not been so gullible, ignorant, or negligent, I could not have deceived you.' Courts should be very loath to deny an actually defrauded plaintiff relief on this ground. When the circumstances are such that a plaintiff seeking relief from alleged fraud must have known the truth, the doctrine of reasonable reliance will prevent him from recovering for a misrepresentation which, if in point of fact made, did not deceive him. In such a case the doctrine is the specific remedy for a complainant who is, so to speak, malingering. A plaintiff who, aware, has made a bad bargain should not be allowed to disown it, no more should a fraudulent defendant be permitted to wriggle out on the theory that his deceit inspired confidence in a credulous plaintiff."

It is not necessary for decision herein, and we do not determine whether First-Citizens reasonably relied on the representation that the checks in question were drawn against sufficient funds or whether it was negligent under the circumstances to make payment to Fayetteville Tractor on the strength of the deposit by Four County of

the checks given to Four County by Fayetteville Tractor, because the decision herein turns on other questions of law.

First-Citizens contends in its brief that if it was permitted to prove that a fraud was perpetrated against it by Fayetteville Tractor and its president, McLamb, it would be entitled to a preferred claim against the assets of Fayetteville Tractor in the hands of the Receiver.

Let us assume it is a fact that a fraud was perpetrated upon First-Citizens and that $47,564.79 was wrongfully obtained from it by the giving of worthless checks by Fayetteville Tractor, its associates and agents.

No one, on this record, denies that First-Citizens has an action against Fayetteville Tractor and its associates and agents who engaged in such a fraud. The main question we are concerned with on this appeal is: Because of such fraud and deceit practiced upon it, does First-Citizens have a preferred claim against the assets of Fayetteville Tractor in the hands of the Receiver superior to the claims of ordinary unsecured creditors?

[7] "Preferences are not favored and can arise only by reason of some definite statutory provision or some fixed principle of common law." 6 Strong, N. C. Index 2d, Receivers, § 12, p. 602. In the present case the appellant has asserted no statutory provision that would entitle it to preferential treatment, but rather relies solely on equitable principles as the basis for its claim to a priority. The basis for the appellant's equitable claim is its contention that in its Proof of Claim it has alleged fraud on the part of Fayetteville Tractor, its agents and associates.

A preference is "the right held by a creditor, in virtue of some lien or security, to be preferred above others (*i.e.*, paid first) out of the debtor's assets constituting the fund for creditors." Black's Law Dictionary, 4th Ed.

[8] "A preferred claim is one which, because of some equity peculiar to it, is granted preference over claims of the same class or an otherwise superior class of claims. Such preferred claims sometimes are established or recognized by statute, but in some instances they have been recognized and enforced by courts of equity independently of statute. Indeed, their origin historically, as their name suggest, is equitable rather than statutory. Furthermore, their origin and development generally have occurred in connection with railroad and public utility operating receiverships. . . . For the most part, such preferred claims are based upon expenses of an operating re-

ceivership or liabilities arising in connection with such a receivership. . . ." 45 Am. Jur., Receivers, § 254.

First-Citizens did not in its complaint, the amendments thereto in case No. 6812SC359, in its Proof of Claim filed in this case, in its exceptions taken to the report of the Receiver on its claim, in its motion to amend, or in its brief filed herein, allege, assert, infer, or offer to prove that the assets of Fayetteville Tractor coming into the hands of the Receiver were composed of the proceeds received by Fayetteville Tractor from the checks in question or that such assets were in any way augumented by such proceeds.

Under the circumstances of this case, the only way First-Citizens could have a preferred lien would be by statute or by equity imposing such.

There is no statute in North Carolina which will give First-Citizens a preferred claim upon the facts in this case.

[9, 10] First-Citizens in its brief contends that the title to the money has never passed, or, if it has passed, the money is held by the Receiver on a constructive trust. There can be no question that the possession of the money in this case, paid out on the checks, has passed. The possession of money by a person, nothing else appearing, certainly entitles a third person dealing with him, in the ordinary course of business, to assume that he has the title thereto.

> "A constructive trust arises where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.
>
> It is a 'fraud-rectifying' trust, created by a court of equity to prevent the unjust enrichment of the holder of a title. The court constructs a trust, makes the defendant a trustee without his consent, for the purpose of working out the ends of justice. It is not a permanent trust, in which the trustee is to have any duties of administration, but a passive, temporary trust, in which the trustee's sole duty is to transfer the title to the beneficiary." R. E. Lee, North Carolina Law of Trusts, (3rd Ed. 1968), § 13a, p. 76.

If the title to the money is still in First-Citizens as it states in one of its contentions, then First-Citizens has not asserted that the Receiver has any of its money. It simply asserts that Fayetteville Tractor is indebted to it on account of a fraud and that it is therefore entitled to have its claim of an indebtedness preferred over the claims of general creditors. However, the record in this case shows

that the Receiver received only $670.55 in cash or bank deposits as assets of the insolvent corporation, Fayetteville Tractor.

[11] We are of the opinion that the title to the money was transferred to Fayetteville Tractor at the time it cashed the checks drawn on the bank account of Four County and that a constructive trust in the money arose in favor of First-Citizens to prevent the unjust enrichment of Fayetteville Tractor.

First-Citizens could have followed the money fraudulently obtained wherever they could trace it and reclaim it in the hands of any person who had not received it in good faith and given value therefor, on the ground that there was a constructive trust in the money in their favor. This was permissible because they would then be endeavoring to get their own money back. They have failed to do this. *Cunningham v. Brown,* 265 U.S. 1, 68 L. Ed. 873 (1924); 2 Banking Law Journal Digest, 6 Ed., Fraudulent Overdraft Transactions, § 1160, p. 775.

In the case of *In re Tate-Jones & Co.,* 85 F. Supp. 971 (W.D. Pa. 1949), a bankruptcy case, the general principle is stated:

> "A person seeking to charge a fund in the hands of the trustee for the benefit of all creditors, as being the proceeds of his property and to have a special trust fund for him, has the burden of proof; and if he is unable to identify the product as representing the proceeds of his property, his claim must fall as all doubts must be resolved in favor of the trustee who represents all creditors."

In the case under consideration, there is no allegation or intimation as to what Fayetteville Tractor did with the money it received. Did it continue to operate its business with it? Did it pay it out on liens on part of its property? These, and many more questions are unanswered.

In the case of *Edwards v. Culberson,* 111 N.C. 342, 16 S.E. 233, Shepherd, C.J., in speaking on a constructive trust, says:

> "Mr. Pomeroy says: 'In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, . . . or through any other circumstances, which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity imposes a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein, and a court of equity has jurisdiction to reach the property either in hands

of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser in good faith and without notice, acquires a higher right and takes the property relieved from the trust.

The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto,* are practically without limit. The principle is applied whenever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer.' Pom. Eq. Jur., 1053. . . . The trusts of which we are speaking are not what are known as technical trusts, and the ground of relief in such cases is, strictly speaking, fraud and not trust. Equity declares the trust in order that it may lay its hand upon the thing and wrest it from the wrongdoer. This principle is distinctly recognized by our leading text-writers, and is is said by Mr. Bispham (Principles of Equity, 92) that 'equity makes use of the machinery of a trust for the purpose of affording redress is (sic) cases of fraud.'"

In the case of *Speight v. Trust Co.,* 209 N.C. 563, 183 S.E. 734, the Supreme Court said:

"Equity applies the principles of constructive trusts wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer. Pomeroy Eq. Jur., sec. 1053; *Edwards v. Culberson,* 111 N.C. 342. The principle is stated in Pomeroy's Equity Jurisprudence that while ordinarily constructive trusts, properly so called, may be referred to what equity denominates fraud, actual or constructive, many instances spring from the violation of some fiduciary obligation, and in them 'there is, latent perhaps, but none the less real, the necessary element of that unconscientious conduct which equity calls constructive fraud.' Pom. Eq. Jur., sec. 1044.

The equitable doctrine of constructive trusts is fully discussed in two well considered opinions from this Court, one by Walker, J., in *Lefkowitz v. Silver,* 182 N.C. 348, and the other by Adams, J., in *Bryant v. Bryant,* 193 N.C. 372."

The cases cited by appellant in its brief are not inconsistent with the principle of law set forth in *Edwards v. Culberson, supra.*

In *The Tradesman's Bank and The Chemical Bank v. Merritt,* 1 Paige (N.Y.) 308 (1829), cited by appellant, the defendant depositor overdrew his bank account and deposited the money obtained in another bank. The Court held:

"If the money was fraudulently obtained from the complainants, as alleged in the bill, the property was not changed by paying it out on the draft, and they may follow it into the hands of any person who has not taken it in the course of business, and allowed an equivalent therefor, without notice of the fraud. The complainants are not creditors at large, but have a specific lien upon the fund in the case stated in the bill."

The specific lien refers to the *fund* in the case stated in the bill and does not contradict but supports the principle *that property fraudulently obtained can be followed* and recovered. Speaking on the question of tracing trust property, in the case of *Spokane County v. First Nat. Bank*, 68 Fed. 979 (9th Cir. 1895), the Court said:

" 'We are unable to assent to the proposition that, because a trust fund has been used by the insolvent in the course of his business, the general creditors of the estate are by that amount benefited, and that, therefore equitable considerations require that the owner of the trust fund be paid out of the estate to their postponement or exclusion. * * * Both the settled principles of equity and the weight of authority sustain the view that the plaintiff's right to establish his trust and recover his fund must depend upon his ability to prove that his property is in its original or a substituted form in the hands of the defendant.' "

[12] In the case under consideration, there is no allegation or attempt to follow the fund alleged to have been fraudulently obtained. Perhaps it cannot be done. Perhaps it was paid out to persons in the course of business, who took it without notice of fraud and therefore cannot be traced. Certainly First-Citizens is entitled to its money, but under the facts in this case, we cannot hold that the other creditors of Fayetteville Tractor should be penalized by permitting First-Citizens to have a preferred claim on the assets in the hands of the Receiver in the absence of an allegation and showing that funds fraudulently obtained from First-Citizens actually constitute a part of the assets coming into the hands of the Receiver.

[13, 14] Appellant's Proof of Claim filed herein is its pleading in this case, which under G.S. 1-507.6, is required to be in writing. Under our applicable statute, all pleadings shall be liberally construed with a view to substantial justice between the parties. G.S. 1-151.

When so construed and in view of the foregoing principles of law and the findings by the trial court that First-Citizens is an unsecured creditor in the amount of $47,564.79, we conclude as a matter of law

that the pleadings do not raise an issue of fact which has been found against First-Citizens requiring submission to a jury. When the judge of Superior Court had awarded First-Citizens all it was entitled to under the facts, there was no issue raised for submission to a jury.

AFFIRMATION OF RECEIVER'S REPORT

G.S. 1-507.7 requires, among other things, a receiver "to report to the term of the superior court subsequent to a finding by him as to any claim against the corporation." The Receiver complied with this provision on 16 December 1965 by reporting to the 3 January 1966 Civil Session of Superior Court of Cumberland County his finding with respect to the claim of First-Citizens. When this report was heard in the Superior Court by Judge Braswell on 13 May 1968, he correctly overruled, as a matter of law, the exceptions filed by First-Citizens to the report of the Receiver and correctly ordered that the claim of First-Citizens is a general unsecured claim against the assets of Fayetteville Tractor. The trial court did not commit error in concluding as a matter of law that the Receiver's report on the claim of First-Citizens should be affirmed.

SIGNING AND ENTRY OF THE JUDGMENT

[15] This is a formal exception which presents the face of the record proper for review and is limited to the question of whether error of law appears on the face of the record. 1 Strong, N. C. Index 2d, Appeal & Error, § 26. No error appears on the face of the record. In view of what has been said, there is no necessity of further discussion here.

The judgment of the Superior Court entered herein is Affirmed.

CAMPBELL and MORRIS, JJ., concur.

FIRST-CITIZENS BANK & TRUST COMPANY v. H. DOLPH BERRY, RECEIVER OF FAYETTEVILLE TRACTOR AND EQUIPMENT COMPANY, INC., H. DOLPH BERRY, RECEIVER OF FOUR COUNTY TRACTORS, INC., JOHN A. McLAMB AND L. D. MINGES

No. 6812SC359

(Filed 16 October 1968)

1. Receivers §§ 5, 12— title or control of insolvent's property — liens

The title to all of the real and personal property of an insolvent corporation vests in the receiver immediately upon appointment, and a judgment rendered in an independent action after the receiver's appointment does not create a lien on the corporate property as against the receiver. G.S. 1-507.3.

2. Receivers § 10— time and method of filing claims

All claims against an insolvent corporation must be presented to the receiver in writing and within the time limit directed by the court or the claims may be barred. G.S. 1-507.6.

3. Receivers § 5— nature of control by receiver

The receiver holds title to and disposes of all property vested in him as an officer of the court, and he receives his authority from the applicable statutes together with the directions and instructions of the court in its order appointing him. G.S. 1-507.2.

4. Receivers § 10— action against insolvent corporation — abatement of action

In an action by creditor-bank against insolvent corporation and its officers to recover money judgment for losses resulting from the corporation's issuance of worthless checks, trial court did not err in dismissing plaintiff's action on ground that the action was abated by the appointment of a receiver for the corporation; nor did trial court err in denying plaintiff's motion that its complaint be treated as a proof of claim in the receivership proceeding, since plaintiff did not make such motion until more than two and one-half years after it had filed a proof of claim in the receivership proceeding and until after its proof of claim in the receivership proceeding had been ruled not entitled to preference over the claims of unsecured creditors.

5. Appeal and Error § 24— preservation of exceptions and assignments of error

Exceptions not brought forward and grouped as assignments of error nor discussed in plaintiff's brief are deemed abandoned. Rule of Practice in the Court of Appeals No. 28.

APPEAL by plaintiff from *Braswell, J.*, 6 May 1968 Civil Session of Superior Court of CUMBERLAND County.

This case was consolidated in this Court for hearing with case No. 6812SC358 entitled *Tractor and Auto Supply Company, Inc. v. Fayetteville Tractor and Equipment Company, Inc., et al.*

First-Citizens Bank & Trust Company (First-Citizens) on 20 May 1965 filed its complaint which was later amended, alleging that during April 1965 Fayetteville Tractor and Equipment Company, Inc., (Fayetteville Tractor) gave thirteen checks in the total amount of $113,966.55 to Four County Tractors, Inc. (Four County), all drawn on the Southern National Bank of North Carolina (Southern National). Four County deposited all of these in a checking account it maintained with First-Citizens at its Dunn branch. All of these checks were returned unpaid after being promptly forwarded to Southern National for payment. Before these checks had been returned, First-Citizens had paid checks of Four County totaling $60,267.01. Included in this total were checks totaling $50,963.18 that Four County had given to Fayetteville Tractor. Fayetteville Tractor had presented these checks to and was paid by First-Citizens from Four County's bank account before Southern National returned unpaid the first of the thirteen checks that Fayetteville Tractor had theretofore given to Four County. Defendant John A. McLamb is president of Fayetteville Tractor and defendant L. D. Minges is its secretary. Defendant John A. McLamb is also president of Four County and defendant L. D. Minges is its secretary and treasurer. Plaintiff asks that it recover of the defendants, jointly and severally, the sum of $60,267.01. Thereafter, H. Dolph Berry, Receiver of Fayetteville Tractor, having been appointed as such on 31 May 1965 in above referred to case bearing No. 6812SC358, was substituted as a party defendant in this action in place of Fayetteville Tractor and filed answer and a plea in bar. The plea in bar of the Receiver of Fayetteville Tractor alleges:

"I. That in the action entitled 'TRACTOR AND AUTO SUPPLY COMPANY, INC. vs. FAYETTEVILLE TRACTOR AND EQUIPMENT COMPANY, INC., ET AL.,' now pending in the Superior Court of Cumberland County, North Carolina, by an order entered therein dated May 31, 1965, by His Honor E. Maurice Braswell, Resident Superior Court Judge of the Twelfth Judicial District, H. Dolph Berry was appointed temporary Receiver of Fayetteville Tractor and Equipment Company, Inc., and by further order entered by His Honor Edward B. Clark, Superior Court Judge presiding at the June 14, 1965, Civil Session of the Superior Court of Cumberland County, H. Dolph Berry was appointed permanent Receiver of Fayetteville Tractor and Equipment Company, Inc.

II. That, by each of the aforesaid orders, all creditors of Fayetteville Tractor and Equipment Company, Inc. were enjoined and restrained from commencing any civil action against Fay-

etteville Tractor and Equipment Company, Inc., and that no appeal has been perfected by the plaintiff from such orders entered in the aforesaid action now pending in the Superior Court of Cumberland County. That this action was instituted by First-Citizens Bank & Trust Company prior to the entry of such orders in the above referred to action that gave rise to the actual receivership proceedings of Fayetteville Tractor and Equipment Company, Inc.

III. That the aforesaid orders have not in any way been modified or rescinded, that H. Dolph Berry has duly qualified and is now acting as permanent Receiver of Fayetteville Tractor and Equipment Company, Inc., and that H. Dolph Berry has entered upon the properties of Fayetteville Tractor and Equipment Company, Inc., and is now in the process of liquidating same.

IV. That Fayetteville Tractor and Equipment Company, Inc., is not at this time conducting any business in its own name, but that all of the affairs of said corporation are being handled by H. Dolph Berry, Receiver, as aforesaid.

V. That by the terms of the aforesaid orders entered in the action entitled 'TRACTOR AND AUTO SUPPLY COMPANY, INC. vs, FAYETTEVILLE TRACTOR AND EQUIPMENT COMPANY, INC., ET AL.,' and also pursuant to the general laws and rules of equity as same are enforced and applicable in the State of North Carolina, that the plaintiff is not entitled to obtain any money judgment in this action by which judgment, in itself, the plaintiff would obtain any higher lien or preference above the other creditors of Fayetteville Tractor and Equipment Company, Inc."

This plea in bar filed by H. Dolph Berry, Receiver of Fayetteville Tractor, was heard at the 6 May 1968 Civil Session of the Superior Court of Cumberland County. After this hearing the court made the following conclusions of law and rendered judgment dated 13 May 1968 as follows:

"(1) That the plaintiff in this action, First-Citizens Bank and Trust Company, is not entitled to obtain any money judgment in this action against Fayetteville Tractor and Equipment Company, Inc., by which judgment, in itself, the plaintiff would obtain any higher lien or preference above the other creditors of Fayetteville Tractor and Equipment Company, Inc.

(2) That this action as to the claim of First-Citizens Bank

and Trust Company against Fayetteville Tractor and Equipment Company, Inc., has been effectively abated by the appointment of a permanent Receiver for Fayetteville Tractor and Equipment Company, Inc., in Case No. 66CvS277, and that the Receivership Proceedings in Case No. 66CvS277 is the proper forum for the determination of the amount of the just claim of First-Citizens Bank and Trust Company against Fayetteville Tractor and Equipment Company, Inc., and for the determination of the priority and dignity of such claim with respect to other claimants against Fayetteville Tractor and Equipment Company, Inc.

(3) That no money judgment should be entered in this action in favor of the plaintiff and against the defendant H. Dolph Berry, Receiver of Fayetteville Tractor and Equipment Company, Inc.

NOW, THEREFORE, upon the foregoing findings of facts and conclusions of law, IT IS ORDERED, ADJUDGED AND DECREED that this action by First-Citizens Bank and Trust Company as to H. Dolph Berry, Receiver of Fayetteville Tractor and Equipment Company, Inc., is dismissed, and that no part of the costs of this action are taxed to said Receiver."

To the judgment entered thereon, First-Citizens excepts and gives notice of appeal to the Court of Appeals.

Jordan, Morris & Hoke by William R. Hoke for plaintiff appellant.

J. Duane Gilliam for defendant H. Dolph Berry, Receiver of Fayetteville Tractor and Equipment Company, Inc., appellee.

MALLARD, C.J.

At the outset it should be stated that on this appeal we are concerned only with the cause of action alleged in the complaint by plaintiff against the defendant Fayetteville Tractor. We are not concerned with the cause of action alleged by plaintiff against H. Dolph Berry, Receiver of Four County Tractors, Inc., John A. McLamb, or L. D. Minges.

Plaintiff asserts in its brief that the question presented on this appeal is: "Did the trial Court err in dismissing the plaintiff's action without ordering that the complaint be treated as a Proof of Claim in the receivership proceedings?" Plaintiff asked that a receiver be appointed in this case, but before its motion was heard, a receiver

was appointed for Fayetteville Tractor in the case of *Tractor and Auto Supply Company, Inc. v. Fayetteville Tractor and Equipment Company, Inc., et al,* which has No. 6812SC358 in this Court. This case was consolidated for argument with the case under consideration.

Plaintiff contends that the two cases are so intertwined that they must be considered together. We do not agree with this contention. Each case is here upon different assignments of error.

First-Citizens filed suit in the instant case on 20 May 1965. Shortly thereafter, the Receiver was appointed in the other case referred to above, which was filed 27 May 1965, and First-Citizens filed a proof of claim in that case which is numbered 6812SC358 in this Court. First-Citizens asserts it has alleged in both cases facts which if proven will place its claim in a status of priority over that of ordinary creditors of Fayetteville Tractor.

In the case under consideration, the plaintiff does not cite any authority in support of its contention that the trial court committed error in dismissing the plaintiff's action and in failing to order that the complaint be treated as a proof of claim in the case in which the Receiver was appointed, other than to say that appellant presents its argument and citation of authority in its brief filed in case No. 6812SC358.

[1-3] The title to all of the real and personal property of an insolvent corporation vests in the receiver immediately upon appointment. G.S. 1-507.3. A judgment rendered in an independent action after the appointment of a receiver does not create a lien on the corporate property as against the receiver. *Hardware Co. v. Holt,* 173 N.C. 308, 92 S.E. 8; 6 Strong, N. C. Index 2d, Receivers, § 12, p. 602. All claims against an insolvent corporation must be presented to the receiver in writing. G.S. 1-507.6. The receiver holds title to the property vested in him as an officer of the court. He receives his authority from the applicable statutes, together with the directions and instructions of the court in its order appointing him. *Battle v. Davis,* 66 N.C. 252; *Stuart v. Boulware,* 133 U.S. 78, 33 L. Ed. 568; *Union National Bank of Chicago v. Bank of Kansas City,* 136 U.S. 223, 34 L. Ed. 341. The receiver *holds and disposes* of all property coming into his hands in his official capacity under the direction of the court. G.S. 1-507.2. The question of the appointment of and the validity of the appointment of the receiver is not raised or presented on this record.

In the case of *Surety Corp. v. Sharpe,* 232 N.C. 98, 59 S.E. 2d 593, the Supreme Court said:

"The law contemplates the settlement of all claims against the insolvent debtor in the original action in which the receiver is appointed, except in the infrequent instances where the appointing court, for good cause shown, grants leave to a claimant to bring an independent action against the receiver."

[2] Proof of claims must be filed with the receiver in writing pursuant to the statute and within the time limit directed by the court or such claim may be barred. G.S. 1-507.6; *Brewer v. Elks,* 260 N.C. 470, 133 S.E. 2d 159.

[4] In the case under consideration, we are of the opinion and so decide that it was within the power and authority of the court in its discretion to dismiss First-Citizens' cause of action against the appellee and to require First-Citizens to rely upon the filing and assertion of its claim against the Receiver of Fayetteville Tractor, appellee, in the cause of action in which the Receiver was appointed.

From the record in case No. 6812SC358, it appears that First-Citizens was on 3 June 1965 made an additional party defendant in that case and filed its proof of claim therein on 22 October 1965. It was the duty of First-Citizens, after receiving proper notice, to file its own proper claim in the action in which the Receiver was appointed. There is no allegation in the complaint or motion in the record filed herein by plaintiff asking that the complaint, as amended, be treated as proof of claim in the case in which the Receiver was appointed. Thus, the Superior Court, upon the hearing of the Receiver's plea in bar, did not commit error in failing to order the complaint in this case to be made a part of the plaintiff's proof of claim in the case in which the Receiver was appointed. Plaintiff on 22 October 1965 had filed its proof of claim in that case, and on 2 November 1965 the Receiver, in his answer filed herein, requested that plaintiff's complaint be treated as a verified proof of claim in the case in which the Receiver was appointed. Apparently plaintiff was satisfied with its proof of claim for two and one-half years and did not want and did not accept Receiver's motion to have this complaint treated as its proof of claim. The records in both cases do not show any motion made by plaintiff to amend its proof of claim until 15 May 1968 when an order was filed in case No. 6812SC358 dated 13 May 1968 and signed by Judge Braswell, denying plaintiff's motion for an order allowing it to amend its proof of claim filed therein. It is interesting to note that there is nothing in either of the records to show when plaintiff's motion was made, and whether it was oral or in writing. (Appellee's brief in case No. 6812SC358 reveals that this motion was made orally on 13 May 1968, the same day it was

ruled on.) However, it is observed that it was dated the same date as and filed two days after Judge Braswell's order is dated and filed in which he held in case No. 6812SC358 that First-Citizens' claim was not entitled to priority.

The first time plaintiff mentions anything about the complaint in this action becoming part of its proof of claim in the case in which the Receiver was appointed was in its brief.

[5] Plaintiff's exceptions numbered two and three are deemed abandoned. They were not claimed as the basis for an assignment of error and were not grouped in the assignments of error and were not mentioned in plaintiff's brief. (See Rule 28 of the Rules of Practice in the Court of Appeals.)

The trial court did not commit error in the signing and entry of the judgment of 13 May 1968 dismissing the plaintiff's action without ordering that the complaint be treated as a proof of claim in the case in which the Receiver was appointed. The judgment of the Superior Court is

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

GENE C. SMITH, ADMINISTRATOR OF THE ESTATE OF DONALD JOSEPH POURCH v. HARLEY LESTER DEAN, NELLIE CANFIELD AND EUGENE ANDREW CANFIELD

No. 6810SC249

(Filed 16 October 1968)

1. Automobiles § 45; Evidence § 11— identification of deceased as driver of automobile — amendment to G.S. 8-51

The amendment to G.S. 8-51 providing that the statute does not preclude an interested party from testifying in an action against a deceased's estate growing out of an automobile accident that deceased was driving the automobile is not applicable to actions instituted prior to the date of its ratification, June 22, 1967.

2. Automobiles § 45; Evidence § 11— Dead Man's Statute — occupant's identification of deceased as driver

In actions instituted prior to June 22, 1967, G.S. 8-51 prohibits testimony by a surviving occupant in an action against deceased's estate based on driver negligence that deceased was driving the automobile at the time of the accident.

3. Evidence § 11— Dead Man's Statute — personal transaction defined

A personal transaction as used in G.S. 8-51 includes that which is done by one person which affects the rights of another and out of which a cause of action has arisen.

4. Evidence § 11— waiver of G.S. 8-51

Under certain circumstances, the personal representative can waive the protection afforded by G.S. 8-51 and thus open the door for testimony of the opposing party or interested survivor as to a personal transaction or communication with the deceased.

5. Automobiles § 45; Evidence § 11— waiver of G.S. 8-51

In a wrongful death action growing out of an automobile accident, plaintiff's introduction of testimony that defendant had admitted he was driving the automobile when the accident occurred constitutes a waiver of the protection of G.S. 8-51 as to the transaction of the driving of the automobile and renders competent testimony by defendant that plaintiff's intestate was the driver.

6. Automobiles § 45; Evidence § 11— waiver of G.S. 8-51 — same transaction

Where plaintiff's evidence opened the door to testimony by defendant as to the transaction of the driving of the automobile in which both plaintiff's intestate and defendant were riding, the court properly admitted defendant's testimony as to who was driving the automobile in other states during the trip which culminated in the accident in question, the trip being continuous and the driving of the automobile during the entire trip constituting one transaction.

7. Evidence § 11— waiver of G.S. 8-51 by cross-examination

In a wrongful death action, plaintiff's cross-examination of defendant as to certain communications with deceased *is held* to constitute a waiver of the protection of G.S. 8-51 as to the matters inquired about, rendering competent defendant's testimony on redirect examination as to such communications.

8. Evidence § 25— photographs

As a general rule, photographs are competent to be used for the purpose of illustrating anything it is competent for the witness to describe in words.

9. Evidence § 25— establishing accuracy of photograph

The accuracy of a photograph as a true representation of the scene, object or person it purports to portray must be shown by extrinsic evidence, but this need not be established by the photographer, it being sufficient if it is established by any witness familiar with the scene, object or person portrayed.

10. Evidence § 25— admissions of photographs — discretion of court

Whether a photograph is sufficiently verified and correct to justify its admission for illustrative purposes is for determination by the trial judge in the exercise of his judicial discretion, and no abuse of that discretion

is shown in the court's exclusion of an exhibit designated a photograph where the evidence as to what the exhibit shows is conflicting and the exhibit filed with the Court of Appeals reveals that it is a faded reproduction of a photograph made by a copying machine.

11. Trial § 42— verdict — sufficiency of evidence

A finding by the jury that the party having the burden of proof on an issue failed to carry that burden need not be supported by the evidence, a lack of evidence being sufficient to support such a verdict.

12. Trial § 42— inconsistent verdict

Where plaintiff alleged in a wrongful death action that the death of his intestate resulted from the negligence of defendant and another, and defendant counterclaimed for personal injuries allegedly caused by the negligence of plaintiff's intestate, the allegations and evidence conflicting as to whether plaintiff's intestate or defendant was driving the automobile in which they rode together, a finding by the jury that the death of plaintiff's intestate was not proximately caused by negligence of defendant is not inconsistent with the jury's further finding that defendant's injuries were not proximately caused by negligence of plaintiff's intestate.

13. Trial § 32— purpose of charge

The chief purpose of the charge is to aid the jurors to understand the case clearly and to arrive at a proper verdict.

14. Trial § 33— G.S. 1-180

G.S. 1-180 requires the judge to charge the law on the substantial features of the case arising on the evidence and to give equal stress to the contentions of the parties.

APPEAL by plaintiff and defendant Harley Lester Dean from *Bone, E.J.*, March 1968 Civil Assigned Session of Superior Court of WAKE County.

Plaintiff seeks to recover for the death of his intestate, alleged to have been proximately caused by the actionable negligence of the defendants Harley Lester Dean and Eugene Andrew Canfield.

Defendant Harley Lester Dean answered denying negligence and as a further answer and defense, asserted that if it should be found he was negligent, the plaintiff's intestate, Donald Joseph Pourch, was contributorily negligent. Defendant Dean filed a counterclaim against plaintiff in which he seeks to recover for personal injuries alleged to have been proximately caused by the actionable negligence of plaintiff's intestate.

In the second paragraph of his charge to the jury, Judge Bone said, "No issue is being submitted to you as to the liability of the defendants, Canfield, and we're not adjudicating the matters alleged in the pleadings in regard to them."

Counsel for plaintiff and defendant agreed upon the issues which were submitted to and answered by the jury as follows:

"1. Was the plaintiff's intestate killed as a result of the negligence of the defendant Harley Lester Dean, as alleged in the complaint?

ANSWER: No.

2. What amount of damages, if any, is the plaintiff entitled to recover for the death of the decedent?

ANSWER: .....

3. Was the defendant Harley Lester Dean injured through the negligence of the plaintiff's intestate, as alleged in the Answer and Counterclaim?

ANSWER: No.

4. What amount of damages, if any, is the defendant entitled to recover of the plaintiff Administrator?

ANSWER: ....."

From the judgment rendered on the verdict of the jury, both plaintiff and defendant appeal to the Court of Appeals.

Yarborough, Blanchard, Tucker & Yarborough by Charles F. Blanchard and Newsom, Graham, Strayhorn & Hedrick by E. C. Bryson, Jr., for plaintiff.

Joseph C. Olschner and Dupree, Weaver, Horton, Cockman & Alvis by F. T. Dupree, Jr., for defendant Harley Lester Dean.

MALLARD, C.J.

Plaintiff offered evidence which, in substance, tended to show that on 22 November 1965 he was the duly qualified and acting administrator of the estate of Donald Joseph Pourch who died 22 November 1965 shortly after seven o'clock A.M. from a brain injury received in the collision hereinafter referred to. On that same date at about two o'clock A.M., the defendant Dean was operating an Oldsmobile automobile at about sixty miles per hour, traveling South on highway #301. Plaintiff's intestate was a passenger therein when the front end of the Oldsmobile collided with the rear end of a stopped bus on the highway. The collision occurred about three miles South of Whitakers on Highway #301, which highway had a black asphalt surface and was about twenty-two feet wide. The road there was level and straight. The bus had stopped because of an accident

on the highway which had occurred before it arrived. The lights on the rear of the bus were burning at the time of the collision. It was raining and the road was wet.

A constable was at the scene with a six-volt battery light in his hand, waving it in an effort to stop the Oldsmobile before it collided with the bus, but the Oldsmobile did not stop and struck the rear of the bus. After hitting the bus, the Oldsmobile collided with a Plymouth which was traveling behind it. All three of the vehicles involved in this collision had been heading South. Plaintiff's intestate was injured in the collision.

Defendant offered evidence which, in substance, tended to show that plaintiff's intestate Pourch was driving the Oldsmobile at the time of the collision. He, Dean, was a member of the Marine Corps and stationed at Camp Lejeune. On the weekend of 19 November 1965, he went to New Jersey, and his car became disabled. He did not know Donald Joseph Pourch prior to the afternoon of 21 November 1965. He met Pourch in New York City at the Port Authority Terminal Building, a place where service personnel could go to obtain rides back to their respective bases. Pourch was driving the Oldsmobile and Dean rode in the front seat with him on their way to Camp Lejeune. There were two persons in the back of the car, a person named Lopez and one named Walsh. Defendant Dean received personal injuries in the collision.

PLAINTIFF'S APPEAL

Plaintiff asserts that there are three questions involved in his appeal, as follows:

1. Did the trial court commit error in permitting the defendant Dean to testify about transactions between the defendant and the plaintiff's intestate?

2. Did the trial court commit error in excluding plaintiff's exhibit three showing the vehicle involved in the collision in question?

3. Was the verdict inconsistent and contradictory?

[1] G.S. 8-51, relating to the competency of witnesses and excluding a party to a transaction when the other party is dead, was amended by Chapter 896 of the 1967 Session Laws by adding the following sentence to the end thereof:

> "Nothing in this section shall preclude testimony as to the identity of the deceased operator of a motor vehicle in any case brought against the deceased's estate arising out of the operation

of a motor vehicle in which the deceased is alleged to have been the operator or one of the operators involved."

This amendment, which does not apply to pending litigation, was effective upon ratification and was ratified 22 June 1967. This case was instituted on 14 March 1966. Therefore, the statute prior to the amendment is applicable here.

[2] "A party interested in the event of an action may not testify in his own behalf as to a transaction or communication with an adverse party who . . . dies prior to the trial when such testimony is against the personal representative of the deceased . . . .

A personal transaction or communication within the purview of G.S. 8-51 is anything done or said between the witness and the deceased person . . . tending to establish the claim being asserted against the personal representative of the deceased person. . . . Thus, testimony as to the manner in which the decedent was driving the car is incompetent to establish his negligence, as is testimony that it was the decedent who was driving the car at the time of the accident." 3 Strong, N. C. Index 2d, Evidence, § 11.

[3] Although the term "personal transaction" has not been specifically defined or given any very definite meaning by our Supreme Court, we think that a personal transaction as used in the statute includes that which is done by one person which affects the rights of another, and out of which a cause of action has arisen. Jones, Evidence 2d, § 785 (1908); *Davidson v. Bardin,* 139 N.C. 1, 51 S.E. 779.

[2] In the case of *Carswell v. Greene,* 253 N.C. 266, 116 S.E. 2d 801, Justice Higgins, speaking for the Court, said:

"The decisions of this Court have gone a long way in excluding evidence of a surviving passenger in his action against the estate of the deceased driver based on driver negligence. Our cases, however, have never gone so far as to exclude the evidence of a survivor as to what he saw with respect to the operation of a separate vehicle with which he had a collision. A party may testify to substantive facts about which he has independent knowledge not acquired in a communication from nor a transaction with the deceased. *Hardison v. Gregory, supra; Sutton v. Wells,* 175 N.C. 1, 94 S.E. 688; *McCall v. Wilson,* 101 N.C. 598, 8 S.E. 225.

The law that an interested survivor to a personal transaction

> or communication cannot testify with respect thereto against the dead man's estate is intended as a shield to protect against fraudulent and unfounded claims. It is not intended as a sword with which the estate may attack the survivor."

[4] Under certain circumstances, the personal representative can waive the protection afforded by the statute, and when this is done, it is frequently referred to as "opening the door" for the testimony of the opposing party or interested survivor. Stansbury, N. C. Evidence 2d, § 75 (1963).

[5] In this case the plaintiff, the personal representative of the deceased, in order to establish the identity of the driver of the vehicle, offered the evidence of the highway patrolman as to a statement made by the defendant that he, the defendant, was the driver of the Oldsmobile when it ran into the rear of the bus stopped on the road. Plaintiff contends that this did not open the door and the only testimony under G.S. 8-51 that the defendant Dean could give would be to deny that he made such statement to the officer. We do not agree with this contention. To do so would permit the plaintiff to prove the *fact* that the defendant Dean was operating the automobile at the time of the collision by what the witness said the defendant told him but would withhold from the defendant the right to deny the *fact* that he was driving. In other words, plaintiff would use defendant's words to prove his case against the defendant and then deny the defendant the right to use his words to prove his case against the plaintiff and limit him only to saying — I didn't tell the officer that. We think the trial judge correctly ruled that the plaintiff "opened the door" to this transaction with the deceased when plaintiff used the statement of the defendant that he was driving in order to make out a case for the jury. The "transaction" involved in this case was the driving of the automobile. The plaintiff used the defendant's words as a sword and then attempts to use the shield of the statute to prevent the defendant from asserting that plaintiff's intestate was the driver and that he was not the driver by permitting him only to say that he did not tell the officer he was the driver.

In 58 Am. Jur., Witnesses, § 360, the principle is stated thus:

> "The act of a protected party in introducing in evidence testimony of the adverse party as to a transaction with the deceased, . . . *or in introducing his admissions* for the purpose of proving such a transaction, is equivalent to calling the witness to prove the transaction." (emphasis added)

We think the law should not and will not permit the plaintiff, the protected party, to call the defendant as his witness by using the de-

fendant's words to prove that he was the driver and then say to the defendant — all you can do is to deny you said it, and you cannot say that plaintiff's intestate drove the automobile and deny that you were the driver because that door was not opened.

Such a construction of the statute would permit the plaintiff to open the door as to who was driving wide enough for him to enter but deny the defendant the right to enter at the same door. Our interpretation of the statute, we think, limits the testimony to the same transaction and the same "door." It does not contradict but, in fact, is supported by the principle stated in Stansbury, N. C. Evidence 2d, § 75, p. 164, as follows:

> "The competency of the interested witness is limited to the same transaction as the one testified about by the administrator or the deceased, or elicited from the witness himself by the administrator."

G.S. 8-51 relates not only to "personal transactions" but also to "communications" with a deceased person. Plaintiff contends that the court committed error in permitting evidence of transactions between the defendant and the deceased which had occurred the day before and hundreds of miles from the place of collision.

[6] The evidence tended to show that the automobile trip began in New York at about three o'clock P.M. on 21 November 1965 and continued without interruption, except for a stop when car trouble developed and stops for gas, until the collision in the early morning of 22 November 1965 in Wake County, North Carolina. We think that this was just one transaction and that it was competent for the defendant to testify about who was doing the driving on the trip after the plaintiff had used the words of the defendant to make out plaintiff's case.

[7] Plaintiff asserts that the court committed error in allowing the defendant Dean to answer certain questions as to conversation between the plaintiff's intestate and Dean on the trip from New York to the point of collision in North Carolina. These questions appear on pages 186 and 187 of the Transcript of the Evidence. At this point in the trial, the defendant's counsel was questioning the defendant on redirect examination, after the defendant had been cross-examined by plaintiff's counsel, when the following occurred as set out in plaintiff's seventh assignment of error, based on plaintiff's exception twenty-four:

"Q. Now, did Donald Joseph Pourch say anything to you about wanting or needing a relief driver at any time?

A. No sir.

Q. What did he say about driving the car and who would drive, if anything?

OBJECTION OVERRULED

A. As nearly as I can accurately remember, he said he would drive. It was his car and he would drive."

There was no objection made to the first of the above questions, and we are not concerned with it here. However, the second question is in direct conflict with the provisions of G.S. 8-51 relating to communications with a deceased person unless this particular communication could be considered a part of the above-mentioned personal transaction or unless the door was opened by the personal representative and the provisions of the statute waived with respect to such communication.

The law is that the incompetence of the adverse party to testify may be removed by his being cross-examined as to the transaction in question by the personal representative of the deceased, but only as to the particular matters inquired about. Jones, Evidence 2d, § 784 (1908, Pocket Edition issued 1911); Stansbury, N. C. Evidence 2d, § 75 (1963); *Gray v. Cooper,* 65 N.C. 183.

The defendant testified on direct examination, without objection, that he had never seen Donald Joseph Pourch prior to the afternoon of 21 November 1965 when he saw him at the Port Authority Terminal Building in New York City and testified generally as to what he did and what occurred concerning the trip to North Carolina but was not asked, and did not on his direct examination testify to, the contents of any verbal communication with the deceased. Plaintiff's counsel cross-examined the defendant before he was examined on redirect examination, and the following occurred:

"Q. Did you talk to Mr. Pourch, Donald Pourch, somewhere during the trip, as to what he did that same night, Saturday, November the 20th?

A. Yes, sir, I did.

Q. Did he indicate to you he got only a few hours' sleep himself that night?

MR. DUPREE: Objection.

COURT: Sustained.

MR. BRYSON: If he knows, Your Honor?

MR. DUPREE: I withdraw that Your Honor.

COURT: You may answer it.

Q. Did you discuss with Mr. Donald Pourch as to what he did on Saturday, November 20th, I believe you said 'yes'?

A. Yes, sir.

Q. Did he indicate that he had not had a great deal of sleep on this night?

A. Not that I recall sir."

[7] From the foregoing questions by plaintiff's counsel, it is readily apparent that he opened the door as to communications between the decedent and the defendant about this transaction. It was therefore not error for the trial judge thereafter to permit defendant's counsel to ask the defendant on redirect examination what the decedent had to say about driving the car. The protective provisions of the statute relating to communications with the deceased had been waived by the cross-examination of the defendant by plaintiff's counsel.

Plaintiff contends that the trial judge committed error by excluding plaintiff's exhibit three for the purpose of illustrating the patrolman's testimony. This exhibit three is designated a photograph and as presented in this Court, we take judicial notice that it is not reproduced on any photographic type of paper such as is usually and customarily used in the preparation of photographs. From an examination of the actual exhibit, it appears to be a dim reproduction, and not a very good one, of a photograph made by some copying machine that was about out of ink. It is a faded reproduction of what appears to be a wrecked automobile with its front damaged and the windshield in front of the driver in part shattered and in part either not damaged or completely broken out.

The trial judge had, prior to the testimony of the witness Andrews, admitted plaintiff's exhibit three for illustrative purposes when plaintiff's witness Brown was testifying, and it was passed to the jury. Then it was withdrawn by the court from jury consideration when plaintiff's witness Brown testified that it didn't illustrate any testimony of his as to how bad the automobiles *"were damaged or anything."* (emphasis added)

The patrolman Andrews testified in substance except where quoted with respect to the damage to the Oldsmobile automobile that: "The front was damaged and was shoved back in towards the front seat

of the car. The right side, and the rear." That plaintiff's exhibit three fairly and accurately represents the appearance of the Oldsmobile that he found at the scene of the collision under investigation shortly after he arrived there at about 2:30 A.M. on 22 November 1965. That he later saw it at Strick's and it was in the same condition. When plaintiff offered exhibit three into evidence for illustrative purposes, the trial judge sustained defendant's objection thereto and remarked:

> "Objection is sustained. Well, to save time, I just don't think that these exhibits have any use for illustrative purposes. They're too dull. They show nothing clearly and I don't think they would be of any assistance to the jury in understanding the testimony. That is the main reason that I'm excluding it."

[8, 9] As a general rule, photographs are competent to be used for the purpose of illustrating anything it is competent for the witness to describe in words.

> "The accuracy of a photograph must be shown by extrinsic evidence that the photograph is a true representation of the scene, object or person it purports to portray. 20 Am. Jur., Evidence, Sec. 730; *S. v. Mitchem,* 188 N.C. 608, 125 S.E. 190; *Pearson v. Luther,* 212 N.C. 412, 193 S.E. 739. 32 C.J.S., Evidence, Sec. 715. Wigmore on Evidence, 3rd Ed., Vol. 3, Sec. 793.
>
> The correctness of such representation may be established by any witness who is familiar with the scene, object, or person portrayed, or is competent to speak from personal observation. It is not necessary to prove this fact by the photographer who took the photograph. *Bane v. R. R.,* 171 N.C. 328, 88 S.E., 477; *White v. Hines,* 182 N.C., 275, 109 S.E., 31; *S. v. Matthews,* 191 N.C., 378, 131 S.E., 743; *S. v. Stanley, supra.*
>
> Whether there is sufficient evidence of the correctness of a photograph to render it competent to be used by a witness for the purpose of illustrating or explaining his testimony is a preliminary question of fact for the trial judge." *State v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824.

Also in *State v. Matthews, supra,* we find the following statement:

> "Whether or not there is sufficient evidence of the correctness of a photograph to render it competent to be used by a witness for the purpose of illustrating or explaining his testimony is a preliminary question of fact for the judge."

In Stansbury, N. C. Evidence 2d, § 34, we find the following with respect to the introduction of photographs:

". . . it is within the discretion of the trial judge to prohibit its use *if the evidence as to its accuracy is conflicting.* . . . (emphasis added)

[10] We are of the opinion and so decide that the preliminary question of fact as to whether plaintiff's exhibit three was sufficiently verified and correct to justify its admission in evidence as a photograph for illustrative purposes was for determination by the trial judge in the exercise of his judicial discretion. The decision of the trial judge is subject to review and may be reversed for abuse of discretion; however, in this case, in view of the testimony of the witnesses Brown and Andrews with respect to what plaintiff's exhibit shows and after an examination of the exhibit on file here, we are of the opinion that no abuse of discretion has been shown and that it was not prejudicial error to fail to admit plaintiff's exhibit three in evidence. See Annotation in 9 A.L.R. 2d 899-932.

Plaintiff also contends that the verdict was inconsistent, contradictory, and not supported by the evidence and that the court committed error in not setting it aside.

[11] As to the contention that the verdict was not supported by the evidence, it is observed that by its verdict, the jury found that the plaintiff, who had the burden of proof on the first issue and the defendant, who had the burden of proof on the third issue, had failed to carry that burden. Such a finding does not require evidence to support it; on the contrary, a lack of evidence will support the negative answers to the issues.

[12] The plaintiff contends that the plaintiff's intestate or the defendant Dean was clearly negligent and that the only question presented was as to who was driving. The pleadings and the evidence in the case do not make it that simple. The plaintiff alleged in his complaint that his intestate died as a proximate result of the actionable negligence of the defendant Dean and also that one of the proximate causes of his death was the actionable negligence of Eugene Andrew Canfield. The jury, by its verdict, found that the actionable negligence of the defendant Dean was not a proximate cause of the death of plaintiff's intestate. Under the facts in this case, such a finding is not inconsistent with or contradictory to the verdict of the jury that the actionable negligence of the plaintiff's intestate was not a proximate cause of any injuries that the defendant Dean may have sustained. We conclude that the verdict herein is not inconsistent or contradictory and is one that could be and was properly returned by the jury. The trial judge did not commit error in failing to set it aside.

The plaintiff contends that the trial court committed error in refusing to set aside the verdict because of errors during the trial. This contention is without merit.

The plaintiff contends that the trial court committed error in signing the judgment. This contention is also without merit.

DEFENDANT'S APPEAL

Defendant assigns as error certain parts of the charge of the court, an asserted failure to apply the law to variant factual situations, and an asserted failure to give equal stress to the contentions of the defendant.

[13, 14] The chief purpose of the charge to the jury is to aid the jurors to understand clearly the case and to arrive at a proper and correct verdict. The judge is required by G.S. 1-180 to charge the law on the substantial features of the case arising on the evidence given in the case, and give equal stress to the contentions of the parties.

We have carefully examined the charge of the court herein and are of the opinion that Judge Bone fully, adequately, and correctly charged the jury on the law on the substantial features of the case arising on the evidence and that he gave equal stress to the contentions of the parties.

This case was well and ably tried in the Superior Court by able lawyers before an able judge, and in the trial thereof we find no error.

On plaintiff's appeal No error.

On defendant's appeal No error.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA, EX REL, UTILITIES COMMISSION AND ARTHUR TAB WILLIAMS, APPLICANT v. PETROLEUM TRANSPORTATION, INC., ASSOCIATED PETROLEUM CARRIERS, QUALITY OIL TRANSPORT, SOUTHERN OIL TRANSPORTATION COMPANY, INC., M & M TANK LINES, INC., EAST COAST TRANSPORT CO., INC., O'BOYLE TANK LINES, INC., KENAN TRANSPORT COMPANY, AND PETROLEUM TRANSIT COMPANY, INC. (SCHWERMAN TRUCKING CO.), PROTESTANTS

No. 6810UC396

(Filed 16 October 1968)

1. Utilities Commission § 9— findings of fact

Findings of fact by the Utilities Commission are conclusive and binding on appeal when supported by competent, material and substantial evidence in view of the entire record.

2. Utilities Commission § 1— duty to publish regulations

The Public Utilities Act authorizes and directs the Utilities Commission to publish rules and regulations. G.S. 62-49.

3. Utilities Commission § 3; Carriers § 2— application for contract carrier permit

Utilities Commission Rule R2-15(b) requires an applicant for a permit to operate as a contract carrier to show that one or more shippers or passengers have a need for a specific type of service not otherwise available by existing means of transportation.

4. Utilities Commission § 3; Carriers § 2— contract carrier — requisites

Where the applicant for a permit to operate as a contract carrier for a specified shipper offered no proof that the shipper has a need for a specific type of service not otherwise available by existing means of transportation, a finding by the Utilities Commission that the applicant met the test of a contract carrier is not supported by the evidence and the permit was improperly granted.

APPEAL by protestants from an order of North Carolina Utilities Commission (Commission) in Docket No. T-1408 entered 22 April 1968.

Arthur Tab Williams (applicant) on 21 September 1967 applied for a contract carrier permit, pursuant to G.S. 62-262(i), to engage in the transportation of petroleum products on a state-wide basis. Twelve certified common carriers of petroleum products filed protests to the application. A public hearing was duly held before Examiner E. A. Hughes, Jr., in November 1967. On 19 January 1968 Examiner Hughes issued a recommended order for the permit with the restriction that applicant be authorized to transport in intrastate commerce enumerated petroleum products "solely for the ac-

count of A. T. Williams Oil Company for service to its retail outlets and to its wholesale customers."

Protestants took exceptions and appealed to the Commission. On 22 April 1968 the exceptions were overruled and denied, and the recommended order was approved, affirmed and adopted as the order of the Commission. Commissioners Eller and McDevitt filed a dissent to the order.

Applicant is the president and principal stockholder of A. T. Williams Oil Company (Company), a corporation engaged in the sale, retail and wholesale, of petroleum products in North Carolina and Virginia. Company has always supplied and furnished its own transportation needs by use of its own equipment. Applicant, in his individual capacity, proposes to acquire from Company its transportation equipment and thereafter provide, for compensation, transportation requirements exclusively for Company between points and places in North Carolina. To facilitate this purpose, a contract was entered into between applicant and Company, and this contract was made a part of the application. The applicant neither intended nor desired to hold himself out to the general public as a common carrier by motor vehicle, as that term is defined in G.S. 62-3(7); on the contrary, he clearly intended to limit himself to serving only one specific shipper.

Allen, Steed & Pullen by Thomas W. Steed, Jr.; Bailey, Dixon & Wooten by Wright T. Dixon, Jr., Attorneys for protestants, appellants.

Spry, Hamrick and Doughton by Claude M. Hamrick, Attorneys for applicant, appellee.

Edward B. Hipp and Larry G. Ford, Attorneys for North Carolina Utilities Commission, appellee.

CAMPBELL, J.

The protestants assert two grounds to support their contention that the granting of the permit by the Commission is improper: one, the proposed operations do not constitute contract carriage, and two, the proposed operations are inconsistent with public interest and the policy of the Public Utilities Act.

G.S. 62-262(i) provides that where there is an application for a permit, the Commission shall give due consideration to whether the proposed operations conform with the definition of a contract carrier.

G.S. 62-3(8) defines a contract carrier as follows:

> "'Contract carrier by motor vehicle' means any person which, under an individual contract or agreement with another person and with such additional persons as may be approved by the Utilities Commission, engages in the transportation other than the transportation referred to in subdivision (7) of this section, by motor vehicle or persons or property in intrastate commerce for compensation, except as exempted in G.S. 62-260."

[1] Findings of fact by the Commission are conclusive and binding upon the reviewing court when supported by competent, material and substantial evidence in view of the entire record. *Utilities Commission v. Champion Papers, Inc.*, 259 N.C. 449, 130 S.E. 2d 890; *Utilities Commission v. Radio Service, Inc.*, 272 N.C. 591, 158 S.E. 2d 855.

"The determination is presumed to be valid and is not to be disturbed unless it is made to appear that it is clearly unreasonable and unjust." *In re Department of Archives & History*, 246 N.C. 392, 98 S.E. 2d 487.

The determination of whether applicant meets the test of a contract carrier requires a review of what a contract carrier is.

The Commission issued a booklet, effective from and after 1 June 1948, entitled "Explanation of the North Carolina Truck Act of 1947 and Rules and Regulations for the Administration and Enforcement of Said Act." No rule is set forth in this booklet with regard to what is required for a permit for a contract carrier. There is, however, an explanation pertaining to what constitutes a contract carrier. This explanation contains the following:

> "It may be stated as a general rule that it requires (1) individual contracts and (2) specialized service to distinguish a contract carrier from a common carrier. The specialized service varies according to the peculiar needs of the particular shipper. It may consist of furnishing equipment especially designed to haul a certain kind of property, or it may consist of the use of employees trained in loading, unloading, or handling a particular commodity. It may consist of services in addition to the usual transportation service, such as packing goods or the installation of machinery, *or it may consist of devoting all or a particular part of the carrier's services and equipment to the use of the particular shipper.* If the carrier does not limit himself to both individual contracts and some specialized service, his operations cannot be distinguished from those of a common carrier. Unless

his operations can be so distinguished, he is a common carrier." (Emphasis added)

In *Watson Transportation Co.*, Docket No. T-822, reported in North Carolina Utilities Commission Reports [1954-1955], at page 111, the applicant sought a permit for a contract carrier. The applicant was a stockholder and officer of Watson Hardware and Oil Company. For several years the applicant had leased his trucking equipment to the company and the company used the equipment to haul its own products. Applicant sought a permit to do the same work except as a contract carrier. Under date of 2 December 1954, a permit was granted since the applicant was "devoting all or a particular part of the carrier's services and equipment to the use of the particular shipper", in accordance with the above explanation.

The following year an order of 20 April 1955 denied such a permit. *McBane-Sonny Oil Co.*, Docket No. T-787, reported in North Carolina Utilities Commission Reports [1954-1955], at page 134. The applicant, in that case, desired a contract carrier permit, pursuant to which he would haul for two prospective shippers by virtue of a contract which had been discussed, but which apparently had not been consummated. The order stated that:

"The protestants' evidence tends to show that adequate transportation service is available by common carriers and that there are idle tank trucks in the possession of authorized common carriers who stand ready and willing to serve the public.

. . . . .

Proof of a public demand and need for the service of a contract carrier is not required, but it must appear that one or more shippers want and will use the service of a contract carrier. It may be stated as a general rule that it requires individual contracts and specialized service to distinguish a contract carrier from a common carrier. A contract between a contract carrier and a shipper imposes obligations upon both carrier and shipper covering a series of shipments during a stated period of time, and it must be reasonably definite in its terms. The record in this cause is silent with respect to any reason or reasons why either of the two shippers, which applicant states will enter into contracts, desires, prefers or *needs* the service of a contract carrier rather than the service of a common carrier; . . ." (Emphasis added)

This case stresses a need for the service and not just an exclusive devotion of services and equipment.

In *T. P. Ashford Oil Co.*, Docket No. T-1070, reported in North Carolina Utilities Commission Reports [July 1, 1956-June 30, 1958], at page 192, the applicant sought contract carrier permit. Applicant proposed to carry for Arkansas Fuel Oil Corporation from Wilmington to New Bern. This operation had been carried on by a common carrier but the change was desired because Arkansas wanted to give additional business to applicant, a distributor of Arkansas products. In addition to carrying for Arkansas, applicant was going to continue to use its equipment for its own personal and private needs. In denying the application, by order of 12 March 1958, the Commission stated that no specialized service and no peculiar need existed for this operation and that "applicant does not propose to offer any special service that will distinguish it as a contract carrier from a common carrier."

In *Newsom Transports, Inc.*, Docket No. T-1119, reported in North Carolina Utilities Commission Reports [July 1, 1958-June 30, 1960], at page 173, applicant, a newly-formed corporation, was created for the purpose of taking over the transportation facilities of the Newsom Oil Company which had previously carried its own products. Applicant simply sought a change in operations by splitting the operation into two parts as in the *Watson Transportation* case, *supra*. The protestants indicated no objection to the granting of the permit, provided applicant's services were limited to the Newsom Oil Company. In view of the fact that there was no protest, this case is not persuasive of any policy on the part of the Commission and the permit could be justified for the same reason as in *Watson Transportation* case, *supra*.

[2] In 1963 the General Assembly enacted the Public Utilities Act and G.S. 62-49 authorized and directed the Commission to publish rules and regulations. Pursuant thereto, the Commission adopted, by order of 18 September 1963, rules to become effective 1 January 1964.

[3] Rule R2-10(b) provides:

> "Contract carrier authority for the transportation of passengers or property will not be granted unless the proposed service conforms to the definition of a contract carrier as defined in G.S. 62-3(8) and applicant meets the burden of proof required under the provisions of G.S. 62-262(i) and Rule R2-15(b)."

Rule R2-15(b) provides:

> "If the application is for a permit to operate as a contract carrier, proof of a public demand and need for the service is not re-

quired; however, *proof is required that one or more shippers or passengers have a need for a specific type of service not otherwise available by existing means of transportation,* and have entered into and filed with the Commission, prior to the hearing or at the time of the hearing, a written contract with the applicant for said service, which contract shall provide for rates not less than those charged by common carriers for similar service." (Emphasis added)

This rule eliminates "proof of a public demand and need for the service", but it specifically requires "a need for a specific type of service not otherwise available by existing means of transportation."

Weil-Creech Transport Corp., Docket No. T-987, Sub 5, reported in North Carolina Utilities Commission Reports [January 1, 1964-December 31, 1964], was heard in November 1963, but the order granting the contract carrier permit was issued 5 March 1964. In that case there was a conclusion as follows:

"There is a need for contract service to handle petroleum and petroleum products from the terminal of Gulf Oil Corporation at Selma, North Carolina, to and for Weil-Creech Oil Company, as hereinbefore set out. The contract carrier dedicates his equipment and makes his service available to those with whom he has contracted and is, therefore, in a position to render such service to points of destination which may or may not be on the route of some regular carrier, and to render such service at any time."

In other words, the Commission found, "(t)here is a need for contract service."

In *Tom B. York, d/b/a Hill-Top Transport,* Docket No. T-1057, Sub 1, reported in North Carolina Utilities Commission Reports [January 1, 1964-December 31, 1964], at page 96, there was an application for an extension of contract carrier rights from terminals other than those for which the applicant already had rights. In that case the application was denied by order of 3 February 1964, and among other things, the Commission found "that applicant introduced no evidence to show a need for hauling from any terminals other than the three from which he now has authority; that applicant offered no evidence to show that there is a need for his services beyond the areas where he is now authorized to make deliveries." Here again, the Commission stressed the requirement of showing the need.

In the instant case the only evidence pertaining to any need for

the services applied for consisted of the following testimony of the applicant:

> "The purpose of wanting the contract authority as contrasted to carrying it in our own corporation is that I have been advised by my accountants and also the legal office that they think this would be a proper step for operation in carrying out the goals that we desire. . . .
>
> . . . .
>
> (T)he effect is to allow me to split up my operation from what is now known as a corporate enterprise into a corporate enterprise and personal enterprise. This does not in any way mean that there is not adequate transportation available to me from other sources. I have no complaint about it. I had not had any cause when I went into this business originally to do so from a lack of common carrier transportation. It is simply something that I went into as a matter that is more profitable to my operation to handle our own. It would be correct to say that my application today is solely for my own gain rather than from any inadequacy in the transportation system in North Carolina."

[4] The record is completely devoid of any proof that Company, the only shipper involved, has a need for any specific type of service that is not otherwise available by existing means of transportation. The finding of fact by the hearing examiner, which was adopted by and became the finding of fact by the Commission "(t)hat the proposed operations conform with the definition of a contract carrier as contained in the Public Utilities Act", is not supported by any evidence in this record. The vice in the instant case is that the Commission followed its explanation of a contract carrier in the 1948 booklet and did not follow the requirement of its Rule R2-15(b). Under the latter, the applicant does not meet the test of a contract carrier.

The evidence on this record being insufficient to support the findings of fact of the Commission and the conclusions of law based thereon, this cause is remanded to the Commission for such findings and order in the premises as may be proper, not inconsistent with this opinion.

MALLARD, C.J., and MORRIS, J., concur.

JAMES B. CARROLL AND WIFE, JEAN CARROLL v. E. A. PARKER, TRUSTEE, AND Z. B. BYRD, JR. AND WIFE, MARIE STEPHENSON BYRD

No. 6811SC295

(Filed 16 October 1968)

1. Mortgages and Deeds of Trust § 13— right of trustor in timber on land secured by deed of trust

The cestui que trust of a deed of trust is liable to the trustors for timber cut on the lands secured by the deed of trust at the instance of the cestui or through his agency and for his benefit, absent a special agreement with the trustors which would relieve the cestui of such liability.

2. Mortgages and Deeds of Trust § 13— action by trustors for accounting of cut timber — necessity of tender

The fact that plaintiffs-trustors made no tender of the balance due on notes secured by a deed of trust does not bar them from bringing action against the cestui of the deed of trust for an accounting for cestui's wrongfully cutting of timber on plaintiffs' land, since plaintiffs do not seek to redeem the instruments and since the credits to which the plaintiffs allege they are entitled will pay all amounts due in the controversy.

3. Mortgages and Deeds of Trust § 13— trustors' action for accounting — sufficiency of evidence

In an action by plaintiffs-trustors against the cestui of a deed of trust to restrain foreclosure proceedings and for an accounting for the wrongful cutting and removal of timber from the trustors' lands secured by the deed of trust, the evidence is sufficient to support a jury finding that (1) the cestui entered upon plaintiffs' lands and without their permission or consent cut timber therefrom without making an accounting to the plaintiffs, and that (2) the value of the timber cut by the cestui was sufficient, if properly credited to the debt, to leave the note secured by the deed of trust not in default at the time foreclosure proceedings were initiated by the cestui.

APPEAL by plaintiffs from *Canaday, J.*, January 1968 Civil Session of JOHNSTON Superior Court.

In September 1962, plaintiffs purchased from Z. B. Byrd, Jr. and his wife, Marie Stephenson Byrd, a 17.95 acre tract of land in Elevation Township, Johnston County, North Carolina. At the time of purchase, they gave their note to the Byrds in the amount of $15,000, representing the balance of the purchase price. The note was payable in annual installments of $1,000 plus interest at 6% on unpaid principal and was secured by a deed of trust to E. A. Parker, Trustee, conveying the lands purchased from the Byrds.

The complaint alleges, and the evidence tends to show, that the installments were paid through the 1965 installment. All of the interest due was paid with the exception of a balance of $180 due with the 1965 installment. The complaint further alleges that plaintiffs

were ready, willing and able to pay that balance when they learned that defendant Z. B. Byrd, Jr., had wrongfully entered upon the lands and cut and removed the timber therefrom; that thereupon plaintiffs advised defendant Byrd that they would not make the 1966 payment nor the payment of the $180 balance due on interest; that the timber cut had a reasonable value of at least $2,000 which should be credited to the indebtedness and that when plaintiffs were given due credit for the timber wrongfully cut, no payment would be due and the note would not be in default and the deed of trust would not be subject to foreclosure; that the plaintiffs were damaged in the sum of $3,000 by reason of the unlawful entry and manner of removal of the timber by use of a "tree farmer" thereby destroying large quantities of young timber, failure to conserve the laps, and allowing trees to fall on tobacco bed. Plaintiffs further alleged that defendants had never given plaintiffs an accounting for the timber sold, had not credited any amount on the note, and had made no effort to repair the damages to the land by reason of the wrongful removal of the timber; that despite this, defendants had instituted foreclosure proceedings on 22 May 1967. The plaintiffs requested that the sale be restrained until the matters and things set out in the complaint can be determined; that plaintiffs have and recover $2,000 of defendants for the wrongful cutting of the timber, the same to be applied as a credit on the note; that the court find the deed of trust not in default and not subject to foreclosure; and that plaintiffs have and recover $3,000 damages to their lands.

Defendants by answer admitted the payments made, denied that defendant Byrd had wrongfully cut the timber, denied allegations of damage to the land, denied that the note was not in default when the foreclosure was begun, and averred that the male plaintiff had contracted with defendant Byrd in the fall of 1964 to have defendant Byrd construct a farm pond on other land of plaintiffs in Pleasant Grove Township, Johnston County, at a price of $700; that the pond was constructed but plaintiffs did not pay therefor and in the late summer of 1965, the male plaintiff requested defendant Byrd to cut the timber on the 17.95 acre tract and apply the proceeds to the amount due for the pond construction; that the net value of the timber cut was $438.45.

Plaintiffs by their reply denied these averments and alleged that there was a contract to construct a pond on the homeplace farm of plaintiffs which is about 12 miles from the lands involved in this litigation; that the pond was constructed but, because of inadequate equipment, defendant Byrd was not able to construct it according to

specifications and male plaintiff advised defendant Byrd that he would not be paid therefor until the pond was properly constructed; that plaintiffs had never authorized defendant Byrd to cut any timber on the 17.95 acre tract and had no knowledge of the amount received by defendant Byrd for the timber until the answer was filed; that the pond contract is a complete and separate transaction from the "mortgage indebtedness" set forth in the complaint.

A temporary restraining order was entered 23 June 1967 and on 2 December 1967 Canaday, J., entered an order continuing it "until the issues raised in the pleadings can be determined by a jury trial." At the trial of the matter, the court sustained defendants' motion for nonsuit at the close of plaintiffs' evidence, and entered judgment dismissing the action and dissolving the restraining order. Plaintiffs appealed.

Lyon & Lyon by W. Pope Lyon for plaintiff appellants.

E. A. Parker and Harris & Harris by Jane P. Harris for defendant appellees.

MORRIS, J.

This appeal raises only one question; *i.e.*, was the nonsuit properly entered.

Plaintiffs seek an accounting for timber cut from their lands by defendant Z. B. Byrd, Jr., holder of a note given to him and defendant Marie Stephenson Byrd, which note is secured by a purchase money deed of trust conveying the lands to defendant E. A. Parker, Trustee. They contend that the note was not in default at the time foreclosure was initiated because they were entitled to a credit on the note for the timber wrongfully cut, and they ask that the pending foreclosure be restrained until the matters set out in the complaint can be determined.

In support of their position, plaintiffs rely on *Harrison v. Bray*, 92 N.C. 488, and *Brown v. Daniel*, 219 N.C. 349, 13 S.E. 2d 623.

In the *Harrison* case, plaintiff brought an action to compel an accounting. She had executed to defendant a note for $400 secured by a mortgage on her house and lot. Prior to the maturity date of the note, she purchased for value 2 bonds of defendant given to a third person. Upon the maturity of her note, defendant advertised for sale, under the power of sale contained in the mortgage, her house and lot. She offered to surrender to him his bonds, then past due, held by her in partial discharge of her note and pay the balance due

in cash. He refused this offer. Plaintiff also alleged that defendant was insolvent. Her application for a restraining order was granted upon condition that she pay into court the sum alleged by her to be due after credit for defendant's bonds. This she did. Upon the hearing on the show cause order, defendant contended that he signed one of the bonds held by plaintiff as surety and it was, therefore, barred by the statute of limitations; that he had sold plaintiff's note prior to maturity to a third party; that if the sale of the note was not effectual, he was poor and entitled to have it set aside for his personal property exemption. The trial court denied the motion for injunction. On appeal, the Supreme Court held that plaintiff was entitled to have the material issues of fact raised by the pleadings tried by a jury, and the issues of law decided finally by the court in the ordinary course of trial, that "the substance of plaintiff's complaint is that the defendant is about to sell her house and lot, while she is entitled to have the mortgage under which he purports to act, and the debt secured by it, discharged by the application of the money due upon the two bonds she holds against him."

In the *Brown* case, plaintiff administratrix had brought an action to foreclose a mortgage given by defendants to her husband. Defendants contended there was nothing due on the mortgage because during plaintiff's intestate's lifetime they had made payments on the note and that plaintiff's intestate had cut timber on the lands which should be credited to the note; that the value of the timber exceeded the balance due. The plaintiff replied that the timber was cut at defendants' authorization and defendants had never accounted for the cutting. The defendant's evidence tended to show that the timber was cut at the instance of plaintiff's intestate for application on the mortgage. Plaintiff's evidence tended to show that one of the defendants had told the lumberman to log the timber but that plaintiff's intestate had directed that the proceeds be paid to him rather than defendants. The question on appeal was the correctness of the issues presented to the jury. In sending the matter back for a new trial, the Supreme Court noted that the main controversy between the parties was over the question of authority and responsibility for the cutting of timber on the mortgaged lands and liability therefor, the defendants contending it was done at the instance of and for the benefit of the mortgagee, the plaintiff contending it was done at the sole instance of the mortgagor. The Court, speaking through Seawell, J., said:

> "The mortgagee in possession is liable to the mortgagor for timber cut and removed from the premises during such possession

at the instance or by permission of the said mortgagee, and for his benefit, and is compelled to credit the proceeds, or the market value, upon the mortgage debt. (citing cases) Where the mortgagee is not in possession, he is still liable to the mortgagor for timber which is cut upon the premises at his instance or through his agency and for his benefit, in the absence of a special agreement with the mortgagor, which would relieve him from such liability, whether the cutting is done with or without the consent of the owner and mortgagor."

[1] We are aware that both the *Brown* case and the *Harrison* case involve mortgages. We think, however, that the principles enunciated therein are equally applicable to a case involving a deed of trust, as here. The defendants Byrd, holders of plaintiffs' note secured by a deed of trust, are liable to the plaintiffs for timber cut on the lands conveyed by the deed of trust, at the instance of the defendants Byrd or through their agency and for their benefit, absent a special agreement with the plaintiffs which would relieve the defendants of such liability.

[2] Defendants' contention that plaintiffs have made no tender of the balance due and, therefore, cannot maintain their action is without merit. This is not an action to redeem. Plaintiffs allege that the note was not in default at the time the foreclosure was begun because the credit to which they were entitled would have paid all amounts due. The amount of the credit, if any, is in controversy, and we cannot say on this record, as in *Dennis v. Redmond,* 210 N.C. 780, 188 S.E. 807, that plaintiffs "knew, or in the exercise of due care could have known the exact amount due on the indebtedness, and tendered same."

Defendants contend that plaintiffs' own evidence clearly showed that, without regard to an acceleration clause, the note was in default at the time the foreclosure was begun. We do not agree.

We note that the deed of trust is not in evidence, nor are any of its terms a part of the record.

[3] Plaintiffs' evidence tended to show that the defendant Z. B. Byrd, Jr., entered upon plaintiffs' land and cut timber therefrom without permission or consent; that no accounting therefor has been made with plaintiffs; that the value of the timber on the stump was $1,000; that the value of the timber at the mill was from $1700 to $2000; that there was approximately 30,000 board feet of mature pine saw timber having a diameter at the stump from 8 to 24 inches worth from $55 to $70 per thousand; that a tree farmer was used to get the timber out; that laps were left on the ground and in the

pond and on a tobacco bed; that the laps would have been worth about $200 as pulpwood; that the trees were damaged by the laps and the small timber destroyed by the tree farmer; that before the cutting of the timber the farm had a value of $18,000 and after the cutting, $13,000; that the defendant Z. B. Byrd, Jr., had a contract with plaintiffs to construct a pond on other land owned by them for $700; that the pond was not properly constructed; that that was a separate transaction and there was no agreement that defendant Z. B. Byrd, Jr., could cut timber on the 17.95 acre tract to pay for the construction of the pond.

The evidence, considered in the light most favorable to the plaintiffs, raises an inference which must be left to the jury that defendant Z. B. Byrd, Jr., entered upon the lands of the plaintiffs and without their permission or consent, cut timber therefrom. The evidence considered in the light most favorable to the plaintiffs would allow, but not compel, a finding that the value of the timber cut was sufficient, if properly credited to the debt, to leave the note not in default at the time the foreclosure was initiated.

Under the evidence in this record, we think the plaintiffs are entitled to have the damages, if any, to their land assessed by the jury.

For the reasons set out herein, there must be a

New trial.

MALLARD, C.J., and CAMPBELL, J., concur.

EZRA MEIR AND WIFE, VIOLET S. MEIR v. RUSSELL C. WALTON, JR., AND WIFE, MARGIE G. WALTON.

No. 6810SC379

(Filed 16 October 1968)

1. Judgments § 24— default judgment — excusable neglect

In order to have a judgment set aside under G.S. 1-220, the movant must show excusable neglect.

2. Judgments § 25— due care by defendant

A defendant duly served with process is required to give his defense that attention which a man of ordinary prudence usually gives to his important business affairs.

3. Judgments § 25— attorney's neglect imputed to defendant

Where defendant turned the suit papers in a civil action over to an at-

torney and thereafter made no inquiry as to whether anything had been done with respect thereto, the neglect of the attorney to take action to defend the suit is imputable to defendant, and the court's denial of his motion under G.S. 1-220 to set aside the default judgment taken against him will not be disturbed.

4. Judgments § 25— setting aside default judgment — discretionary

The discretionary refusal of a motion to set aside a default judgment on the ground of excusable neglect will be upheld on appeal in the absence of abuse of discretion.

APPEAL by defendants from *Cowper, J.*, 2 June 1968 Non-Jury Assigned Session, WAKE Superior Court.

This action arises from a boundary line dispute between plaintiffs and defendants who are adjoining property owners. On 21 April 1966, the parties entered into an arbitration agreement providing that John S. Lawrence, Registered Surveyor, go upon the properties of the parties, determine where the true and correct dividing line lies, and mark such line upon the ground. The agreement further provided that the parties would be bound by Lawrence's determination of the line; that quitclaim deeds as necessary would be given; that the parties would bear equally the expenses of the arbitrator; that he would have 60 days from the date of the agreement to complete his work, and the parties would execute the necessary deeds and pay the charges of the arbitrator within 30 days after the arbitrator completed his work.

On 19 October 1967, plaintiffs brought this action. The agreement was attached to the complaint market Exhibit A and incorporated therein by reference. The complaint alleged that the arbitrator determined the true and correct line, prepared a map thereof dated 27 February 1967, which is duly recorded in the Wake County Registry; that the parties have paid the expenses of the arbitrator; that plaintiffs have recognized the line as located by the arbitrator and in June 1967 executed and delivered to defendants for their execution an instrument recognizing and establishing the line; that defendants held said instrument without objection raised for approximately one month and by word and deed led plaintiffs to believe it would be executed; that despite repeated requests defendants refused to execute the instrument. The complaint alleges acts of defendants constituting trespasses, and asks for a temporary restraining order, a show cause order, $400.00 damages, that defendants be ordered to recognize the line established by the arbitrator and execute the quitclaim deed provided for in the agreement or, in the alternative,

for the court to find the line established by the arbitrator to be the true and correct boundary line.

On 21 November 1967 upon hearing on the show cause order judgment was entered allowing both plaintiffs and defendants to use the dirt road running generally between their properties and enjoining defendant Russell Walton, Jr., from tampering with the fence erected by plaintiffs or otherwise interfering with them in the use of their property.

On 5 March 1968 plaintiffs' attorneys wrote the following letter to counsel for defendants:

> "The above entitled action was instituted on October 19, 1967, at which time a complaint was filed. A temporary restraining order was signed on November 21, 1967. We agreed to an extension of time to and including the 20th day of December 1967, for the defendants to file answer in this matter. Thereafter, we discussed the possibility of a settlement of all matters in controversy and verbally agreed that the defendants' answer would not be due until the possibilities of a settlement had been fully explored.
>
> We feel that our last settlement proposal was very reasonable and we feel that enough time has elapsed for an acceptance or rejection of this proposal. Furthermore, our client is insisting that this matter be tried in order that there might be final determination as soon as possible.
>
> Under the circumstances, we feel that we must demand that our settlement proposal be either accepted or rejected by Monday, March 11, 1968. In the event that there is a rejection, we must further insist that an answer be filed within 30 days from March 11, 1968, in order that this might be placed on the trial calendar."

On 6 March 1968 the following letter was written to defendant Russell C. Walton, Jr., by Mr. Henry Sink, defendants' counsel at that time:

> "We forward herewith photocopy of letter received from Manning, Fulton and Skinner, Attorneys, with regard to the boundary matter.
>
> I feel very strongly that the original offer of compromise settlement should be accepted. We had previously agreed in conference among you, Bill Allen and myself to this offer of compromise settlement. Also, I do not believe that we have any reasonable chance of upsetting the arbitration contract or the resulting ar-

bitration (save with regard to the patent error by the surveyor in carrying the Meir boundary line to the south line of the Reedy Creek Road Extension). Since you agreed to the compromise proposal which Allen and I submitted to Manning, Fulton and Skinner and which was basically accepted by them, I do not feel that we can represent you further in the event of litigation. We will of course be pleased to continue to represent you in winding up the compromise settlement, if you choose to accept it.

Please consider these matters and advise me of your wishes. I will be glad to turn over any and all materials in my files to any attorney chosen by you to continue with the litigation, if you decide to proceed. Of course, I will also give such attorney any additional information which I may have in order that he may proceed with the litigation in your best interest."

On 26 April 1968 plaintiffs moved for and obtained judgment by default and inquiry, copy of which was forwarded to Mr. Sink and by him forwarded to defendant Russell C. Walton, Jr., on 30 April 1968.

On 3 June 1968 defendants moved to vacate and set aside the judgment alleging excusable neglect and meritorious defense. Proposed answer was attached to the motion.

Upon hearing on the motion, defendant Russell C. Walton, Jr., testified that upon receipt of Mr. Sink's letter of 6 March 1968, he turned the case over to a new attorney on 13 March 1968, from whom he heard nothing until on or about 2 May 1968, when he was advised by the attorney by letter that he would not handle the matter. Defendant Walton further testified that he thought the 30-day period for answer in Mr. Gulley's letter to Mr. Sink referred to an answer to the negotiations and not to the original complaint. He testified that he did not communicate with the attorney to whom he had turned over the case in any way from the time he conferred with him on 13 March 1968 to 30 April 1968.

The court entered an order denying defendants' motion to vacate and set aside the judgment by default and inquiry, and defendants appealed.

Crisp, Twiggs & Wells by L. Bruce McDaniel for defendant appellants.

Manning, Fulton and Skinner by Jack P. Gulley for plaintiff appellees.

MORRIS, J.

Defendants contend that the court committed error in three respects: (1) in finding as a fact and concluding as a matter of law that defendants failed to show surprise or excusable neglect in their failure to file an answer, (2) in finding as a fact and concluding as a matter of law that defendants failed to show any meritorious defense to plaintiff's cause of action, and (3) in finding as a fact that defendants retained the proposed agreement establishing a boundary line for approximately one month before raising, for the first time, the objection that the survey had not been completed within 60 days.

G.S. 1-220 provides that, at any time within one year after notice thereof, the judge shall, upon such terms as may be just, relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect.

[1] In order to have a judgment set aside under the statute, the movant must show excusable neglect. 5 Strong, N. C. Index 2d, Judgments, § 24; *Whitaker v. Raines,* 226 N.C. 526, 39 S.E. 2d 266.

Defendants contend that they turned the matter over to an attorney and thereafter relied on him to do whatever needed to be done to protect them, asserting that the neglect of the attorney is not chargeable to them.

Finding of fact No. 11 reads as follows: "That the defendant Russell C. Walton, Jr., did not contact or have any communications with Eugene Smith, Esquire, between the 13th day of March, 1968, and the time that he received a copy of the judgment by default and inquiry." Defendants do not except to this finding of fact, and it is amply supported by the evidence.

[2] We think this case is controlled by the principles enunciated in *Jones v. Fuel Co.,* 259 N.C. 206, 209, 130 S.E. 2d 324, where the Court, speaking through Denny, C.J., said:

> "It is generally held under the above statute that '(p)arties who have been duly served with summons are required to give their defense that attention which a man of ordinary prudence usually gives his important business, and failure to do so is not excusable.' Strong, North Carolina Index, Judgments, § 22; *Whitley v. Caddell,* 236 N.C. 516, 73 S.E. 2d 162; *Pate v. Hospital,* 234 N.C. 637, 68 S.E. 2d 288; *Whitaker v. Raines,* 226 N.C. 526, 39 S.E. 2d 266; *Johnson v. Sidbury,* 225 N.C. 208, 34 S.E. 2d 67.
>
> Where a defendant engages an attorney and thereafter dili-

gently confers with the attorney and generally tries to keep informed as to the proceedings, the negligence of the attorney will not be imputed to the defendant. If, however, the defendant turns a legal matter over to an attorney upon the latter's assurance that he will handle the matter, and then the defendant does nothing further about it, such neglect will be inexcusable. *Moore v. Deal,* 239 N.C. 224, 79 S.E. 2d 507; *Pepper v. Clegg,* 132 N.C. 312, 43 S.E. 906."

In *Moore v. Deal,* 239 N.C. 224, 79 S.E. 2d 507, the Court set out the general principles of law established by its decisions applicable where a litigant relies on neglect of counsel to set aside a judgment by default. There the Court said that "the mere employment of counsel is not enough. *Lumber Co. v. Chair Co.,* 190 N.C. 437, 130 S.E. 12. The client may not abandon his case on employment of counsel, and when he has a case in court he must attend to it. *Roberts v. Allman,* 106 N.C. 391, 11 S.E. 424; *Pepper v. Clegg,* 132 N.C. 312, 43 S.E. 906."

[3] In our opinion, when defendant Russell C. Walton, Jr., turned the matter over to Mr. Smith and thereafter made no inquiry as to whether anything had been done, the neglect of the attorney is imputable to him, and he has shown no excusable neglect.

[4] In addition, the motion to set aside the judgment by default and inquiry was denied in the court's discretion. His decision will be upheld in the absence of abuse of discretion. *Jones v. Fuel Co., supra.* We find no abuse of discretion.

In the absence of sufficient showing of excusable neglect, the question of meritorious defense becomes immaterial. *Stephens v. Childers,* 236 N.C. 348, 72 S.E. 2d 849, and cases there cited. We, therefore, do not discuss defendants' remaining assignments of error.

Affirmed.

MALLARD, C.J., and CAMPBELL, J., concur.

STATE OF NORTH CAROLINA v. JAMES HAYWOOD BEAMON

No. 6815SC393

(Filed 16 October 1968)

1. Escape § 1; Criminal Law § 40— admissibility of commitment

In a prosecution for escape, a commitment issued under the hand and official seal of the clerk of Superior Court is admissible for the purpose

of showing that defendant was in lawful custody at the time of the alleged escape, it not being necessary that the commitment be certified in accordance with G.S. 8-34.

2. Criminal Law § 118— misstatement of contentions

Ordinarily, objections to the statement of contentions should be brought to the trial judge's attention so that a misstatement can be corrected by the trial judge before verdict.

3. Criminal Law § 114— expression of opinion in stating contentions

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 to any other portion of the charge.

4. Escape § 1— instructions supported by defendant's evidence

In a prosecution for escape, instructions to the effect that defendant contends he was induced to leave, that sending him out to work was an excuse for him to leave, and that he ought to be the judge of his own situation *are held* not to constitute an expression of opinion by the court, such instructions being supported by defendant's testimony that prison officials continued to assign him to highway work which he was physically unable to perform, that he informed the prison officials that he would walk off if sent back to the highway squad, and that in walking away from the highway squad he did not intend to escape but only to leave the highway work.

APPEAL by defendant from *Bailey, J.*, 24 June 1968 Session, ORANGE Superior Court.

Defendant was convicted upon a bill of indictment charging the offense of escape from Department of Correction Unit 5535 on 25 October 1967. The indictment alleged that defendant was serving a sentence imposed at the 21 January 1966 Session, Durham Superior Court, for the misdemeanor of larceny of goods of a value of less than $200.00.

From a sentence of one year to commence at the expiration of all sentences previously imposed, defendant appealed.

T. W. Bruton, Attorney General, by Dale Shepherd and Andrew A. Vanore, Jr., Staff Attorneys, for the State.

Haywood, Denny and Miller, by James H. Johnson, III, for the defendant.

BROCK, J.

For the purpose of showing the lawfulness of defendant's confinement at the time of the alleged escape the State offered in evidence the commitment issued from the Durham Superior Court which was

contained in defendant's "field jacket" then in possession of the Department of Correction Unit to which defendant was assigned. This commitment contained the signature of a deputy clerk of Superior Court of Durham County and the official seal of the Clerk of Superior Court of Durham County.

[1] The defendant assigns as error the admission of this commitment upon the grounds that it was not certified in accordance with G.S. 8-34. In *State v. Stallings,* 267 N.C. 405, 148 S.E. 2d 252, Justice Bobbitt in writing for the Court said: "Unquestionably, certified copies of the records of the Superior Court of Wake County showing defendant's conviction and sentence were admissible to show defendant was in lawful custody at the time of the alleged escape. (Citing cases.) A commitment issued under the hand and official seal of the Clerk of Superior Court of Wake County was also admissible for this purpose." Under authority of *State v. Stallings* this assignment of error is overruled.

[4] Defendant assigns as error the trial judge's statement of defendant's contentions in his charge to the jury. In stating the defendant's contentions the trial judge said:

> "The defendant, on the other hand says and contends that you ought not be so satisfied, that you ought not to believe what the State's witnesses have said about it, that in fact he was induced to leave, that they should not have sent him out to work, when they did, they invited him to go, he says and contends that this was an excuse for him to leave, that he ought to be the judge of his own situation, . . ."

[2, 3] Ordinarily, 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. 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. *State v. Watson,* 1 N.C. App. 250, 161 S.E. 2d 159.

The defendant argues that the only effect of the above quoted portion of the judge's charge was to ridicule the defendant and make light of his contentions; and that this constituted an expression of opinion by the trial judge prejudicial to the defendant.

In order to understand what contentions arise from the defendant's evidence it is necessary to review some of it. Defendant testified that he was physically unable to shovel dirt such as is required of the squad assigned to work upon the highways. He further testified

that the doctor had restricted him to light work, but that the prison unit officials continued to send him out on the squad for highway work. Defendant offered his medical records of treatment during his incarceration. These records do not support his claim of physical disability. The defendant also offered the testimony of Dr. Roberts, the prison unit physician. Dr. Roberts testified that he did not tell the prison unit officials "over once, if any" to put defendant on light work. Dr. Roberts further testified that in his opinion defendant was able to shovel dirt. Lieutenant Rich, assistant superintendent of the prison unit to which defendant was assigned, testified that Doctor Roberts had recommended light work for the defendant on only one occasion; and that he was placed on light work that time.

The defendant testified on direct examination as follows:

"A. This last time I told Captain Hurley and Lieut. Rich the doctor told them repeatedly not to put me out on the squad. I didn't want to go out on the squad to work, I was going against my will and against the doctor's will, and if they put me out on the squad, I was going to walk off and leave them.

"Q. How long did you stay out on the squad this last time?

"A. I didn't stay but about ten minutes after I got out there.

"Q. What did you do?

"A. I walked off into the woods."

Further on direct examination, defendant testified:

"Q. Did anybody holler at you when you walked to the woods?

"A. Nobody. I didn't escape from anything, just walked in the woods, I didn't break out of nothing, I didn't have handcuffs on me, nobody told me not to go, in fact, I told them I was going if they put me out there, they put me out there anyway."

And on cross-examination he testified:

"Q. They just invited you to leave, didn't they?

"A. Well, I think it was entrapment, they are guilty too before and after the fact of the crime. They knew that I was going to walk off if they took me out there and they were responsible for my custody.

"Q. Nobody forced you to walk into the woods, did they?

"A. Nobody forced me to breach their trust, no, sir."

The defendant's testimony contradicted the testimony of the State's witnesses, and therefore he contended by his testimony that the jury *ought not to believe what the State's witnesses have said about it.* He testified that the acts of the prison unit officials constituted entrapment, and he therefore contended by his testimony *that he was induced to leave.* He testified that he was physically unable to work on the highway squad, and therefore he contended by his testimony that *they should not have sent him out to work.* He testified that he told the prison unit officials that if they sent him out on the highway squad again that he was going to walk off, and that they put him out there anyway. Therefore, he contended by his testimony that *they invited him to go.* The substance of defendant's testimony was that he did not intend to escape but only to leave the heavy work after advising the prison officials of his physical disability, therefore he contended by his testimony that sending him to do heavy work *was an excuse for him to leave.* Defendant's testimony of his physical disability was contradicted by his other evidence from the doctor and his medical records. Therefore, defendant is the only person who determined that he was unable to work. He testified that he did not want to work on the highway squad and that if they sent him out he would be going against his will, and would walk off and leave them. Therefore by his testimony he contended that he, not the doctor or prison officials, *ought to be the judge of his own situation.*

[4] In view of defendant's testimony and theory of his defense, we hold that no prejudicial error has been shown by the instruction complained of. The case was presented to the jury under applicable principles of law, and in the trial we find no prejudicial error.

No error.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. LONNIE PARRISH

No. 6815SC234

(Filed 16 October 1968)

1. Criminal Law § 168— instructions — statement of evidence — using defendants' names interchangeably

Although trial court in joint trial of two defendants erred in using the names of defendants interchangeably in portion of the charge summariz-

ing the evidence of the State, such error was harmless since (1) the evidence was substantially the same as to each defendant, and (2) since the court specifically instructed the jury that they were to be guided solely by their own recollection as to the evidence.

2. Criminal Law § 168— instructions — failure to restrict consideration of codefendant's testimony

In joint trial of two defendants for breaking and entering and larceny, defendant was not prejudiced by trial court's failure to charge that admissions of his codefendant implicating both defendants in the breakings were to be considered only as to the codefendant, since the court instructed the jury to that effect on at least two occasions when the codefendant's testimony was admitted.

3. Criminal Law § 115— instructions as to possible verdicts

In joint trial of two defendants for felonious breaking and entering, charge of trial court as to possible verdicts *is held* to have adequately instructed the jury that they could convict either or both defendants of the offense or acquit either or both defendants.

4. Criminal Law § 119— request for special instructions

Where the special instructions requested by defendant are not supported by the evidence, the court is not required to give such instructions either verbatim or in substance.

APPEAL from *Bowman, S.J.*, January 1968 Criminal Session of ALAMANCE Superior Court.

Defendant was tried, with Jimmy Robert Harris, under two separate bills of indictment each charging breaking and entering and larceny. Defendant entered a plea of not guilty to each count in each bill of indictment. At the end of the State's evidence, motion to quash the second count, larceny, in one of the bills was allowed. Defendant's motion for nonsuit at the end of State's evidence, renewed at the conclusion of all the evidence, was denied. The jury returned a verdict of guilty, and from the judgment entered thereon, defendant appealed.

James E. Long for defendant appellant.

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

MORRIS, J.

Defendant brings forward 11 of the 20 assignments of error set out in the record on appeal. All are addressed to the charge of the court.

[1] Assignments of error Nos. 5 and 8 relate to the court's use of

the names of defendants interchangeably in a portion of the charge. It is true that at one time, the court in recapitulating the evidence referred to defendant Parrish when, from the evidence, he obviously meant defendant Harris. The inadvertence occurred when the court was attempting to summarize the testimony of Deputy Sheriff Wilson and Deputy Sheriff George. In stating testimony of Deputy Sheriff Wilson, the court said that he testified "that he talked with defendant (Parrish) about these two break-ins, the first time at the home of (Parrish)" and that "the defendant (Parrish) then said he wanted to talk to the witness about the matter so they brought the defendant (Parrish) to the Police Station."

In summarizing the testimony of Deputy Sheriff George, the court said, "That he talked with defendant (Parrish) on October, 1967, at the defendant's home, that he advised the defendant of his Constitutional rights before asking him any questions on October 26. Afterwards, he asked the defendant Harris about the items of missing property found in the small building at the rear of defendant (Parrish's) house, that he told the defendant Harris they had a search warrant for his house and defendant Harris gave them permission to search his house. The witness George stated they found at the defendant (Parrish's) house a diving suit with a weight belt, found the spear gun, the swim fins and other missing items from the Mansfield dwelling house."

Wherever the name "Parrish" appears in parenthesis in the portions of the charge quoted above, the name apparently should have been "Harris". Defendant earnestly contends that this inadvertent use of the wrong name prejudiced defendant Parrish. The evidence discloses that the residences of both defendants were searched, that each defendant gave his permission for the search, that each defendant was warned of his constitutional rights, that the property alleged to be stolen was found at both houses. The evidence was substantially the same as to each defendant. Admittedly, the court was in error in using the name "Parrish" when the name "Harris" would have been correct. We think, however, the error was harmless. It is strikingly similar to the situation in *State v. Sinodis,* 189 N.C. 565, 127 S.E. 601, where the Court said:

> "It is conceded Jackie Mays did not testify that she had permitted Nick Zrakas to have sexual intercourse with her, and that the court below was in error in giving such as a contention of the State. Her evidence had reference to a Greek named Goss. While the statute (C.S., 564) requires the judge to state the evidence given in the case in a plain and correct manner and

declare and explain the law arising thereon, we cannot hold such a slight inadvertence for reversible error in the present record. The evidence is plenary as to the guilt of all the defendants, and it is apparent, we think, from the whole case, that the jury could not have been misled by this misstatement, which was no more than a 'slip of the tongue.' Besides, counsel for this defendant could easily have called the matter to the court's attention and the same could have been corrected then and there."

Additionally, the court specifically instructed the jury that they were to be guided solely and entirely by their own recollection as to what the evidence was or was not and were to disregard entirely anybody else's recollection.

[2] Assignment of error No. 7 is to the failure of the court, in its summary of the evidence, to charge the jury that alleged admissions of Harris implicating him and Parrish in the break-ins were to be considered by them only as to Harris. This contention is without merit. The court had so instructed the jury on at least two occasions when the testimony was admitted. This, we think, sufficiently protected defendant, and the failure to so instruct a third time was not prejudicial error.

[3] By assignment of error No. 9, defendant challenges the following portions of the charge of the court:

". . . and that the defendants or either of them intentionally broke and entered the said dwelling house with the intent to commit the felony of larceny as I have heretofore defined that term to you, then it would be your duty to return a verdict of guilty as charged in the first count in this bill of indictment against both or either of these two defendants.

If you do not find from the evidence and beyond a reasonable doubt it will be your duty to return a verdict of Not Guilty against either or both of the defendants; or, upon the whole evidence in the case there remains in your mind a reasonable doubt as to both or either one of these defendants' guilt, it would be your duty to give either him or them the benefit of that reasonable doubt and to acquit him or them, on the first count in the bill of indictment as to breaking and entering of the Talalah home."

"So, you are instructed if you find from the evidence and beyond a reasonable doubt that on or about the 19th day of October, 1967, in this county, the defendant Lonnie Parrish and the defendant Jimmy Robert Harris or either of these two de-

fendants without the consent of Frances Talalah took and carried away the personal property of Frances Talalah or any part thereof named in the bill of indictment, and that either one or both of these defendants took and carried it away with the felonious intent permanently to deprive Frances Talalah of the use thereof and to convert it to defendants or either of the defendants own use or the use of some other person not entitled thereto, it will be your duty to return a verdict of guilty as to either or both of these defendants on this charge of larceny. If you are not so satisfied from the evidence and all of the evidence beyond a reasonable doubt it will be your duty to return a verdict of Not Guilty as to either or both of these defendants; or, if upon a fair consideration of all the facts and circumstances in the case you have a reasonable doubt as to both the defendants' guilt or the guilt of either of them, it will be your duty to return a verdict of Not Guilty as to either or both of the two defendants."

". . . if the State has satisfied you from the evidence and beyond a reasonable doubt that on or about the 18th day of October, 1967, the Defendants Lonnie Parrish and Jimmy Robert Harris or either of them broke or entered the dwelling house of E. L. Mansfield and further satisfied you from the evidence and beyond a reasonable doubt that valuable securities or personal property of E. L. Mansfield or other persons was contained in said dwelling house, and that the defendants or either one of them intentionally broke and entered these premises with the intent to commit the felony of larceny as I have heretofore defined that term to you, then it will be your duty to return a verdict of guilty as charged in the second bill of indictment against both or either one of these defendants on the charge of breaking and entering the dwelling house of E. L. Mansfield. If you do not so find from the evidence and beyond a reasonable doubt, it would be your duty to return a verdict of Not Guilty; or, if upon the whole of the evidence in the case there remains in your minds a reasonable doubt as to both or either one of the defendant's guilt, either one of them, it will be your duty to give him or them the benefit of that reasonable doubt and acquit him or them on the first count in this bill of indictment charging breaking or entering the premises of E. L. Mansfield."

The contention is that the trial court did not leave open the possibility of one acquittal and one conviction. On the contrary, it seems obvious that the court was very careful to instruct the jury that they

could convict either or both defendants or acquit either or both defendants.

We think that the charge of the court, when considered contextually, is free from prejudicial error.

[4] Defendant's remaining assignments of error are to the failure of the court to give the jury special instructions tendered by the defendant. Defendant Parrish tendered special instructions in writing in apt time and thus complied with the requirements to that extent. *State v. Bailey,* 254 N.C. 380, 119 S.E. 2d 165. He requested that the court charge, in substance, that an intent to steal property and a bona fide claim of right to take it are incompatible; that even though personal property of another is taken and carried away without right or claim of right, it is not larceny unless there is a felonious intent; that the court define abandoned property as in the prayer for instruction and instruct the jury that it "is your duty to determine whether the property at the Talalah residence was in fact abandoned by the former residents"; that abandoned property becomes subject to appropriation by the first taker who reduces it to possession; that if the State had failed to satisfy the jury that defendant Parrish broke and entered the houses but had failed to satisfy the jury that he did so with intent to commit a felony therein or other infamous crime he would be guilty of a misdemeanor and it would be their duty to return a verdict of guilty as to such misdemeanor; and if the jury be satisfied from the testimony of Jerry Hill that defendant Parrish's entry into the Talalah house was not wrongful it would be their duty to find him not guilty of the misdemeanor of wrongful entry.

If the specific instructions prayed for are not supported by the evidence, it is not error to fail to give such instructions verbatim or in substance. *State v. Bailey, supra.* There was no evidence that the property was abandoned property and no evidence that defendants had a right to enter either house. The court gave the jury clear and explicit instructions with respect to the different elements of the crime required for conviction.

Appellant has been ably represented and fairly tried. In his trial, we find

No error.

MALLARD, C.J., and CAMPBELL, J., concur.

JEAN BRYAN v. OTIS ELEVATOR COMPANY, A CORPORATION
No. 6816SC277

(Filed 16 October 1968)

1. Trial § 21— motion to nonsuit

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

2. Negligence § 31— elevator accident — sufficiency of evidence — res ipso loquitur

In plaintiff's action to recover damages for personal injuries allegedly sustained when an automatic elevator in which she was riding suddenly dropped to the ground floor of a building, the doctrine of *res ipsa loquitur* is inapplicable to carry to the jury the issue of the elevator company's negligence in breaching contractual duty to building owner to maintain the elevator equipment in safe and proper operating condition, since plaintiff's expert evidence fails to show any defect in the safety devices on the elevator but shows only failure of the door-opening mechanism (which, however, was not a cause of plaintiff's injury) and where under the terms of the contract the exclusive control and management of the elevator remained in the building owner and not in the defendant.

3. Contracts § 15; Negligence § 2— negligence arising from breach of contract

In order for a person injured in an elevator accident to recover against the elevator company for its breach of a contractual duty to the owner of the building to maintain the elevator equipment in proper and safe operating condition, the injured person must show that the defendant's breach of the contract was the proximate cause or one of the proximate causes of the injury.

4. Negligence § 31— res ipsa loquitur

The rule of *res ipsa loquitur* never applies when the facts of the occurrence merely indicate negligence by some person and do not point to the defendant as the only probable tortfeasor, and in such case the action must be nonsuited unless additional evidence is introduced which eliminates negligence on the part of all others who had control of the instrument causing plaintiff's injury.

APPEAL by plaintiff from *Carr, J.*, 15 April 1968, Civil Session, General Court of Justice, Superior Court Division, ROBESON County.

Plaintiff alleged that on 15 April 1966, while employed as a legal secretary with an office on the second floor of a two-story building in Lumberton, North Carolina, she entered an automatic elevator serving the occupants of the building for the purpose of descending from the second floor to first floor. She alleged: "Immediately thereafter said elevator proceeded normally for one or two feet and then

suddenly dropped to the ground floor of the building, stopping with such impact as to cause the injuries to plaintiff hereinafter described. After said elevator stopped, plaintiff was unable to open the door in spite of her pushing the proper button with the result that plaintiff was imprisoned in said elevator for approximately thirty minutes during which time she suffered excruciating pain from her injuries and great mental anguish as the result of being confined and imprisoned in said elevator."

Plaintiff further alleged that her injuries were proximately caused by the negligence of the defendant in four respects as follows: "(a) The failure and neglect of defendant to maintain said elevator in a safe and proper manner, fit for the use for which it was intended. (b) Failure and neglect of defendant to warn plaintiff of the faulty and hazardous condition of said elevator; (c) Failure and neglect of defendant to provide appropriate safety devices on said elevator to keep it from suddenly dropping from the second floor to the first floor. (d) Failure and neglect of defendant to keep said elevator in proper repair."

At the close of the plaintiff's evidence, the defendant made a motion for judgment as of nonsuit. This motion was sustained, and from the dismissal of the action, the plaintiff appealed.

W. Earl Britt, N. L. Britt, and Henry & Henry by W. Earl Britt, Attorneys for plaintiff appellant.

Dupree, Weaver, Horton, Cockman & Alvis by F. T. Dupree, Jr., Attorneys for defendant appellee.

CAMPBELL, J.

[1] The evidence of the plaintiff must be taken to be true and must be considered in the light most favorable to her, resolving all contradictions therein in her favor, and giving her the benefit of every inference in her favor which can reasonably be drawn from it. *Anderson v. Carter,* 272 N.C. 426, 158 S.E. 2d 607.

[2] The evidence for the plaintiff tends to show she was employed as a legal secretary with an office on the second floor of a two-story building in Lumberton. The building was served by an automatic elevator. On 15 April 1966, at noon, the plaintiff pushed the elevator button on the second floor. The elevator came up and the door opened automatically. The plaintiff entered the elevator and pressed the number one button in order to go to the first floor. It started down normally, and the plaintiff, who was alone in the elevator, was

aware of a normal noise as it was moving. The noise ceased and the elevator dropped. She did not remember any sensation of the elevator speeding up. When it stopped at the first floor, she did not fall. However, her knees buckled and she felt an awful pain in her stomach. The door to the elevator did not open, causing her to become scared. She testified: "I was scared to death; I thought I would run out of air, that the air would just be gone, burn itself up. I was afraid I would not be able to get out; didn't know what would happen if it caught on fire or what would happen." She rang the alarm bell and succeeded in attracting the attention of another occupant of the building. It took some thirty minutes before she and the other occupant of the building were able to get the door to open. During this time she was trying to force it open from the inside, while the other person was pushing from the outside. The elevator was sitting at the first floor level. After lunch plaintiff returned to her work, but she experienced some spotting of blood later in the afternoon. This became more evident that night and she went to the hospital. The next night she had a miscarriage. She missed one week of work. The plaintiff had experienced similar bleeding some two or three days prior to the episode in the elevator.

Her doctor testified that while it was possible that the fall could have caused the miscarriage, he would not say that it probably did, for there are a lot of causes of miscarriage. The plaintiff offered no evidence as to any defects in the up and down mechanical operation of the elevator. She testified that she continued to work in the same building, and that while she did not use the elevator anymore herself, she did know that it continued in operation.

The plaintiff offered an expert witness in the mechanism and operation of elevators. In answer to hypothetical questions, this witness testified that in his opinion there was nothing wrong with the mechanism of the elevator relating to its going up and down, but that there was a malfunction in the door-opening device. He further testified that there could have been several causes for the failure of the doors to operate properly which an ordinary inspection of the elevator would not reveal. Among other things, lint could have gotten between the contacts of the electric switch, thereby causing an interruption in the power control of the doors. He also testified that the safety devices were working properly.

On direct examination the plaintiff's expert testified:

"Q. If the jury should find on the occasion which we have under inquiry, that she entered the elevator and punched the door button to go to the bottom floor, and it descended

suddenly and stopped, the doors wouldn't open and she couldn't open them manually, were the safety devices on there working properly?

A. Yes, sir, I would consider they were working properly."

Again the same expert witness testified that if the elevator descended and stopped level with the floor: "I would say the elevator was operating properly."

[3] The plaintiff relies upon a contract between the defendant and the owner of the building, pursuant to which the defendant agreed to use trained and qualified persons to keep the equipment properly adjusted, and "they will use all reasonable care to maintain the elevator equipment in proper and safe operating condition." Defendant further agreed to examine the elevator periodically as to all safety devices and governors and to make an annual safety test. The contract further provided: "It is agreed that we do not assume possession or management or any part of the equipment but such remains yours exclusively as the owner thereof." The plaintiff contends that the defendant negligently breached the duty of due care which arose out of this contract. However, the defendant is not guilty of actionable negligence in the absence of a breach which was the proximate cause or one of the proximate causes of plaintiff's injury. *Jones v. Elevator Co.*, 234 N.C. 512, 67 S.E. 2d 492.

[4] The plaintiff is relying on the doctrine of *res ipsa loquitur*.

"The rule of *res ipsa loquitur* never applies when the facts of the occurrence, although indicating negligence on the part of some person, do not point to the defendant as the *only* probable tortfeasor. In such a case, unless *additional evidence,* which eliminates negligence on the part of all others who have had control of the instrument causing the plaintiff's injury is introduced, the court must nonsuit the case." *Kekelis v. Machine Works,* 273 N.C. 439, 160 S.E. 2d 320.

[2] In the instant case plaintiff's evidence fails to show any defect in any of the safety devices on the elevator. When she entered the elevator and pressed the button to go to the first floor, the elevator started down normally. Then the noise ceased and the elevator dropped. The plaintiff braced herself by catching on the sides. The elevator, which did not hit anything, stopped so that her knees buckled and she had an awful pain in her stomach. The only defect shown by the plaintiff's evidence was the failure of the doors to open. However, this failure did not produce any injury to the plaintiff since her evidence was to the effect that the pain she sustained was prior to ascertaining that the doors would not open.

The elevator was a so-called automatic elevator, and the defendant did not have exclusive control or management of this instrumentality. In fact, the contract itself specifically provided that the defendant did not assume possession or management or any part of the equipment but same was to remain exclusively in the possession, management and control of the owner. We hold that under the facts and evidence in this case, the doctrine of *res ipsa loquitur* does not apply.

The judgment of nonsuit is

Affirmed.

MALLARD, C.J., and MORRIS, J., concur.

ELIZABETH KINNEY v. HOME SECURITY LIFE INSURANCE COMPANY
No. 6810SC309

(Filed 16 October 1968)

1. Insurance § 67— action on accident policy — nonsuit

In an action on an accident policy, nonsuit is proper if plaintiff's evidence fails to show coverage under the insuring clause of the policy or if plaintiff's evidence makes out a case of coverage and at the same time establishes the defense that the injury is excluded from coverage; when defendant's evidence, not in conflict with that of plaintiff, shows that plaintiff does not have a case or that defendant has a complete defense, defendant's remedy is by motion for a peremptory instruction.

2. Appeal and Error § 59— appeal from judgment of nonsuit — consideration of evidence

On appeal from judgment of nonsuit, all evidence admitted in the court below which is favorable to plaintiff, whether competent or incompetent, must be considered.

3. Insurance § 45— "accidental death" v. "accidental means"

In construing a double indemnity clause in a life insurance policy, the terms "accidental death" and "death by accidental means" are not synonymous: "accidental means" refers to the occurrence which produces the result while "accidental death" refers to the result itself.

4. Insurance §§ 47, 58— accidental death — sufficiency of evidence — defendant's evidence shows coverage excluded

In an action to recover accidental death benefits under a double indemnity provision of a life insurance policy, plaintiff's evidence tending to show that an automobile driven by insured at 90 miles per hour failed to negotiate a curve and wrecked, that insured's skull was crushed, and that

insured's death was caused by the accident, *is held* to make a *prima facie* showing of death resulting from an accidental injury visible on the surface of the body within terms of the policy, and the fact that defendant insurer's evidence tended to show that the death was excluded from coverage in that it resulted from insured's participation in the felony of stealing the wrecked automobile does not justify nonsuit, plaintiff being entitled to have the case determined by the jury.

APPEAL by plaintiff from *Hobgood, J.*, 22 April 1968 Session, WAKE Superior Court.

Plaintiff, beneficiary, brought this action to recover on a life insurance policy issued by defendant in which it contracted to pay an additional benefit of $3,000 in the event of insured's accidental death as defined and limited by the terms of the policy. Defendant filed answer admitting issuance of the policy and that it was in full force and effect on 4 October 1964 at the time of death of the insured, Willie McNeill. Defendant admitted also its liability for $3,000 on the life of the insured which amount it has paid to the beneficiary, Elizabeth Kinney, but denied liability for the alleged accidental death of the insured; and, as a further affirmative defense, defendant alleged that the policy expressly excluded the accidental death benefit if the insured's death resulted directly or indirectly, or wholly or partially, from participation in or committing or attempting to commit a felony.

The evidence presented at the trial disclosed the following: On 3 October 1964, at midnight, or thereabouts, a Buick automobile was observed traveling north on U. S. Highway 1 near Sanford at a high rate of speed. A heavy rain was falling and the pavement was wet. The Buick automobile went out of control, leaving the highway and crashing into a tree. The car was torn in half with debris and wreckage scattered over a hundred yards in all directions. The body of the insured was found tangled in a barbed wire fence fifteen feet west of the pavement. His clothes were partially torn from his body and his skull was crushed.

There was opinion evidence, introduced by plaintiff over the objection of defendant, from a patrolman who investigated the accident and an undertaker who was present at the scene, that in their opinion the death of the insured resulted from the automobile accident. Plaintiff also introduced the deposition of George Daniel Fleming, the only eyewitness to the wreck of the Buick automobile, which evidence tended to show that immediately before the collision the Buick was traveling at a speed of approximately 90 miles per hour; that it rounded a curve in the left lane of the two-lane highway; that

it avoided colliding with Fleming's car and started "skidding sideways" leaving the road and crashing into a tree.

Upon the denial of a motion to nonsuit at the close of plaintiff's evidence, the defendant offered evidence which tended to show that the speedometer of the Buick automobile after the accident indicated a mileage of fifteen and one-tenth miles; that on 3 October 1964 a 1965 Buick, the property of Keith Motor Company, was locked in its garage in Sanford at closing time about 1:00 p.m.; that at midnight of the same day this 1965 Buick was found wrecked ten or twelve miles from Sanford on U. S. Highway 1 near the dead body of the insured, Willie McNeill.

At the close of all the evidence the defendant renewed its motion of nonsuit which was allowed and the plaintiff appealed.

Nassif and Churchill, by Ellis Nassif, for plaintiff appellant.

Hofler, Mount and White, and Mordecai, Mills and Parker, by John G. Mills, Jr., for defendant appellee.

BROCK, J.

Plaintiff's sole assignment of error is the action of the Court below in granting defendant's motion for judgment of nonsuit. The policy here involved provides for an additional benefit in the event of accidental death as follows: "The Company agrees, subject to the terms and conditions of this provision and the policy, to pay an Ascidental Death Benefit to the Beneficiary upon receipt at its Home Office of due proof of the *accidental death* of the Insured which directly shows that (1) Death resulted solely from an accidental bodily injury. . . . The phrase *'accidental death'* means death resulting directly and solely from a. *An accidental injury visible on the surface of the body or disclosed by an autopsy. . . .*" (Emphasis added.) The policy contained an exclusion clause in material part as follows: "No benefit will be payable under this provision if the Insured's death results directly or indirectly, or wholly or partially, from. . . . (4) Participation in an assault or a felony."

[1] In order to recover the plaintiff must show coverage within the terms of the policy. And nonsuit would be proper where plaintiff's evidence fails to show coverage, or establishes a defense under an exclusion clause. Under the decisions of our Supreme Court the prevailing rule, as stated by Justice Higgins in *Slaughter v. Insurance Co.*, 250 N.C. 265, 108 S.E. 2d 438, is: "When the plaintiff fails to show coverage under the insuring clause of a policy, nonsuit is proper. If the plaintiff's evidence makes out a case of coverage and

at the same time establishes the defense that the particular injury is excluded from coverage, nonsuit is likewise proper. . . . However, when the defendant's evidence, not in conflict with the plaintiff's, shows the plaintiff does not have a case, or that the defendant does have a complete defense, the defendant's remedy is by motion for a peremptory instruction to the jury . . . rather than by motion for nonsuit."

[2] Plaintiff, in our view, has met her responsibility by sufficiently showing the insured's accidental death came within the terms of the policy to require submission of the case to the jury. The defendant argues that opinion evidence by the patrolman and the undertaker to the effect that insured's death resulted from the automobile accident was incompetent and should not have been admitted over defendant's objection. Such argument is unavailing here since on appeal from a judgment of nonsuit all evidence favorable to the plaintiff, whether competent or incompetent, must be considered. *Langley v. Insurance Co.*, 261 N.C. 459, 135 S.E. 2d 38.

[3] The defendant cites a number of cases for the proposition that, where an accident insurance policy provides coverage for injuries sustained by external, violent and accidental means, the burden is on the plaintiff to show, not only that the *means* were external and violent, but also that they were *accidental.* It contends that nonsuit was proper in this case because plaintiff's evidence fails to show that insured came to his death by "accidental means." However, defendant has failed to recognize that for purposes of coverage under an accident policy a distinction exists between the terms "accidental death" and "death by accidental means." *Mills v. Insurance Co.*, 261 N.C. 546, 135 S.E. 2d 586. The phrase "accidental means" as distinguished from "accidental death" refers to the occurrence or happening which produces the result rather than the result itself. They are not synonymous and coverage of the policy is materially affected by the use of the one or the other. *Scarborough v. Insurance Co.*, 244 N.C. 502, 94 S.E. 2d 558; *Fletcher v. Trust Co.*, 220 N.C. 148, 16 S.E. 2d 687. The phrase "accidental death," as defined in the policy under consideration, and as distinguished from the phrase "death by accidental means," refers to the result itself rather than the occurrence or happening which produces the result.

[4] It is obvious that a "crushed skull" sustained in an automobile accident is "an accidental injury visible on the surface of the body," and where death results from such an injury, that this is an "accidental death" within the terms of the policy.

The defendant also contends that nonsuit was proper because the

accidental death benefit is excluded by the policy where the insured's death results "directly or indirectly, or wholly or partially, from participation in a felony." This contention is entirely without merit. The only evidence which tends to show that the wrecked automobile was one which had been stolen was evidence offered by the defendant.

In this case the plaintiff's evidence makes a *prima facie* showing of coverage under the "accidental death" provision of the policy. It does not establish a bar under the exclusion clause. On this Record plaintiff is entitled to have her case determined by the jury.

The judgment of nonsuit appealed from is

Reversed.

BRITT and Parker, JJ., concur.

STATE v. CHARLES FLOYD WHITT
No. 6814SC297

(Filed 16 October 1968)

Escape § 1— escape during work at county home

An escape from the county home while serving a sentence confining defendant to the county jail and assigning him to work in the county home is punishable as a general misdemeanor pursuant to G.S. 14-256, the provisions of G.S. 153-220 being inapplicable and that statute having been repealed by the enactment of G.S. 14-256. Suggested judgment for assigning defendant to work on public works of the county set forth in opinion.

APPEAL from *Bowman, S.J.*, 22 March 1968, Regular Criminal Session of General Court of Justice, Superior Court Division, DURHAM County.

The defendant was charged under a warrant with the offense of public drunkenness in the City of Durham, North Carolina. To this charge the defendant in open court entered a plea of guilty and the court, with jurisdiction of the matter, imposed a sentence upon the defendant that he be confined twenty days in jail and assigned to work at the county home. While thus confined, the defendant escaped on 29 January 1968. He was again apprehended and given a sentence of twenty days in jail and assigned to work at the county home. This judgment was entered 1 February 1968 in the District Court of Durham County. On 16 February 1968 the defendant again escaped

and was charged in a warrant for an escape, second offense. From a judgment imposing a jail sentence and assigning the defendant to work under the supervision of the State Prison Department, the defendant appealed to the superior court.

In the superior court the defendant entered a plea of guilty to the crime of a second offense of escape in violation of the provisions of G.S. 14-256.

Upon inquiry in open court the judge found that the plea of guilty was entered freely, voluntarily, and understandingly by the defendant.

The court entered a judgment that the defendant be confined to the common jail of Durham County for a period of not less than six months nor more than twelve months and assigned to work under the supervision of the North Carolina Department of Correction. This sentence was to commence at the expiration of another sentence imposed for another offense committed by the defendant. From the judgment entered in this case, the defendant appealed.

C. E. Johnson, Attorney for defendant appellant.

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

CAMPBELL, J.

Defendant assigns as error the imposition of the sentence contending that it exceeds the maximum permitted by law.

The defendant contends that Durham County, pursuant to G.S. 153-209, had established a house of correction and that G.S. 153-220 provided that an escape from such an institution would permit additional confinement of one month. The defendant, thus, asserts that the sentence in this case was improper.

G.S. 153-209 provides:

> *"Commissioners may establish houses of correction.* — The board of commissioners may, when they deem it necessary, establish within their respective counties one or more convenient institutions to be known as houses of correction, or, in the discretion of the board of commissioners, as training schools, municipal farms, or juvenile farms, with workshops and other suitable buildings for the safekeeping, correcting, governing, and employing of offenders legally committed thereto."

G.S. 153-220 provides:

"*Absconding offenders punished.* — If any offender absconds, escapes, or departs from any such institution without license, the manager has power to pursue, retake and bring him back, and to require all necessary aid for that purpose; and when brought back, the manager may confine him to his work in such manner as he may judge necessary, or may put him in close confinement in the county jail or elsewhere, until he submits to the regulations of such institution; and for every escape each offender shall be held to labor in such institution for the term of one month in addition to the time for which he was first committed."

The above statutes with regard to houses of correction were first enacted by the General Assembly in 1866.

G.S. 153-9 sets forth certain powers of the board of county commissioners of the several counties of the State. Among these is the power:

"(25) *To provide for a House of Correction.* — To make provision for the erection in each county of a house of correction, where vagrants and persons guilty of misdemeanors shall be restrained and usefully employed; to regulate the employment of labor therein; to appoint a superintendent thereof, and such assistants as are deemed necessary, and to fix their compensation."

G.S. 153-153 provides for the establishment of a county home as follows:

"*County home for aged and infirm.* — All persons who become chargeable to any county shall be maintained at the county home for the aged and infirm, or at such place or places as the board of commissioners select or agree upon."

In the instant case the judgment of the district court entered 29 January 1968 sentenced the defendant to "20 days in jail & assigned County Home." It was from this sentence that the defendant escaped.

The better practice would have been for the judge of the district court to have entered a judgment in the following form:

"The judgment of the court is that the defendant be imprisoned in the common jail of Durham County for a term of ..... months and assigned to work under the supervision of the State Department of Correction; commitment to the State Department of Correction will not issue, however, if he be accepted and received by the chairman of the board of county commissioners

of said county to be worked in and around the county premises and remain under the direction and supervision of the said chairman of the board of county commissioners and prove himself obedient to all of the rules and regulations that have been or may be prescribed by said chairman of the board of county commissioners of Durham County for the conduct and deportment of prisoners so assigned; should he become unruly, ungovernable or disobedient to the order of said chairman or anyone acting for or on his behalf, or violate any prescribed rule or regulation, in that event he shall be surrendered to the sheriff of Durham County and commitment shall forthwith issue by the clerk of the superior court of said county and the defendant shall be required to serve the remainder of the unserved sentence in the county jail as hereinbefore provided."

This form of judgment conforms with the requirements of G.S. 153-194 and G.S. 153-196.

G.S. 14-256 provides:

"If any person shall break any prison, jail or lockup maintained by any county or municipality in North Carolina, being lawfully confined therein, or shall escape from the lawful custody of any superintendent, guard or officer of such prison, jail or lockup, he shall be guilty of a misdemeanor."

This statute was enacted in 1955 and Section 5, Chapter 279, of the 1955 Session Laws provided:

"All laws and clauses of laws in conflict with this Act are hereby repealed."

In the instant case the defendant was sentenced to the jail, not to any house of correction, and from the jail, he was assigned to do work at the county home. G.S. 153-220 is not applicable under the facts of this case, and even if it were applicable, it was repealed by the enactment of G.S. 14-256 in 1955.

When the defendant entered his plea of guilty in the superior court, Judge Bowman made it very clear which statute had been violated when he stated:

"(T)he defendant, Charles Floyd Whitt, pleads guilty to second offense of escape in violation of the provisions of 14-256. . . ."

Later, in questioning the defendant as to his plea of guilty, Judge Bowman asked him:

"And the misdemeanor of escape from the county jail or municipal lockup of one kind or another is a general misdemeanor

which would be twenty-four months maximum, do you understand that?"

The defendant answered him:

"Yes, sir."

The sentence imposed did not exceed the limits provided by law.

The judgment of the superior court is affirmed.

MALLARD, C.J., and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. WILLIAM EVERETT PATTON, JR.
No. 6815SC251

(Filed 16 October 1968)

1. Criminal Law § 169— appeal and error — exclusion of evidence

The exclusion of testimony cannot be held prejudicial when the record fails to show what the answer of the witness would have been had he been permitted to testify.

2. Criminal Law § 114; Automobiles § 117— prosecution for speeding — instructions — expression of opinion on evidence

In a prosecution upon indictment charging defendant with operating a motor vehicle upon the public highway at a speed in excess of 100 m.p.h. in a 45 m.p.h. zone, wherein the defendant pleaded not guilty and offered testimony that the excessive speed resulted from a stuck accelerator, a statement by the trial court during the course of the charge, "Well, I haven't heard any evidence that the officers were wrong about the speed," is prejudicial as an expression of opinion on the evidence. G.S. 1-180.

3. Criminal Law § 24— effect of plea of not guilty

Defendant's plea of not guilty controverts and puts in issue the existence of every fact essential to constitute the offense charged in the indictment and casts upon the State the burden of proving beyond a reasonable doubt all the essential elements of the offense.

4. Criminal Law § 24— effect of plea of not guilty

Where there is no admission by defendant and no presumption against him is raised, the plea of not guilty challenges the credibility of the evidence, even if uncontradicted.

APPEAL by defendant from *Bailey, J.*, February 1968 Session ALAMANCE Superior Court.

By indictment proper in form, defendant was charged with op-

erating a motor vehicle upon a public highway of Alamance County at a speed in excess of 100 mph in a 45 mph speed zone.

The State's evidence consisted of testimony given by Sgt. Thomas Bray of the Burlington Police Department who testified that late on the night in question he observed defendant operating a 1960 Chevrolet in the city of Burlington; that the defendant was speeding and he pursued defendant over the streets of Burlington up to approximately 110 mph, finally apprehending him.

One Harold Tucker was riding with defendant at the time and testified as a witness for defendant. His testimony was to the effect that while defendant was driving on the Burlington streets, his accelerator became stuck and that the excessive speed occurred while the accelerator was stuck and before defendant was able to get it released.

The jury found defendant guilty as charged in the bill of indictment, and from active prison sentence imposed thereon, defendant appealed.

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

John D. Xanthos for defendant appellant.

BRITT, J.

Defendant assigns as error the refusal of the trial judge to permit the State's witness to answer certain questions asked by defendant's counsel on cross-examination. The record fails to disclose what the answers would have been had the witness been allowed to testify.

[1] The exclusion of testimony cannot be held prejudicial when the record fails to show what the answer would have been had he been permitted to testify. 1 Strong, N. C. Index 2d, Appeal and Error, § 49. The assignment of error is overruled.

[2] Defendant assigns as error a statement made by the trial judge to defendant's counsel in the presence of the jury, contending that the statement amounted to an expression of opinion by the judge in violation of G.S. 1-180.

The trial judge interrupted his charge to the jury to inquire of defendant's counsel if defendant's contentions had been correctly stated. As counsel was attempting to answer, His Honor declared: *"Well, I haven't heard any evidence that the officers were wrong about the speed.* The theory of your case as I recall it is that he

had a stuck accelerator and was unable to reduce it." (Emphasis ours.) This assignment of error is well taken.

[3, 4] Defendant's plea of not guilty controverts and puts in issue the existence of every fact essential to constitute the offense charged in the indictment, and casts upon the State the burden of proving beyond a reasonable doubt all the essential elements of the offense. *State v. Mitchell,* 260 N.C. 235, 132 S.E. 2d 481. Where there is no admission by defendant and no presumption against him is raised, the plea of not guilty challenges the credibility of the evidence, even if uncontradicted. *State v. Stone,* 224 N.C. 848, 32 S.E. 2d 651.

In *State v. Swaringen,* 249 N.C. 38, 105 S.E. 2d 99, in an opinion by Rodman, J., it is said:

> "The State had the burden of establishing beyond a reasonable doubt each element of the crime. Proof must be made without intimation or suggestion from the court that the controverted facts have or have not been established. G.S. 1-180.
>
> "The assumption by the court that any fact controverted by a plea of not guilty has been established is prejudicial error."
>
> (Citing numerous authorities.)

In *Galloway v. Lawrence,* 266 N.C. 245, 145 S.E. 2d 861, in an opinion by Lake, J., we find the following:

> "* * * 'The slightest intimation from the judge as to the weight, importance or effect of the evidence has great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial.'
>
> "G.S. 1-180 provides: 'No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case.'
>
> "We have said many times that this statute does not apply to the charge alone, but prohibits a trial judge from asking questions or making comments at any time during the trial which amount to an expression of opinion as to what has or has not been shown by the testimony of a witness."

[2] However unintentional it might have been on the part of the able trial judge, we hold that the statement complained of, made in

the presence of the jury, was violative of G.S. 1-180 and was prejudicial to the defendant.

We do not deem it necessary to consider and discuss other assignments of error brought forward in defendant's brief.

For the reasons stated, there must be a

New trial.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. FINLEY W. BAILIFF

No. 6815SC313

(Filed 16 October 1968)

1. Criminal Law § 106— circumstantial evidence — nonsuit

The test of the sufficiency of circumstantial evidence to withstand a motion for nonsuit is the same as the rule applicable to direct evidence.

2. Criminal Law § 106— nonsuit — sufficiency of evidence

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.

3. Larceny § 7— sufficiency of evidence

In a prosecution for larceny of property of a value of more than $200, defendant's motion for nonsuit was properly denied where the State's evidence tended to show that while the prosecuting witness was asleep the defendant and property and cash worth over $200 belonging to the prosecuting witness disappeared from the trailer in which defendant and the prosecuting witness lived together, that the prosecuting witness did not hear from or see defendant again until the trial, and that defendant was wearing one of the stolen items at the trial.

4. Criminal Law § 112— failure to define "reasonable doubt"

Failure of the court to define "reasonable doubt" is not error in absence of a request by defendant.

APPEAL by defendant from *Bailey, J.*, 29 April 1968 Session, ALAMANCE Superior Court.

Defendant was found guilty by the jury of larceny of property of a value of more than two hundred dollars.

The State's evidence tended to show: The prosecuting witness,

Boyd Curl, was living in a trailer on Alamance Road. The defendant, Finley Bailiff, is the brother-in-law of the prosecuting witness, and the prosecuting witness had known him for about two years. The defendant lived with the prosecuting witness in the trailer and had been so living for about a month. Both men had a key to the trailer and had their own separate property in the trailer. The prosecuting witness was working at Burlington Mills on the third shift and left work at 7:00 in the morning. On 2 February he left work and both men went back to the trailer. The defendant was supposed to be working at Virginia Mills in Swepsonville on the third shift, but prosecuting witness found out later that defendant was not working although they were riding back and forth together.

On the morning in question when they got back to the trailer, the defendant asked the prosecuting witness if he was sleepy and told him to go to bed, and this occurred two times. The prosecuting witness went to bed between 8:00 and 8:30 a.m., and the defendant was there at the time. The prosecuting witness awoke about 4:30 or 5:00 in the afternoon when he found that the defendant was gone and he was in the trailer alone. The prosecuting witness, when he went to bed that morning, owned a record player worth about $100.00, which was a combination radio and record player, and when he awoke this was gone but it was there when he went to sleep. He owned a wrist watch valued at $50.00, which he took off when he went to bed, and this was also gone. He owned a class ring, and the defendant asked him to give it to him to clean before he went to sleep, and he did this. The prosecuting witness had $140.00 in cash in his wallet when he went to sleep, and this was either on the stand or left in his pants. When he awoke the wallet was there but the money was gone. He also missed some clothes, consisting of a sport shirt and coat, and the defendant was wearing the sport shirt at the trial. The defendant never came back to the trailer and was not seen by the prosecuting witness until the day of the trial. The defendant did not call the prosecuting witness or visit him.

From judgment pronounced on the verdict of guilty, defendant appealed.

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

Herbert F. Pierce for the defendant.

BROCK, J.

The defendant assigns as error that the trial judge overruled his motion for nonsuit.

[1, 2] Although the State's evidence was circumstantial it was sufficient to withstand a motion for nonsuit. The test of the sufficiency of circumstantial evidence to withstand a motion for nonsuit is the same as the rule applicable to direct evidence. *State v. Bogan,* 266 N.C. 99, 145 S.E. 2d 374. "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." *State v. Johnson,* 199 N.C. 429, 154 S.E. 730. The rule stated in *Johnson* does not mean that the evidence, in the Court's opinion, excludes every reasonable hypothesis of innocence. Should the Court decide that the State has offered substantial evidence of defendant's guilt, it becomes a question for the jury whether this evidence establishes beyond a reasonable doubt that defendant, and no other person, committed the crime charged. *State v. Bogan, supra.*

[3] Considering the evidence in the light most favorable to the State we think the combination of facts as disclosed by the evidence constitutes substantial evidence of defendant's guilt, and not merely suspicious circumstances. This assignment of error is overruled.

[4] The defendant assigns as error the failure of the trial judge to define the term reasonable doubt in his instructions to the jury. The trial judge did not define the term "reasonable doubt," nor did he attempt to define it. However, the trial judge clearly explained to the jury that the burden was upon the State to prove the defendant guilty beyond a reasonable doubt; that there was no burden on the defendant to prove or disprove anything; and that if they were not satisfied of his guilt beyond a reasonable doubt, they should give him the benefit of the doubt and acquit him. Defendant made no request of the Court to define "reasonable doubt." "The failure to define the words 'reasonable' and 'doubt' does no violence to G.S. 1-180." *State v. Lee,* 248 N.C. 327, 103 S.E. 2d 295. This assignment of error is overruled.

Affirmed.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIAM LEON MORRIS AND WILLIAM MOSES CRAVEN

No. 6815SC386

(Filed 16 October 1968)

1. Criminal Law § 23— motion to withdraw guilty plea

A motion to be allowed to withdraw a plea of guilty after the plea has been accepted and sentence imposed is addressed to the sound discretion of the trial court, and no abuse of discretion is shown in the denial of such a motion where it appears that defendant was represented by counsel and entered the plea voluntarily and understandingly.

2. Constitutional Law § 36— punishment within statutory limits

Punishment which does not exceed the limits fixed by statute cannot be considered cruel and unusual in the constitutional sense.

APPEAL by defendants from *Beal, S.J.*, 3 June 1968, Criminal Session, ALAMANCE County Superior Court.

The defendants freely, voluntarily, and understandingly entered pleas of guilty to six felonies of breaking and entering and six felonies of larceny. After the imposition of a sentence of ten years in one case and two years to commence at the expiration of the ten year sentence in another case, and the continuance of the prayer for judgment for five years in the remaining cases, each defendant made a motion to be permitted to withdraw the pleas of guilty and have a jury trial. To the refusal of the trial court to permit this, each defendant excepted and appealed.

Lee W. Settle, Attorney for defendant appellants.

Thomas Wade Bruton, Attorney General, Harrison Lewis, Deputy Attorney General, and Charles W. Wilkinson, Jr., Staff Attorney, for the State.

CAMPBELL, J.

[1] The defendants assign as error the denial by the trial judge of the motion to withdraw their pleas of guilty and the request for a jury trial. The withdrawal of such a plea after its acceptance by the court and the imposition of sentence "is not a matter of right, and a motion to be allowed to so retract is addressed to the sound discretion of the court." *State v. Crandall,* 225 N.C. 148, 33 S.E. 2d 861. "This is especially true when it appears that the plea was understandingly and intelligently made." *Padgett v. United States,* 252 F. Supp. 772 (E.D.N.C. 1965). "Motions of such character are addressed to the sound discretion of the trial court," and counsel

for the defendants frankly admits that there was no abuse of discretion in the instant case. *Rachel v. United States,* 61 F. 2d 360 (8th Cir., 1932). *State v. Porter,* 188 N.C. 804, 125 S.E. 615.

> "Defendant has not shown that there has been any violation of his fundamental constitutional rights or that he was denied the substance of a fair trial in a situation where he was not in a position to protect himself because of ignorance, duress, or other reasons for which he should not be held responsible. The record shows affirmatively that defendant, who was represented by counsel, understood the charges against him, the nature and effect of his pleas of guilty, and the maximum sentences which might lawfully be imposed upon him if he entered such pleas, and that he entered the pleas of guilty to the offenses charged voluntarily, without threats or inducements or promises, and with a full understanding of the effect and possible consequences of such pleas of guilty. . . . Even if defendant had not been warned by . . . anyone of his constitutional rights, it seems manifest under the particular facts of this case and his pleas of guilty as above set forth that he intentionally, understandingly, and voluntarily relinquished or abandoned such rights. *Johnson v. Zerbst,* 304 U.S. 458, 82 L. Ed. 1461, 146 A.L.R. 357." *State v. Caldwell,* 269 N.C. 521, 153 S.E. 2d 34.

[2] It is contended by the defendants that the sentences imposed were too harsh; however, the punishment did not exceed the statutory limit. G.S. 14-54. "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." *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330. *Mathis v. State of North Carolina,* 266 F. Supp. 841 (M.D.N.C. 1967).

The language of the North Carolina Supreme Court in *Elliott* (*supra*) is appropriate:

> "The appeal in the instant case is a conspicuous illustration of the abuse of the power of appeal by an indigent defendant in a criminal case . . . and to have the taxpayers put to the expense of paying for the cost of the transcript of the trial proceedings, the cost of mimeographing the record and the brief filed for defendant, and of paying a fee to the defendant's lawyer for his services on appeal, when there is no merit at all in the appeal."

No error.

MALLARD, C.J., and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. PEARL RANSOM

No. 68SC233

(Filed 16 October 1968)

1. Intoxicating Liquor § 19— prosecution for unlawful sale — instructions

In a prosecution for the unlawful sale of taxpaid whiskey, the State offered testimony of a Treasury agent that he purchased a one-half pint bottle of whiskey from defendant in her home on the date in question, while the witness for defendant testified that defendant was sick in bed on that date and that no one came to her home except the witness and a relative. *Held:* Trial court committed error in charging that defendant contended the Treasury agent was an aider and abettor or an accomplice of defendant in inducing the sale of the whiskey, since defendant by her evidence emphatically denied the making of the sale.

2. Criminal Law § 118— instructions — charge on defendant's contentions

A fundamental misconstruction of defendant's contentions will be held error notwithstanding the absence of objection at the time.

APPEAL by defendant from *Carr, J.*, 1 April 1968 Session, ROBESON Superior Court.

Defendant was charged in a warrant with the offense of selling taxpaid whiskey. From a verdict of guilty and judgment entered thereon in the District Court, she appealed to the Superior Court. Trial in the Superior Court was *de novo* by a jury upon the charge contained in the warrant.

The evidence of the State consisted of the testimony of an agent of the Alcohol and Tobacco Tax Division of the U. S. Treasury Department, who testified that he purchased a one-half pint bottle of whiskey from defendant in her home on the occasion in question; and the testimony of a deputy sheriff who testified that he instructed the undercover agent on how to get to defendant's home.

The testimony of defendant's only witness was to the effect that he was in defendant's home on the night in question and that defendant was sick in bed; and further that no one except a relative came to defendant's home on the occasion in question.

The jury returned a verdict of guilty, and judgment of confinement was entered. Defendant appealed.

T. W. Bruton, Attorney General, by James F. Bullock, Deputy Attorney General, for the State.

W. Earl Britt for the defendant.

BROCK, J.

[1] Defendant's entire evidence was addressed to her defense that she did not sell any whiskey to the ATU agent, that she was sick in bed, and that no one except her one witness and a relative came to her home on the occasion in question.

In stating her contentions the trial judge charged the jury, *inter alia,* as follows:

> ". . . And she relies upon the principle of law which the Court will give you, also, at least she contends that you should scrutinize the testimony of the witness, in that he was engaged in promoting the transaction, and that he was at least an aider and abettor, or an accomplice, in the crime.
>
> ". . . And the defendant contends he was an accomplice, in that he was aiding and abetting her in the sale by purchasing the liquor, and if he was not a principal, that he was at least an accessory before the fact, in inducing her to make the sale to him.
>
> "Our Court has said that in passing upon an accomplice, you, the jury, should scrutinize his testimony closely, whether it is supported or unsupported, and you should only believe the same, if you do believe it, after careful and cautious consideration and your consideration of his testimony should be in connection with the fact that he is interested in the event, and the further fact that he, upon his own admission, is guilty as an accomplice of the crime charged against the defendant.
>
> "The defendant contends that you should scrutinize the testimony of the witness Brady, in the light of that instruction, and that you should not accept his testimony as true."

It is obvious that the defendant's evidence does not make such a contention. The contention given by the trial judge may be proper where a defendant contends entrapment; but here the defendant emphatically denies making a sale of whiskey to the State's witness. In this case the able and experienced trial judge has made a fundamental misconstruction of defendant's contention.

[2] Ordinarily a misstatement of the contentions of the parties must be brought to the Court's attention in order that it can be corrected before verdict; otherwise objection thereto will be deemed to have been waived. *State v. Watson,* 1 N.C. App. 250, 161 S.E. 2d 159. However, 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. 29.

New trial.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. MADAM (X), ALIAS DORIS JACKSON
No. 6815SC294

(Filed 16 October 1968)

Criminal Law § 113— instructions — application of law to evidence

Where the State offers evidence tending to show that the defendant aided and abetted someone else in the commission of a crime, it is incumbent upon the trial judge to explain the principles of aiding and abetting which apply to the particular evidence in the case.

APPEAL by defendant from *Bailey, J.*, 6 May 1968 Session, CHATHAM Superior Court.

Defendant was charged in a bill of indictment with the felony of robbery of $228.00 from Miller-Hammer, Inc.

The State's evidence tended to show that defendant, along with two male companions (who have not been identified), entered the store of Miller-Hammer, Inc., in Siler City, North Carolina, between 4:30 and 5:00 p.m. on 15 March 1968. At that time Mr. Donald Hammer, an officer of the corporation, was alone in the store. That before entering the defendant and her two male companions walked by the front of the store twice looking in the window. After entering, the defendant and one male companion walked to a show window which was out of sight of the cash register, and called Mr. Hammer over to inquire about a television and stereo set. While in this position, Mr. Hammer heard the cash register ring, and saw the second male companion running from the area of the cash register. Mr. Hammer pursued but was unable to catch him. While Mr. Hammer was pursuing the man who ran from the cash register area, the defendant and the other man left the store in the opposite direction. Mr. Hammer chased this pair and was able to catch the defendant. The sum of $228.00 was missing from the cash register. Defendant refused to give her name, or the name of either male companion.

The defendant offered no evidence. From a verdict of guilty and judgment entered thereon, defendant appealed.

T. W. Bruton, Attorney General, by Harry W. McGalliard and James F. Bullock, Deputies Attorney General, for the State.

Pittman, Staton and Betts, by William W. Staton, for the defendant.

BROCK, J.

The defendant assigns as error the failure of the trial judge to define "aider and abettor" in his charge to the jury.

The only instruction upon the law applicable to aiding and abetting in the commission of a crime was as follows:

> "Now, ladies and gentlemen of the jury, it is the law that where a crime is committed by one person, aided and abetted by another who is present at the time of the commission of the crime, then the second person, the aider and abettor, is as guilty of the crime as the principal; that's the theory upon which the State relies in this case."

The principles applicable to aiding and abetting are not self-evident to the extent that a jury needs no clarification of them. Where the State proceeds on the theory of aiding and abetting, and offers evidence tending to show that a defendant aided and abetted someone else in the commission of a crime, it is incumbent upon the trial judge to explain the principles of aiding and abetting which apply to the particular evidence in the case. *State v. Hart,* 186 N.C. 582, 120 S.E. 345. See also *State v. Keller,* 268 N.C. 522, 151 S.E. 2d 56; and *State v. Bruton,* 264 N.C. 488, 142 S.E. 2d 169.

Here the trial judge stated an abstract principle of law and left it for the jury to determine under what circumstances the defendant could be found guilty of aiding and abetting. Apparently it was an oversight on the judge's part; however, it was error prejudicial to the defendant.

New trial.

BRITT and PARKER, JJ., concur.

ST. LUKE'S EPISCOPAL CHURCH v. JOHN C. BERRY AND WIFE, LOUISE G. BERRY; HOMER L. RILEY AND WIFE, MARTHA G. RILEY; HARVEY HOLT AND WIFE, LUCY NEVILLE HOLT; SHUFORD P. DOBSON AND WIFE, JULIA C. DOBSON; B. W. CRABTREE AND WIFE, FRANCES C. CRABTREE; BERNARD C. GREGORY AND WIFE, ROSE GREGORY; HERBERT J. FOX AND WIFE, FRANCES H. FOX

No. 6814SC332

(Filed 23 October 1968)

1. Deeds § 19— restrictive covenants — recorded deeds from previous title holders

A purchaser of real property in North Carolina must examine all recorded "out" conveyances made by prior record title holders during the periods when they respectively held title to the property to determine if any such owner has expressly imposed a restriction upon the use of the property.

2. Deeds § 19— restrictive covenants — prior recorded deeds from grantor

Where neither the deed from a subdivision developer conveying to plaintiff particular subdivision lots nor the recorded subdivision plat contains restrictive covenants, plaintiff is not bound by restrictive covenants in previously recorded deeds from his grantor conveying other lots in the subdivision unless such a deed has clearly and expressly imposed a restriction on the use of plaintiff's property, an implied intention to make the restrictions applicable to all lots in the subdivision by the fact the previous deeds contained uniform restrictions or by an analysis of the language used in the previous deeds being insufficient to place a restriction on plaintiff's property.

BROCK, J., dissenting.

APPEAL by defendants Berry, Holt, Dobson and Gregory from *Hall, J.*, 13 May 1968 Civil Session of DURHAM Superior Court.

This is an action for a declaratory judgment brought by the plaintiff, St. Luke's Episcopal Church, to determine whether certain restrictive covenants are applicable to lots acquired by it in a real estate subdivision on which it plans to erect a church building. Defendants are owners of other lots in the same subdivision who acquired record title to their lots prior to the time plaintiff acquired title to its lots. The restrictive covenants in question limiting use to residential purposes were contained in deeds from the original grantor developers through which defendants derive title to their lots. There were no restrictive covenants in the deeds subsequently given by the same grantor developers when they conveyed lots to the plaintiff.

The parties waived jury trial and submitted the case on stipula-

tions and evidence. The facts, as to which there is no material dispute, may be summarized as follows:

Mrs. Frances Hill Fox was the owner of an undeveloped tract of land in the City of Durham which she had acquired by deed from her father in 1948. In June 1955 she subdivided the tract into sixteen numbered lots with appropriate intervening and adjoining streets and sewer easements and showed these on a plat of the subdivision prepared by an engineer. After this plat had been submitted to and approved by the appropriate city authorities, it was recorded on 28 December 1955 in Plat Book 31, Page 27, in the office of the Register of Deeds of Durham County. The plat is entitled "Property of Mrs. Frances Hill Fox, Durham, N. C., June 1955," and shows the lots, streets, and sewer easements, but makes no reference to any restrictions except for a notation that "no building or structure (is) permitted on sewer easement."

On 29 June 1955 and prior to recording the plat, Mrs. Fox and her husband had conveyed lot #1 of the subdivision to the defendants, Homer L. Riley and wife, by deed containing the following restriction:

> "That this property shall be used for residential purposes only and is limited to one residence being built on said described property, and no other building except a garage, shall be built on said premises."

The defendants Riley and the original grantors, Mrs. Fox and her husband, who are also defendants in this action, are not involved in this appeal.

Following recording of the plat, Mrs. Fox and her husband from time to time sold and conveyed six of the lots, being lots #2, 3, 13, 14, 15 and 16, by various deeds through which ultimately the appealing defendants derived title. Each of the deeds by which these six lots were conveyed, following the description of the property being conveyed by metes and bounds and by reference to the recorded plat, contained the following:

> "This property is sold subject to the following restrictions:
>
> 1. The property shall be used for residential purposes only, and no buildings other than one residence, except garages or outhouses for domestic purposes, shall be built on a lot as shown in Plat Book 31, page 27.
>
> * * * * *
>
> 3. That not more than a one-family unit shall be constructed upon a lot, . . .
>
> * * * * *

7. That the above restrictive covenants shall not apply to Lots 7 and 8 as shown on the plat referred to, being recorded in Plat Book 31, page 27, in the Office of the Register of Deeds of Durham County."

The appealing defendants Berry, Holt, Dobson and Gregory are the present owners of record of these six lots and have built their residences on four of the lots. Lot #8 and portions of lots #7, 9, 10, 11 and 12, were taken by the State Highway Commission for use in construction of Interstate Highway #85.

Following the above-described transactions and after the appealing defendants had recorded their deeds and had built their residences on four of their six lots, Mrs. Fox and her husband conveyed lots #4 and 5 by deed dated 27 June 1966 and lots #6, 7, 9 and 10 (except for such portions of lots #7, 9 and 10 as had theretofore been taken for highway purposes) to the plaintiff church. The two deeds to the plaintiff church described the property being conveyed by metes and bounds as well as by reference to the recorded plat. However, neither deed to the church contained any restrictions or referred to any other deeds which previously had been given by the grantors when they had conveyed other lots in the subdivision subject to restrictions. Before plaintiff purchased its first two lots in June 1966, the Senior Warden of its Vestry who, with others, conducted negotiations on behalf of the church for acquisition of the property from Mrs. Fox, had seen a copy of the deed executed 6 February 1956 from Mrs. Fox and her husband to the defendants Berry, which deed contained the restrictions as above set forth. The plaintiff proposes to erect a church building on a portion of the property conveyed to it, other than on lot #7. So far as appears from the record, Mrs. Fox remains the owner of two of the original sixteen lots, being lots #11 and 12.

The trial judge entered judgment making findings of fact substantially as above set forth and concluding as a matter of law that the restrictive covenants appearing in defendants' deeds do not appear in the chain or line of title for the plaintiff's property and are therefore not applicable to the plaintiff's property. From judgment entered in conformity with this conclusion, the defendants Berry, Holt, Dobson and Gregory appeal.

Nye & Mitchell by R. Roy Mitchell, Jr., and Hofler, Mount & White by Richard M. Hutson, II, for plaintiff appellee.

Smith, Moore, Smith, Schell & Hunter by Doris R. Bray for defendant appellants.

PARKER, J.

No restrictive covenants appear in any deed in the direct line of plaintiff's chain of title, and the question presented by this appeal is whether plaintiff's lots are nevertheless bound by restrictive covenants contained in deeds previously given by plaintiff's grantors conveying other lots to other grantees. The question posed is of importance to all concerned with land titles in our State (see: Webster, *The Quest for Clear Land Titles; The Burden of Searching the Record for Instruments Outside the Vendor's Chain of Title,* 46 N.C.L. Rev. 295), as well as in other jurisdictions (see: Ryckman, *Notice and the "Deeds Out" Problem,* 64 Michigan Law Rev. 421; Annotations, 16 A.L.R. 1013; 60 A.L.R. 1216; 144 A.L.R. 916; 4 A.L.R. 2d 1364). On the one hand concern must be given to the rights of those who, as did each of the appealing defendants in this case, invest their funds in homes on lots in a subdivision acquired under deeds expressly imposing restrictions, such persons having a legitimate interest in knowing that all other lots in the subdivision are similarly restricted. On the other hand concern must be given to the problem of maintaining marketable land titles, so that real property throughout the State can be traded readily and without the burden of unnecessarily tedious and excessively expensive title searches. The correct balancing of these sometimes countervailing concerns is not always easy.

Prior to the decision in the case of *Reed v. Elmore,* 246 N.C. 221, 98 S.E. 2d 360, decided in 1957, the law appeared to be settled that the purchaser of land in North Carolina was chargeable with notice of, and his lands were consequently affected by, a restrictive covenant only if such covenant was contained or referred to in a recorded deed or other instrument *in his direct line of title.* Such was the holding in the cases of *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197, and *Hege v. Sellers,* 241 N.C. 240, 84 S.E. 2d 892.

In *Turner v. Glenn, supra,* decided in 1942, a realty development company had subdivided a tract of 214 acres into 596 lots in a subdivision known as Sunset Hills. A large number of lots were sold subject to restrictions. Plaintiff Turner acquired his lots by foreclosure of deeds of trust given by the development company. One of these deeds of trust and the deed in foreclosure thereof given to Turner contained the following: "The above described property is conveyed subject . . . to the usual restrictions of the use and reservations placed by A. K. Moore Realty Company on property similarly situated in Sunset Hills." The other deed of trust and deed to Turner contained the following: "Subject to customary restric-

tions of the use and reservations reserved by A. K. Moore Realty Company in the conveyances of lots fronting Madison Avenue in Block 1, Section 1, Sunset Hills." In a suit by Turner to remove a cloud on title to his lots the North Carolina Supreme Court held that he was entitled to a decree adjudging that his lots were clear of any restrictions. Barnhill, J. (later C.J.) speaking for the Court, said (p. 626):

> ". . . No deed in the chain of title to either of the lots owned by plaintiff sets forth any particular restrictions or reservations and no reference is made to any other instrument of record which sufficiently discloses what are the 'customary restrictions in conveyances of lots fronting Madison Avenue in Block 1, Section 1, Sunset Hills,' or what are the 'usual restrictions of the use and reservations placed by A. K. Moore Realty Company on property similarly situated in Sunset Hills.' Notwithstanding the general provision in the deeds of the plaintiffs they took without notice of any restrictions or reservations such as would be binding on them.
>
> "As stated, it is the duty of a purchaser of land to examine every recorded deed or instrument in his line of title and he is conclusively presumed to know the contents of such instruments and is put on notice of any fact or circumstance affecting his title which either of such instruments reasonably discloses. *He is not, however, required to examine collateral conveyances of other property by any one of his predecessors in title.*" (Emphasis added.)

In *Hege v. Sellers, supra,* decided in 1954, the owners subdivided a tract of land into 40 lots of approximately one acre each in a "high-class, highly restricted residential development," known as Wooded Acres. Thirty-nine deeds were given, all of which contained, among other restrictions, provision that "(a)ll lots contained in this property known as Wooded Acres shall be used for residential purposes only." Thereafter a fortieth deed was given conveying lot #11 to the defendants. This last deed contained no restrictions. The plaintiffs, owners of lots in Wooded Acres under deeds which contained the uniform restrictions, brought suit to have defendants' lot declared subject to the restrictions and to restrain defendants from violating them. Judgment of nonsuit was affirmed on appeal by unanimous decision of the Supreme Court. Higgins, J., speaking for the Court, said (p. 248):

> "The remaining question is whether the defendants C. G. Sellers and wife in accepting a deed without restriction, never-

theless were charged with such notice of the plans and purposes in the development of Wooded Acres as would make the uniform restrictions applicable to Lot No. 11. As has already been pointed out, no restrictions appear in the chain of title to that lot. No notice, therefore, can be found in the line of title. The recorded map shows no restrictions. 'The law contemplates that a purchaser of land will examine each recorded deed or other instrument in his chain of title, and charges him with notice of every fact affecting his title which such examination would disclose. In consequence, a purchaser of land is chargeable with notice of a restrictive covenant by the record itself if such covenant is contained in any recorded deed or other instrument in his line of title, even though it does not appear in his immediate deed.' *Higdon v. Jaffa,* 231 N.C. 242, 56 S.E. 2d 661; *Sheets v. Dillon,* 221 N.C. 426, 20 S.E. 2d 344; *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197. Since the effective date of the Connor Act, 1 December, 1885, in matters involving the title to land it is intended that the public registry should be the source of notice. Since then it is considered not enough to send word by the mail boy. Notice, however full and formal, cannot take the place of registered documents. *Austin v. Staten,* 126 N.C. 783, 36 S.E. 338; *Hinton v. Williams,* 170 N.C. 115, 86 S.E. 994; *Blacknall v. Hancock,* 182 N.C. 369, 109 S.E. 72.

" 'If purchasers wish to acquire a right of way or other easement over the lands of their grantor, it is very easy to have it so declared in the deed of conveyance. It would be a dangerous invasion of rights of property, after many years and after the removal by death or otherwise of the original parties to the deed, and conditions have changed, to impose by implication upon the slippery memory of witnesses such burdens on land.' *Davis v. Robinson, supra; Milliken v. Denny,* 141 N.C. 224, 53 S.E. 867. A building restriction is a negative easement and within the statute of frauds. It cannot be proved by parol. A verbal contract for a right of easement is void under the statute of frauds. *Davis v. Robinson, supra.*

"Restrictive covenants are not favored. As was said by this Court in *Callaham v. Arenson,* 239 N.C. 619, 80 S.E. 2d 619, 'Further, it is to be noted that we adhere to the rule that since these restrictive servitudes are in derogation of the free and unfettered use of land, covenants and agreements imposing them are to be strictly construed against limitation on use. *Craven County v. Trust Co.,* 237 N.C. 502, 75 S.E. 2d 620.' The courts

are not inclined to put restrictions in deeds where the parties left them out."

In *Reed v. Elmore, supra,* decided in 1957, a landowner had divided a tract into seven lots and sold five without restrictions. She conveyed lot #3 to plaintiff by deed stipulating that the land therein conveyed should be subject to the restriction that no structure be erected thereon within a stipulated distance of the public road. The deed further provided: "This restriction shall likewise apply to Lot No. 4, retained by the grantor, said Lot No. 4 being adjacent to the lands hereby conveyed." Plaintiff recorded his deed. Subsequently the original owner developer conveyed lot #4 by deed containing no reference to the restriction and defendant obtained title to this lot by mesne conveyances. In an action by plaintiff owner of lot #3 brought to restrain defendant from building on lot #4 in contravention of the restriction, the trial court held that the deed from the original owner to the plaintiff imposed reciprocal negative easements on lot #3 sold to plaintiff and lot #4 retained by the grantor, and registration of this deed put those who thereafter acquired any interest in lot #4 on notice of the servitude imposed on that tract. On appeal from a judgment enforcing the restriction on lot #4, a majority of the Supreme Court affirmed.

In the instant case appellants earnestly contend that the rights of the parties are controlled by the decision in *Reed v. Elmore, supra.* They point to their prior recorded deeds which contained uniform restrictions as evidencing the clear intention of the grantors and their several grantees that the restrictions should also apply to all lots in the subdivision, including those lots which at the dates of such conveyances were still being retained by the original grantors, excepting only for lots #7 and 8 which were expressly excluded. They argue that the express exclusion of these two lots necessarily implies that the restrictions must have been intended to apply to all other lots, else the express exemption of lots #7 and 8 would not have been necessary. They contend this intention was further manifested by the use of the language in paragraphs one and three of the restrictions prohibiting building more than one residence on *"a* lot" as shown on the recorded plat, since if the parties had intended the restrictions to apply only to the lot being conveyed, the more appropriate reference would have been to *"the* lot being hereby conveyed."

[1, 2] In summary, appellants' position is: First, that the intention to make the restrictions applicable to all lots on the recorded plat must necessarily be implied (a) from the fact that all deeds executed by the original owner developers for the seven lots sold by

them prior to the conveyances to plaintiff had in fact contained a restriction limiting use to residential purposes and (b) from a logical analysis of the language employed in the deeds by which six of these lots had been sold with uniform restrictions; and second, that since this intention is necessarily implied, the holding in *Reed v. Elmore, supra,* requires that the restrictions be enforced against plaintiff's lots. Even if the first portion of appellants' argument is logically warranted, we cannot accept the second. We do not so interpret *Reed v. Elmore, supra.* It should be noted that the majority opinion of the Court in that case cited both *Turner v. Glenn* and *Hege v. Sellers* and did not expressly overrule either. On the contrary, the Court took care to distinguish *Turner v. Glenn* by pointing out that in that case there had been no *express* covenant made by the common grantor as to the remainder of his property, whereas in *Reed* there had been a clear *express* application of the restriction to grantor's retained lot #4. While the majority opinion in *Reed* does undoubtedly modify the prior decisions in *Turner* and in *Hege,* as we understand the *Reed* decision it goes no further than to require a purchaser of real property in North Carolina to examine all recorded "out" conveyances made by prior record title holders during the periods when they respectively held title to the property, to determine if any such owner had *expressly* imposed a restriction upon the use of the property. If no restriction is imposed by clear and *express* language, the purchaser or his title examiner is not required to go further and to speculate at his peril as to whether imposition of some restriction is to be *implied,* either through processes of logical analysis of language employed, or from the fact that a large number of deeds containing uniform restrictions had been given, or from any combination of both.

If the developer of a real estate subdivision actually intends that all lots therein be restricted, it is simple enough for him to say so. If one of his grantees wants to invest in a restricted lot only if all then unsold lots are similarly restricted, he has but to insist that his grantor expressly say so in the deed by which he acquires title. He has no right to rely on the shaky grounds of implication.

> "Covenants and agreements restricting the free use of property are strictly construed against limitations upon such use. Such restrictions will not be aided or extended by implication or enlarged by construction to affect lands not specifically described, or to grant rights to persons in whose favor it is not clearly shown such restrictions are to apply. Doubt will be resolved in favor of the unrestricted use of property, so that where

> the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which extends it, should be adopted, and that construction should be embraced which least restricts the free use of the land." 20 Am. Jur. 2d, Covenants, § 187, p. 755.

In the present case since there was no deed which expressly imposed any restriction on plaintiff's lots, the decision of the trial court was correct and is

Affirmed.

BRITT, J., concurs.

BROCK, J., dissenting:

The appealing defendants have no objection to a sanctuary and related buildings being constructed in the subdivision. Their concern is the destruction of the protection of the restrictive covenants on the remaining lots held by Mrs. Fox. Also they are concerned that if the restrictive covenants do not apply to the lots purchased by plaintiff, then plaintiff is free to reconvey the property for commercial or other purposes.

From an equitable point of view the plaintiff stands to lose nothing by having the restrictive covenants imposed upon its lots; it could have relief from Mrs. Fox upon her warranty of title. On the other hand the appealing defendants will lose the entire benefit of a residential development if the covenants are not imposed, and they have no redress against anyone.

Also it does not seem equitable for Mrs. Fox to lead the appealing defendants into purchasing these lots upon the promise of a restricted residential subdevelopment (and more than likely at inflated prices because of the restrictive covenants); then later convey lots to plaintiff without including the covenants in the deed; and then sit back as a nominal party defendant to watch plaintiff erase for her the restrictions she had imposed, thus releasing the remainder of her lots to be sold for whatever purpose she desires.

However, the case cannot be decided on the equities; it must be decided upon principles that will not unduly restrict free alienation and which can be uniformly applied to conveyances of real estate. For this purpose I agree with the majority that the opinion in *Reed v. Elmore*, 246 N.C. 221, 98 S.E. 2d 360, requires a purchaser of real property in North Carolina to examine all recorded "out" conveyances made by prior record title holders during the periods that they

respectively held title to the property, to determine if any such owner had expressly imposed a restriction upon the use of the property.

It is upon the question of whether there is an express imposition of restrictions that I disagree with the majority. Without engaging in a point by point argument with the reasoning by which the majority arrived at the conclusion that the deeds to the appealing defendants gave no specific notice of the application of the restrictive covenants to the remaining lots (except 7 and 8) in the subdivision, I will merely state that in my opinion the deeds to the appealing defendants do show an *express imposition* of the restrictive covenants on all the lots in the subdivision (except 7 and 8).

The majority opinion sets out portions of the restrictive covenants, but for a full understanding of the nature of the residential subdivision which the appealing defendants desire to protect it is helpful to view all of the restrictive covenants contained in the deeds from Mrs. Fox to the appealing defendants. Therefore they are set out in full below, with emphasis added at points which to me most clearly expressly impose the restrictions upon all of the lots in the subdivision (except 7 and 8).

"This property is sold subject to the following restrictions:

"1. The property shall be used for residential purposes only, and *no buildings other than one residence,* except garages or outhouses for domestic purposes, *shall be built on a lot as shown in Plat Book 31, Page 27.*

"2. No shop, store, factory, or place of public resort, or business house of any kind shall be erected, or suffered or licensed to exist on the property above-described and no hospital, asylum or institution of like or kindred nature shall be erected or suffered or licensed to exist on the property above-described.

"3. That *not more than a one-family unit* shall be constructed *upon a lot,* and that *each dwelling* so constructed shall consist of a minimum of fifteen hundred (1500) square feet exterior measurement of contiguous enclosed living area.

"4. No residence or building of any kind erected on the property shall be nearer the *front property line on any street* than thirty (30) feet, nor nearer than ten (10) feet of the side property lines *of a 'building lot'* provided this section shall not apply to garages and outhouses which are erected in the rear of the residence or dwelling.

"5. That no privy shall be constructed or kept on the land

hereby conveyed, or no swine, chickens or cows shall be kept on the premises, and no nuisance of any kind shall be maintained or allowed thereon, nor use made thereof or permitted which shall be noxious or dangerous to health.

"6. That no signs or billboards of any description shall be displayed on the property with the exception of signs 'For Rent' and 'For Sale', which signs shall not exceed 2 x 3 feet in size.

"7. That *the above restrictive covenants shall not apply to lots 7 and 8 as shown on the plat referred to,* being recorded in Plat Book 31, at Page 27, in the office of the Register of Deeds of Durham County."

These deeds were recorded before plaintiff purchased its lots, therefore they constituted notice to plaintiff. *Reed v. Elmore, supra.* Furthermore, before its purchase, plaintiff, through its Senior Warden, had actual notice of the restrictive covenants in the deed to defendant Berry which are quoted above. Plaintiff consummated its purchase with all of the actual and constructive notice of these restrictive covenants that anyone could hope for.

I vote to reverse.

STATE OF NORTH CAROLINA v. WILLIAM FLOYD HICKMAN

No. 68SC9

(Filed 23 October 1968)

1. Criminal Law § 154— case on appeal — duties of solicitor and defense counsel

It is the duty of the appellant to prepare and serve on the solicitor what he contends makes up the record on appeal; if the solicitor disagrees with the defendant's record on appeal, he can except thereto and serve on the defendant a counterstatement; if the solicitor and counsel for defendant do not agree upon a record on appeal, the judge who tried the case is required to settle it. G.S. 1-282; G.S. 1-283; G.S. 15-180.

2. Criminal Law § 157— necessary parts of record on appeal

The record on appeal should consist of a plain, accurate and concise statement of what the record shows occurred in the trial court. Rule of Practice in the Court of Appeals No. 19.

3. Criminal Law § 154; Attorney General; Solicitor— case on appeal — duties of Attorney General and solicitor

Under our system of criminal appellate practice, the solicitor is charged with the responsibility of determining the correctness of the record on ap-

peal, but the Attorney General is charged with the duty of defending all actions in the Appellate Division in which the State shall be interested or is a party; consequently, the Attorney General has no voice in preparation of the record on appeal but must take it as he finds it, even if it fails to reflect what actually occurred on trial. N. C. Constitution, Art. III, § 13; G.S. 114-2 (1967 Supp.)

4. Criminal Law § 158— conclusiveness of record on appeal

The record imports verity and the Court of Appeals is bound thereby.

5. Criminal Law § 160— correction of record on appeal

When the solicitor approves a defendant's record on appeal, it is not thereafter subject to correction except when on the face thereof the contents of the record relating to the questions raised on appeal are so contradictory and inconsistent as to be irreconcilable, in which event the Court of Appeals has the inherent power in the interest of justice to remand the case to the trial tribunal for correction.

6. Criminal Law §§ 146, 158— Court of Appeals — exercise of inherent power — contradictions in record on appeal

Where parts of the record on appeal contradict other parts as to the circumstances surrounding defendant's pleas of guilty and *nolo contendere* and as to matters relating to defendant's opportunity to cross-examine the State's witnesses and to present evidence in his own behalf, the Court of Appeals in the exercise of its inherent power orders that the pleas of defendant and the judgments imposed thereon be stricken and that defendant be granted a new trial.

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

The defendant, who was not at that time represented by counsel, was tried in the City Court of Raleigh on three warrants, each charging him with a misdemeanor. Upon conviction in the city court and the judgments imposed, the defendant appealed to the Superior Court of Wake County.

In the superior court on 13 October 1967, again without counsel, the defendant, in writing, tendered a plea of *nolo contendere* to the two misdemeanors of damage to personal property and assault. The defendant, in writing, also pleaded guilty to the misdemeanor of public drunkenness. On 13 October 1967 the court imposed judgment thereon.

On 17 October 1967 Judge Henry L. Stevens, Jr., pursuant to a letter he received from the defendant on 17 October 1967, in which the defendant stated his desire to appeal, to have bond fixed, and to have counsel appointed to perfect and present his appeal, entered an order directing that the clerk of court furnish the defendant copies of the record of his pleas, fixing "his stay bond" at $500 and

appointed Bruce McDaniel to prepare and present the defendant's case on appeal.

Thereafter on 3 November 1967, pursuant to a letter he received from the defendant on 3 November 1967, Judge Bickett entered an order in almost identical language and the same in substance as that entered by Judge Stevens on 17 October 1967.

There was no affidavit of indigency filed as a basis for either of these orders of Judge Stevens or Judge Bickett.

Thereafter on 4 January 1968, the defendant filed an affidavit asserting indigency, and on 5 January 1968 Judge Bickett again appointed L. Bruce McDaniel, of the firm of Crisp, Twiggs & Wells, to represent the defendant in perfecting his appeal. In this order Judge Bickett, as provided by law, ordered Wake County to pay for the cost of the printing of the transcript and defendant's brief.

The defendant had, under date of 14 November 1967, through his attorney Mr. McDaniel, tendered his statement of record on appeal. Under the same date the assistant solicitor for the State accepted service of the record on appeal and on the same date signed the following stipulation: "It is stipulated and agreed that the foregoing shall constitute the case and record on appeal to the Court of Appeals of North Carolina." This record on appeal was filed in the Court of Appeals on 8 January 1968.

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

Crisp, Twiggs & Wells by L. Bruce McDaniel for defendant appellant.

MALLARD, C.J.

[1] At the outset it should be mentioned that under the laws of the State of North Carolina, it was the duty of the appellant in this case to prepare and serve on the solicitor of the district what the defendant contends makes up the record on appeal. G.S. 1-282; G.S. 15-180.

[2] The record on appeal should consist of a plain, accurate, and concise statement of what the record shows occurred in the trial court, compiled and presented in the order prescribed and pursuant to Rule 19 of the Rules of Practice in the Court of Appeals of North Carolina. See also *Cressler v. Asheville,* 138 N.C. 482, 51 S.E. 53.

[1] Under the provisions of G.S. 1-282, if a solicitor does not

agree with the defendant's record on appeal, he can except thereto and serve on the defendant a counterstatement of the record on appeal. Then, if the solicitor and counsel for the defendant do not agree on the record on appeal, the judge who tried the case is required to settle the record on appeal as provided by law. G.S. 1-283.

[3] It should also be mentioned that the solicitor who tries the case in the superior court does not prosecute the case on appeal in the Appellate Division. The Attorney General of North Carolina under the statutes now in effect is charged with, among other things, the duty of defending all actions in the Appellate Division in which the State shall be interested or is a party. N. C. Const., Art. 3, § 13; G.S. 114-2 (1967 Supp.). Thus, it is seen that the Attorney General has no voice in the preparation of the record on appeal but must take it as he finds it. However, the solicitor, who is not charged with the duty of prosecuting the case on appeal, is charged with the responsibility of determining whether a defendant inserts something in the record on appeal that did not occur in the trial court. If the solicitor does not properly attend to this responsibility, then the record on appeal may reflect what a defendant wants it to show instead of what actually occurred.

[4, 5] Regardless of what may actually have occurred during the trial of a case, the appellate court is bound by the contents of the record on appeal. The record imports verity and the Court of Appeals is bound thereby. When a solicitor approves a defendant's record on appeal, it becomes the record on appeal and is not thereafter subject to correction, except when on the face thereof the contents of the record relating to the questions raised on appeal are so contradictory and inconsistent as to be irreconcilable and the Court of Appeals finds that justice requires a correction, in which event the Court has the inherent power to remand the case to the trial tribunal for correction. *State v. Old,* 271 N.C. 341, 156 S.E. 2d 756. "Courts have inherent power to effectuate the functions and duties imposed upon them in criminal as well as in civil matters, although perhaps not to the same extent in criminal as in civil matters." 20 Am. Jur. 2d, Courts, § 78, p. 440. "Courts have inherent power to do all things that are reasonably necessary for the administration of justice within the scope of their jurisdiction." 20 Am. Jur. 2d, Courts, § 79, p. 440.

[6] In the case under consideration, part of the record on appeal contradicted other parts. Upon the argument in this Court, counsel for defendant stated orally that the assistant solicitor had signed the defendant's proposed record on appeal in order to accept service

thereof and not to stipulate as to the correctness thereof. However, the solicitor did not file exception to the defendant's statement of the record on appeal.

On 28 February 1968 this Court remanded the case to the Superior Court of Wake County for the judge to settle the record on appeal "and if need be to correct the record so that it will speak the truth."

At the trial defendant signed the following sworn statement with respect to his written plea:

"The defendant, being sworn, makes the following answers to the Court:

(1) Are you able to hear and understand my statements and questions?

ANSWER: Yes.

(2) Are you now under the influence of any alcohol, drugs, narcotics or other Pills?

ANSWER: No.

(3) Do you understand that you are charged with the misdemeanor of Public Drunkenness; Assault and Damage to personal property?

ANSWER: Yes.

(4) Do you understand that you have the right to plead not guilty and to be tried by a Jury?

ANSWER: Yes.

(5) How do you plead to these charges:

ANSWER: Plead Guilty to Public Drunkenness & Nolo Contendere.

(6) Are you in fact guilty and do you desire to plead nolo contendere?

ANSWER: Yes.

(7) Do you understand that upon your pleas of guilty and nolo contendere you could be imprisoned for as much as 20 days for public drunkenness, 30 days for assault on officer and 2 years for Damage to property?

ANSWER: Yes.

(8) Has the Solicitor, or any policeman, law offcer or anyone

else made any promise to you to influence you to plead guilty and nolo contendere in this case?

ANSWER: No.

(9) Has the Solicitor, or any policeman, law officer or anyone else made any threat to you to influence you to plead guilty and nolo contendere in this case?

ANSWER: No.

(10) Have you had time to subpœna witnesses desired by you, and are you ready for trial?

ANSWER: Yes.

(11) Do you now, freely, understandingly and voluntarily authorize and instruct the Court to enter a plea of guilty and nolo contendere?

ANSWER: Yes.

I have read or heard read all of the above questions and answers and understand them, and the answers shown are the ones I gave in open Court and they are true and correct.

William F. Hickman
DEFENDANT

Subscribed before me, this 13 day of October, 1967.
William Y. Bickett
JUDGE, SUPERIOR COURT OF WAKE COUNTY."

Thereafter the court made appropriate findings based on the written plea among which appears the following:

"The undersigned Presiding Judge hereby finds and adjudges:

I. That the above named defendant in open Court and the questions asked him as set forth in the Transcript of Plea, and the answers given thereto by said defendant are as set forth therein;

II. That the defendant, William Floyd Hickman, plead guilty to Public Drunkenness and entered a plea of Nolo Contendere to Damage to Personal Property and Assault as charged in the warrants, and in open court, further informs the Court that:

(1) He is and has been fully advised of his rights and the charges against him;

(2) He is and has been fully advised of the maximum punish-

ment for said offense charged, and for the offense to which he pleads guilty and nolo contendere;

(3) He is guilty of the offense to which he pleads guilty;

(4) He authorizes the Court to enter a plea of guilty and nolo contendere to said charge(s);

(5) He has had ample time to confer with and to subpœna witnesses desired by him;

(6) He is ready for trial;

And after further examination by the Court, the Court ascertains, determines and adjudges, that the plea of guilty and nolo contendere by the defendant is freely, understandingly and voluntarily made, and was made without undue influence, compulsion or duress, and without promise of leniency. It is therefore ORDERED that his plea of guilty and nolo contendere be entered in the record, and the Transcript of Plea and Adjudication be filed and made a part of the record.

This the 13th day of October, 1967.

William Y. Bickett
JUDGE PRESIDING."

There appears in another part of the record on appeal what is entitled a "Statement Of Record On Appeal" which reads as follows:

"Upon arraignment of the Defendant in the Wake County Superior Court on October 13, 1967, he was, at that time, asked how he pleaded to the charges. He replied that he pleaded guilty to public intoxication and nolo contendere as to the charges of assault on an officer and damage to personal property. The trial Court thereupon proceeded to ask some questions concerning the nature of these pleas; and the defendant, getting the impression that he was to answer these questions with properly indicated answers, did answer such of the trial Court's questions as he (the Defendant) understood.

Immediately after this questioning, the defendant was directed to sign a blank Transcript of Plea. The defendant did sign this form in blank; and the form, when later completed, was included in the official documents of this record and is included herein as part of the record proper.

The defendant did not understand the nature of his pleas of nolo contendere and believed such pleas to by synonymous with, or

in the nature of, pleas of not guilty, rather than pleas of guilty. Moreover, the defendant is of limited education, having gone no further in school than the third grade. In addition, the defendant suffers from gran-mal (sic) epilepsy, which is a chronic form of this disease and was, upon the date of his arraignment, confused and unintelligible due to the fact that he was, at that time, under the influence of medicine and drugs prescribed for the treatment of such disease.

The failure of the trial Court to adequately advise the defendant of the nature and effect of the pleas of nolo contendere, especially in light of the defendant's ignorance and confused mental condition due to medicine and drugs at the time of such arraignment, constitutes DEFENDANT APPELLANT'S EXCEPTION #1.

After the defendant executed the Transcript of Plea, the trial Court then proceeded to pronounce judgment upon the defendant. No evidence whatsoever was heard on behalf of the State. This constitutes DEFENDANT APPELLANT'S EXCEPTION #2.

This, of course, also denied the defendant his opportunity to cross-examine witnesses for the State. This constitutes DEFENDANT APPELLANT'S EXCEPTION #3.

The defendant had no opportunity to present evidence in his own behalf, even in mitigation and extenuation, notwithstanding the fact that the Superior Court's minutes indicate that the defendant was heard from prior to the pronouncement of judgment by the Court. This constitutes DEFENDANT APPELLANT'S EXCEPTION #4.

Also, notwithstanding the fact that the minutes of the Superior Court indicate that the proceedings were reported, the proceedings were not, in fact, reported; and, for that reason, there is and can be no transcript of the proceedings. This constitutes DEFENDANT APPELLANT'S EXCEPTION #5.

Because of the facts noted and discussed hereinabove, the defendant was denied his right to a fair trial, as provided by the laws of the United States and of the State of North Carolina. This constitutes DEFENDANT APPELLANT'S EXCEPTION #6."

Even a casual reader of that portion of the "stipulated" record on appeal entitled "Statement Of Record On Appeal" (hereinafter referred to as "Statement"), could see that it purports to be a part of what occurred at the trial and not the defendant's contentions. The defendant in his brief refers to his exceptions set out therein as error. The casual reader would also see that this "Statement" does

not have a factual basis in any other part of the record, other than what it contains. This "Statement" proves itself by itself with the solicitor's "stipulation" as to its correctness or his failure to file exceptions thereto.

The seventh and eighth paragraphs of the "Statement" also contradict what they relate the minutes of the court reveal.

The judge found that the plea of guilty and *nolo contendere* was freely, understandingly and voluntarily made; the "Statement" contradicts this as it relates that the defendant did not understand his pleas, that he believed such to be in the nature of pleas of not guilty.

The written plea shows that the defendant stated he was not under the influence of any drugs, and the judge found after examination of the defendant that he understandingly entered his pleas; the "Statement" contradicts this and relates that upon the date of his arraignment, the defendant was confused and unintelligible due to the fact that he was, at that time, under the influence of medicine and drugs prescribed for him.

The court found that the defendant was fully advised of his rights and the charges against him and of the maximum punishment for the offenses charged and for the offense to which he pleads guilty and *nolo contendere;* the "Statement" contradicts this finding by referring to "the failure of the the trial court to adequately advise the defendant of the nature and effect of the pleas of *nolo contendere.*"

The court found that the defendant had ample time to confer with and subpœna witnesses desired by him and that he was ready for trial; the "Statement" refutes this when it relates that no evidence was heard on behalf of the State and that the defendant had no opportunity to cross-examine witnesses or to present evidence in his own behalf, even in mitigation and extenuation.

On 12 July 1968 there was filed an "Addendum" (not a correction) to the record on appeal, and this further tends to confuse the record contained in the "Statement" when it relates that after the court took the defendant's "Transcript of Plea" and rendered its "Adjudication," the court heard from the solicitor, William G. Ransdell, Jr., "who, with the consent of the defendant, given in open court, stated the evidence in the case." In the addendum the evidence thus stated is set out in narrative form.

The addendum also contains the statement that the court heard from the defendant, who asked for leniency but did not contest the evidence, and it was after this that the court pronounced judgment.

This addendum to the record was stipulated to by defendant's attorney and an assistant solicitor for the State under date of 10 July 1968. It did not comply with the order of remand dated 28 February 1968 in that the judge of the superior court did not settle the record on appeal as directed to do. Thereafter, this Court ordered that the cause be remanded to the Superior Court of Wake County for compliance with its order of 28 February 1968.

Thereafter on 4 September 1968, there was filed an order signed by Judge Bickett, under date of 16 August 1968, reading as follows:

> "This cause coming on to be heard before the Honorable William Y. Bickett who was the Judge presiding at the 1st October 1967 Regular Criminal Session at which the case of the State vs. William Floyd Hickman, Wake County Superior Court Docket Number 14345, was originally heard, and it appearing to the court that the foregoing attached statement of the case, record proper, and statement of the record on appeal are proper and accurate.
>
> IT IS HEREFORE ORDERED, ADJUDGED AND DECREED that the foregoing attached shall constitute the case and record on appeal."

There is no way to determine what the judge meant in his order by "the foregoing attached" as this is the only part of this record that was marked filed on 4 September 1968. This Court is also unable to determine what the trial court referred to as "proper and accurate." The other part of the addendum to the record is marked filed 12 July 1968, and the original record is marked filed 8 January 1968.

Some time after 4 September 1968, there was placed in the original files in this case an instrument, not marked "filed" but with the names of defendant and an assistant solicitor for the State signed thereto, purporting to be another stipulation which attempts to interpret the foregoing order of Judge Bickett and to change the stipulation in the addendum to the record. This purported stipulation is not in the records herein; however, it reads as follows:

> "For the purposes of clarification, it is hereby stipulated and agreed that the Statement of Record on Appeal which was filed in the Court of Appeals on July 12, 1968, is a substitute for the original Statement of Record on Appeal. The Statement of Record on Appeal which was filed on July 12, 1968 was intended as a substitute for and not an addemdum (sic) to the original Statement of Record on Appeal, and it was this Statement of Record on Appeal filed July 12, 1968 which the Honorable Wil-

liam Y. Bickett, Resident Judge of the Tenth Judicial District, read and settled as being the proper Statement of Record on Appeal in his Order of August 16, 1968."

In view of the inconsistencies and contradictions in this record, we cannot determine what the true record is. Therefore, in the exercise of the inherent power of the Court, the pleas entered by the defendant in this case and the judgments imposed thereon are ordered stricken, and the defendant is granted a

New trial.

CAMPBELL and MORRIS, JJ., concur.

STATE OF NORTH CAROLINA v. EDWARD LOUIS CONYERS

No. 689SC389

(Filed 23 October 1968)

1. Assault and Battery § 6— secret assault — sufficiency of evidence

Evidence tending to show that while operating a farm tractor the prosecuting witness heard a popping noise, that he turned around and saw defendant holding a raised rifle, that he was then shot in the arm, that he was shot in the leg as he attempted to get off the tractor and was again shot after he had fallen to the ground, *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of secret assault, and the State's further evidence that defendant stated he shot the prosecuting witness because he wanted him to suffer, and that after the prosecuting witness was shot the defendant told him to shut his mouth or he would kill him and that he was "good willed to kill you now" does not negate an intent to kill at the time the shots were fired.

2. Assault and Battery § 11— secret assault — indictment

An indictment charging defendant with an assault in a secret manner "by waylaying and otherwise" sufficiently informs defendant of the charge against him.

3. Assault and Battery § 15— instructions — felonious assault

In a prosecution for felonious assault and secret assault, failure of the court to use the word "felonious" preceding the words "intent to kill" in the charge is not error, an intent to kill in itself being a felonious intent.

4. Criminal Law § 112— instructions — reasonable doubt

Where the trial judge correctly defined the term "reasonable doubt" and charged that a reasonable doubt could arise from a lack of evidence, failure of the judge to define reasonable doubt again each time he used that term in the charge is not error.

5. Criminal Law §§ 158, 163— punctuation in transcribed charge to jury

The Court of Appeals is not bound by the punctuation employed by the court reporter in transcribing the charge; the words used by the judge are controlling.

6. Criminal Law § 163— assignment of error to several parts of charge

Where a single assignment of error undertakes to present exceptions to several distinct parts of the charge and one of the parts excepted to is correct, the assignment of error will be overruled.

7. Assault and Battery § 16— submission of lesser degrees of offense

In a prosecution for secret assault and felonious assault, failure of the court to submit the question of defendant's guilt of simple assault is not error where all of the evidence tended to show that the alleged assault was committed by a rifle fired at the prosecuting witness five or more times.

8. Assault and Battery § 15; Criminal Law § 112— instructions on self-defense

In a prosecution for felonious assault and secret assault, portions of the charge excepted to are held not to have placed the burden of proof of self-defense upon the defendant when read in context with all of the instructions upon self-defense.

APPEAL by defendant from *McKinnon, J.*, 6 May 1968 Session, FRANKLIN Superior Court.

Defendant was charged in two bills of indictment: (1) with the felony of assault with a deadly weapon with intent to kill Howard Conyers, inflicting serious injuries not resulting in death; and (2) with the felony of a secret assault upon Howard Conyers with a deadly weapon with intent to kill. The two cases were consolidated for trial, and defendant entered pleas of not guilty.

The defendant Edward Louis Conyers and the prosecuting witness Howard Conyers are cousins and live on adjoining farmlands west of the town of Franklinton. A portion of the lands cultivated by the prosecuting witness are adjacent to defendant's property where his house and barns are situated.

The State offered evidence which tends to show that on 17 May 1967, the prosecuting witness Howard Conyers was operating a farm tractor and grain drill sowing grain in his field immediately west of defendant's home and tobacco barn; that he heard some popping noise and looked around to see what was wrong with his equipment; that he saw the defendant Edward Louis Conyers near the defendant's barn under a tree with his twenty-two rifle raised; that he heard a shot and felt a wound or injury to his left arm and

as he was attempting to get off the tractor, he was shot in the leg and fell to the ground, where he was shot a third time. Thereafter he crawled behind the grain drill; that the defendant told the prosecuting witness he wanted to see him suffer, and later told him to shut his mouth or he would kill him; thereafter the prosecuting witness sent for help and before any help arrived the defendant returned to the edge of his property from where he had fired the shots at the prosecuting witness, but immediately returned to his back porch. That soon thereafter help arrived and the prosecuting witness was taken to a hospital where he remained for some time and was disabled for a further length of time with a cast on his arm and leg.

The State further offered evidence of the witness Robert Pender tending to show that he was present, and helping the prosecuting witness with his farming operations and observed the shooting of the prosecuting witness; that he observed the defendant coming from a barn and walking a short distance, and then firing several times at the prosecuting witness from a distance of 50 to 60 feet. The State's evidence tended to show that the defendant fired his rifle at the prosecuting witness five or more times.

The defendant offered evidence tending to show that on the occasion in question he was on his own property, that he was in and near the barn killing rats and looking for birds before the prosecuting witness started operating his tractor in the field near defendant's barn; that as the defendant started to leave his barn and go to his house, the prosecuting witness stopped his tractor at the edge of defendant's property line, jumped off the tractor with some object in his hand and began cursing and threatening defendant, saying he had beat defendant once and would do it again, and defendant said he believed he was going to assault him again. That defendant fired his rifle several times at the prosecuting witness to stop him. That the defendant was a man 58 years of age and the prosecuting witness was a younger man, being 39 years of age. Prosecuting witness had beaten the defendant on a prior date to the extent that he was knocked to the ground and his glasses were broken.

Upon the combination of the charges contained in the two bills of indictment the trial judge submitted the case to the jury under instructions that it might return any one of four possible verdicts: (1) guilty of secret assault, (2) guilty of a felonious assault, (3) guilty of assault with a deadly weapon, or (4) not guilty. The jury returned a verdict that defendant was guilty of secret assault. From judgment of confinement for a term of not less than four nor more than six years the defendant appealed.

T. W. Bruton, Attorney General, by James F. Bullock, for the State.

Hill Yarborough, E. F. Yarborough, and Herbert H. Senter, for the defendant.

BROCK, J.

[1] The defendant assigns as error that the trial judge denied his motion for nonsuit at the close of the State's evidence, and renewed at the close of all the evidence. The State's evidence was sufficient to make out a *prima facie* case for consideration by the jury. Defendant's evidence was to some extent contradictory of the State's and tended to show that defendant acted in self-defense. Nevertheless, upon the whole evidence, the case was clearly one for jury determination. This assignment of error is overruled.

The defendant assigns as error that the trial judge denied his motion made at the close of the State's evidence, and again at the close of all the evidence, to nonsuit the felony charges. The defendant argues that the State's evidence negatived "intent to kill." We quote from defendant's brief his assertion of what the State's evidence shows in support of this argument:

> "The prosecuting witness Howard Conyers testified under direct examination that after being struck by shots fired by the defendant he asked the defendant 'why did he have to do that to me?' and the defendant replied in part that he wanted the prosecuting witness 'to suffer,' and later told the prosecuting witness that 'if you open your mouth I will kill you now,' and 'I am good-willed to kill you now.' "

It appears that defendant's version of the State's evidence does not carry the full impact of what was said and done at the time. The following appears in the transcript of the evidence just after the prosecuting witness had described the shooting.

> "A. And when I tried to get behind something, another bullet came and went through my right leg and I crawled around behind the drill and got my body as well protected as I could and then I asked him why did he do this to me.
>
> "Q. Asked who that?
>
> "A. I asked Louis Conyers why did he have to do that to me?
>
> "Q. What did he tell you?
>
> "A. He said you have always tried to be a little better than

I was and said I want you to suffer, you yellow bellied s.o.b. (not abbreviated in the transcript), and I said, yes, if I had a rifle, I said, we would suffer together. He said, that is the difference, said, I have got the rifle and you haven't got anything and he said, what are you going to do about it? I said, nothing, I said the State of North Carolina will take care of you, and he said, well, look at that pain on your face. . . ."

After the prosecuting witness described sending his farm helper, Robert Pender, to his house for assistance, and that defendant went back to his (defendant's) house the following appears in the transcript:

"Q. Did Robert Pender go to your home?

"A. Yes sir.

"Q. All right.

"A. Well, Robert Pender came back to the field where I was.

"Q. All right. Was anyone else there where you were at the time Robert Pender came back?

"A. No.

"Q. Did anyone else come?

"A. Louis Conyers came back.

"Q. When?

"A. When I told Robert Pender to go back to the house and stay with my daddy and not to let him come down there.

"Q. How long after Robert Pender came back was it before Louis Conyers came back?

"A. Well, he was on his way back when Robert Pender left down there, left the field where I was, and he came back and told me, said I am good willed to kill you now, you s.o.b. (not abbreviated in transcript), and I said, I think you have done about enough, the best thing for you to do is get back up there somewhere and sit down, and that is when he turned around and went back.

"Q. Went back where?

"A. Louis Conyers went back and sit down up on his back step.

"Q. Is that the second time he had gone back to his house?

"A. Yes sir."

Although this testimony may have prompted defendant to argue no "intent to kill" to the jury, we do not agree that the State's evidence negatived the "intent to kill" element of the charges against defendant. This assignment of error is overruled.

[2] The defendant assigns as error that the bill of indictment charges that defendant . . . in a secret manner did assault Howard Conyers by waylaying *and* otherwise . . . , and that the trial judge instructed the jury in the terms of the statute, i.e., . . . in a secret manner did assault Howard Conyers by waylaying *or* otherwise. . . . It appears that defendant contends that by reason of this he was not properly informed of the charges against him.

In *State v. Shade,* 115 N.C. 757, 20 S.E. 537, the indictment was as follows: The jurors, etc., present that Rachael Shade, etc., unlawfully, wilfully, maliciously, feloniously and in a secret manner, and with a certain deadly weapon, to wit, a pistol, in and upon the body of one Rose Wright did make an assault with the intent then and there to kill the said Rose Wright, her the said Rose Wright did beat, bruise and seriously injure, against the form of the statute, etc. The defendant moved in arrest of judgment for that the indictment did not charge the assault was committed by waylaying, and did not specify the secret manner in which it was committed. The Court said:

> "The gravamen of the offense created by the statute (Laws 1887, ch. 32) is that the assault must be committed 'in a secret manner with intent to kill' the person assailed. The language which the defendant claims was not so followed in the indictment as to put him on notice of the precise nature of the offense with which he was charged, was 'by waylaying or otherwise.' We think that the charge is sufficiently 'plain, intelligible and explicit' (The Code, sec. 1183) to enable the defendant to prepare his defense and to warrant the court in proceeding to judgment in case of conviction. *S. v. Haddock,* 109 N.C. 873. The trend of judicial decision and the tendency of legislation is towards the practical view that objections founded upon mere matter of form should not be considered by the courts unless there is reason to believe that a defendant has been misled by the form of the charge, or was not apprised by its terms of the nature of the offense which he was held to answer. Where the defendant thinks that an indictment, otherwise objectionable in form, fails to impart information sufficiently specific as to the nature of the charge, he may before trial move the court to order that a bill of particulars be filed, and the court will not arrest the

judgment after verdict where he attempts to reserve his fire until he takes first the chance of acquittal. *S. v. Brady,* 107 N.C. 826. The statute denounces as criminal secret assaults with intent to kill, and after giving one explicit illustration, lest the maxim *expressio unius exclusio ulterius* might be invoked in its interpretation, the Legislature added the words 'or otherwise,' meaning thereby to include every other manner of making such secret attempts, no matter what might be the attendant circumstances. A court is not bound, in seeking to arrive at the intent of the Legislature, to adopt the printer's punctuation, and we think that the purpose in passing the act of 1887 was to include, in addition to those accompanied by waylaying, every other assault committed in a secret manner."

This assignment of error is overruled.

[3] The defendant assigns as error that the trial judge failed to use the words "felonious" preceding the words "intent to kill" in its charge to the jury. Apparently defendant contends that in a trial upon a charge of a felonious assault, or a secret assault, the trial judge must always instruct the jury in terms of a "felonious intent to kill" rather than an "intent to kill."

An intent to kill is in itself a felonious or murderous intent, and adding felonious to it is superfluous. We perceive no error in the charge in this respect. See *State v. McCaskill,* 270 N.C. 788, 154 S.E. 2d 907; *State v. Plemmons,* 230 N.C. 56, 52 S.E. 2d 10.

[4] The defendant assigns as error the failure of the trial judge to explain to the jury that a reasonable doubt of defendant's guilt might arise from a lack of or insufficiency of the evidence. It is not necessary for the trial judge to define the term "reasonable doubt," but when he undertakes to do so, he must do it correctly. Here the trial judge correctly defined reasonable doubt and pointed out that a reasonable doubt could arise from a lack of or insufficiency of the evidence. Defendant complains that the judge did not again define it each time he used the term "reasonable doubt" in the charge. This assignment of error is obviously without merit and is overruled.

[5] Defendant's next assignment of error (No. 14) is to a portion of the charge to the jury. We are not bound by the punctuation employed by the court reporter; the words used by the judge are controlling. If one comma is added to the paragraph complained of, defendant would clearly have no cause to complain. This assignment of error is overruled.

[6] Defendant's assignment of error No. 15 has eight exceptions

grouped thereunder. These exceptions present more than one question of law; they are taken to the court's instructions to the jury upon (1) presumption of innocence, (2) malice, (3) intent to kill, (4) serious injury, (5) self-defense, and (6) a contention of the defendant. An assignment of error, irrespective of the number of exceptions grouped thereunder, must present a single question of law for consideration on appeal. Where a single assignment of error undertakes to present exceptions to several distinct parts of the charge to the jury, and one of the parts excepted to is correct, the assignment of error will be overruled. *State v. Atkins,* 242 N.C. 294, 87 S.E. 2d 507. This assignment of error is overruled.

[7] The defendant next assigns as error that the trial judge did not submit the case to the jury upon an instruction that a possible verdict was one of simple assault, which would have made five possible verdicts instead of the four submitted by the Court. This assignment of error is without merit. There is no evidence, including defendant's, which would support a verdict of guilty of simple assault. All of the evidence tended to show that the alleged assault was committed with a 22 caliber rifle fired at the prosecuting witness five or more times. *State v. Johnson,* 1 N.C. App. 15, 159 S.E. 2d 249, *State v. LeGrande,* 1 N.C. App. 25, 159 S.E. 2d 265.

[8] Defendant next assigns as error portions of the charge as it related to defendant's assertion that he acted in self-defense. Defendant contends that the charge placed the burden of proof of self-defense upon the defendant, and that this is error in a non-homicide case.

The portions of the charge excepted to are not objectionable when read in context with all of the instructions upon the law of self-defense. The able trial judge carefully explained to the jury that the entire burden of proof was upon the State and that the defendant had no burden of proof. We have carefully read the entire charge and hold that it fairly presented the case to the jury under appropriate principles of law. This assignment of error is overruled.

The remaining assignments of error are formal and require no discussion in the light of what has heretofore been said.

We hold that the defendant has had a fair trial, free from prejudicial error.

No error.

BRITT and PARKER, JJ., concur.

CULLEN BUNN BAILEY, JR. v. NORTH CAROLINA DEPARTMENT OF MENTAL HEALTH

No. 6810IC364

(Filed 23 October 1968)

1. Master and Servant § 98; State § 10— Tort Claims Act — proceedings after remand to Industrial Commission

Upon remand by the Supreme Court to the Industrial Commission of plaintiff's tort claim action on the ground that the Commission's findings of fact were not supported by the evidence, the Industrial Commission did not abuse its discretion in denying plaintiff's motion to introduce additional evidence, since the judgment of the Supreme Court did not order a trial *de novo* but instead directed that the Commission consider the evidence in the case in its true legal light and make findings of fact thereon.

2. Master and Servant § 98— proceedings after remand to Industrial Commission — introduction of additional evidence

Upon remand of an action to the Industrial Commission on the ground that the Commission's findings of fact are not supported by the evidence, the Commission has the discretion, upon a proper showing, to order the taking of additional evidence.

3. State § 5— nature of Tort Claims Act

In a suit against the State for an alleged tort, plaintiff cannot complain when the State requires him to follow certain procedural rules before its consent is given to waive its sovereign immunity.

4. Master and Servant § 47— construction of Workmen's Compensation Act

The Workmen's Compensation Act should be liberally construed.

5. State § 5— construction of Tort Claims Act

The State Tort Claims Act, being in derogation of the sovereign immunity from liability for torts, should be strictly construed and should be followed as written.

6. State § 8— action under Tort Claims Act — sufficiency of evidence to show negligence

In plaintiff's action under the State Tort Claims Act for damages allegedly incurred as a result of a State hospital's negligence in administering shock treatments, the evidence is sufficient to support the Industrial Commission's findings of fact that (1) the hospital's physician was not negligent in his treatment of the plaintiff during the shock treatments and that (2) the plaintiff was unable to remember what occurred during the treatment complained of since he was under the influence of sedatives.

7. State § 8— Tort Claims Act — burden of proof

On appeal in proceeding under the Tort Claims Act, plaintiff has the burden to show that the Industrial Commission erred in finding and concluding that a doctor, who was a State employee, was not negligent in his treatment of plaintiff.

PLAINTIFF appealed from the North Carolina Industrial Commission Decision and Order filed 7 May 1968.

Action by claimant, hereinafter sometimes referred to as plaintiff, under the State Tort Claims Act, G.S. 143-291, *et seq.*, for recovery of damages for the alleged negligence on the part of the North Carolina Department of Mental Health in the administering of shock treatment to the plaintiff, Cullen Bunn Bailey, Jr.

For a summary of the facts in the case, see the opinion in this case entitled *Bailey v. Dept. of Mental Health,* 272 N.C. 680, 159 S.E. 2d 28.

There was a full hearing before Chairman Bean of the Industrial Commission on 4 May 1966, at which time evidence was presented by the plaintiff. Chairman Bean filed a Decision and Order of 11 May 1966 denying the relief sought. On 13 May 1966, plaintiff appealed to the Full Commission and was heard upon appeal, and the Full Commission affirmed the earlier Order and Decision, on 25 July 1966. Plaintiff gave notice of appeal to the Superior Court on 25 August 1966. The appeal came on for hearing before Judge H. L. Riddle, Jr., at the May 1967 Session of the Superior Court of Wake County, at which time Judge Riddle ruled that the Industrial Commission erred as a matter of law, vacated the judgment of the Commission and remanded the cause for such rehearing as may be necessary to conform the findings of fact and conclusions of law to the record, and directed that additional evidence be taken. To the judgment and order of Judge Riddle, the defendant excepted and gave notice of appeal to the Supreme Court of North Carolina.

On 2 February 1968 the Supreme Court of North Carolina filed its opinion (272 N.C. 680) holding that the findings of fact by the Industrial Commission were insufficient to enable the court to determine the rights of the parties and remanding the case to the Industrial Commission for proper findings. The North Carolina Supreme Court further held that Judge Riddle exceeded the authority of a reviewing court by ordering that additional evidence be taken at a rehearing of the matter.

Plaintiff then filed a motion before the Industrial Commission requesting that the Commission hear additional evidence in the cause. Motion was argued by counsel for both plaintiff and defendant and the Full Commission denied the motion to allow additional evidence. Upon remand the Full Commission vacated and expunged from its records the Decision and Order filed by Chairman Bean on 11 May 1966, and without further hearing of evidence substituted in

its place the Order and Decision of the Full Commission filed on 7 May 1968, which Order denied the relief sought by plaintiff. To the denial of his claim and the filing of the Decision and Order of the Full Commission, the plaintiff excepted and gave notice of appeal to the Court of Appeals of North Carolina.

Douglas F. DeBank for plaintiff appellant.

Attorney General T. W. Bruton and Staff Attorney L. Philip Covington for defendant appellee.

MALLARD, C.J.

[1] Plaintiff contends that the Full Commission committed reversible error in refusing to permit the introduction of additional evidence after this case was remanded by the Supreme Court.

In the opinion of the Supreme Court by Branch, J., (272 N.C. 680), the court said:

> "The Industrial Commission's findings of fact are conclusive on appeal when supported by competent evidence, except for jurisdictional findings. This is true, even though there is evidence which would support findings to the contrary. *Mica Co. v. Board of Education,* 246 N.C. 714, 100 S.E. 2d 72; *Teer Co. v. Highway Commission,* 265 N.C. 1, 143 S.E. 2d 247. However, where facts are found or where the Commission fails to find facts under a misapprehension of law, the court will, where the ends of justice require, remand the cause so that the evidence may be considered in its true legal light." *Bailey v. Dept. of Mental Health, supra.*

A careful reading of the opinion of the Supreme Court reveals that the findings of fact theretofore found by the hearing commissioner and affirmed by the Full Commission were not supported by the evidence. The judgment rendered thereon was vacated so that the evidence may be considered in its true legal light. The Supreme Court in remanding the case also said:

> "The judgment is vacated and the cause is remanded to the Superior Court of Wake County with direction that it be remanded to the North Carolina Industrial Commission for further consideration, to the end that the Commission may proceed with findings of fact and a determination of the rights of the parties in accord with the principles herein enunciated." *Bailey v. Dept. of Mental Health, supra.*

The North Carolina Industrial Commission was to further consider the matter to the end that the Commission might proceed with

findings of fact and a determination of the rights of the parties. A trial *de novo* was not ordered. The Supreme Court did not order a *new trial* before the Industrial Commission. The Industrial Commission was not directed to take additional evidence, nor was it denied the authority to take additional evidence.

[2] We are of the opinion and so decide that the Industrial Commission could have, upon a proper showing, and in its discretion, ordered additional evidence to have been taken. It did not do so and on this record no abuse of discretion is shown for failing to do so. *McCulloh v. Catawba College,* 266 N.C. 513, 146 S.E. 2d 467; *Hall v. Milling Co.,* 1 N.C. App. 380, 161 S.E. 2d 780.

[3] The Legislature has made the procedure in hearings before the Industrial Commission different from the procedures in the Superior Court. In a suit against the State for an alleged tort, the plaintiff cannot complain when the State requires him to follow certain procedural rules before its consent is given to waive its sovereign immunity.

Plaintiff also in his brief, after citing *McFarlane v. Wildlife Resources Commission,* 244 N.C. 385, 93 S.E. 2d 557, asserts and contends that "had this action against the State of North Carolina been pending and tried in the Superior Court systems of this State, upon remand by the Supreme Court, the case would have begun anew."

In his contentions, plaintiff overlooks what the Supreme Court did; it *did not* reverse a judgment of nonsuit. Plaintiff complains because his case was required to be tried by the same fact finding body on the same evidence. The Legislature required him to submit his controversy to this particular fact finding body, the Industrial Commission. He cannot complain about the "jury" or fact finding body being selected for him by the State, for if the State had not waived its immunity and provided some tribunal, the plaintiff would have had no forum at all in which to present his claim. Every person similarly situated is required to submit his cause to this same "jury" or fact finding body.

Plaintiff contends that he should have been permitted to introduce further evidence and, in support thereof, offered to the Industrial Commission an unverified written motion signed by his attorney. In this motion, it is said, among other things:

> "In support of this request the Plaintiff would show unto the Commission that at the time of the original hearing on this claim held before J. W. Bean, Chairman of the North Carolina Industrial Commission on May 4th, 1966, there were in fact witnesses

present at the trial, completely unbeknown to the Plaintiff, who could have aided substantially in the proof and presentation of the Plaintiff's claim. The Plaintiff and his Counsel knew of these witnesses but were totally unable prior to the trial to determine their residence or whereabouts and were also unable to recognize said witnesses in person. That the Plaintiff and his Counsel therefore did not know that several key witnesses had been subpœnæd by the State and were in fact present in the courtroom on the date of the original hearing.

That the Plaintiff is particularly referring to the presence at said original hearing of Dr. William Frierson, the physician who administered the shock treatment as well as one or two of the people who assisted Dr. Frierson on the date the injury was incurred by the Plaintiff. These people were subpœnæd by the State as witnesses for the State, however, the State did not offer any evidence at the hearing. It is the Plaintiff's contention that these particular witnesses, had their presence been known by the Plaintiff or had they been subjected to cross-examination, would have contributed substantially to the proof of the Plaintiff's claim."

It is observed that this motion was not sworn to and thus does not comply with even the initial requirement as set out in *Bailey v. Dept. of Mental Health, supra,* for the admission of *newly discovered* evidence. The Supreme Court had reversed the order of the Superior Court *requiring* the taking of additional evidence. We are of the opinion that the plaintiff was not entitled as a matter of law to introduce additional evidence in this case after it was ruled on by the Supreme Court, and that the Industrial Commission did not commit error in refusing to allow plaintiff's motion to offer additional evidence.

[4, 5] There are many differences in procedure in cases brought under the Workmen's Compensation Act and those brought under the State Tort Claims Act. The Workmen's Compensation Act should be liberally construed. *Hall v. Milling Co., supra.* The Supreme Court held in *Floyd v. Highway Commission,* 241 N.C. 461, 85 S.E. 2d 703 (1955), with Parker, J. (now C.J.), dissenting, that the State Tort Claims Act is in derogation of the sovereign immunity from liability for torts and the better view is that the act should be strictly construed and the act should be followed as written.

[6] Plaintiff contends that the Full Commission committed error in finding "(t)hat the plaintiff was under sedation at the time of the electric shock and did not recall anything that happened."

The finding is a rather broad one and does not specifically state to which electric shock reference is made. The plaintiff had testified in substance that he didn't know, but others had told him he had taken 37 electric shocks. However, in the finding by the Commission immediately preceding this one complained of, reference is made to the shock treatment on 3 December 1963.

In the transcript of the evidence, the plaintiff states in substance that shock treatments were usually given in the morning, and specifically states that on the evening of 3 December 1963 he was given a shock treatment and the only medication he received was a saliva shot and that he did not receive any medication which relaxed or paralyzed his body. The plaintiff then related the details of how the shock treatment was given and the following occurred:

"Q. Had Dr. Frierson ever administered a shock treatment to you before?

A. No, this was the first one.

I will describe what the procedure is when I receive an electric shock treatment. They lock you in a room with a lot of the rest of them. They give you a saliva shot and take you upstairs and put you in seclusion and you prepare for it the best way you know how, and they take you by the seat of your breeches and put on the table. The doctor stands behind you I guess. You never know when the shock treatment will begin.

Q. In what fashion are your limbs restrained?

A. Well, it scares me to even talk about them now, but they are very rigid.

They had to hold me on the table every time they got me in there because I was afraid, very much afraid. I prepared to die, so to speak.

Q. Had you ever had any fracture or injury to your body previous to that time in an electric shock treatment case?

A. No.

MR. BROWN: Objection.

THE COURT: I will let him answer for the record.

Q. (Mr. DeBank) Did you ever receive a fracture of your vertebra or your spine?

A. No, I didn't know I had one.

I don't remember getting an electrocardiogram at Dorothea Dix. I had one at Duke, but I don't remember getting one at

Dorothea Dix at all. My blood pressure was taken the morning they called it off that evening, after I had already eaten. I thought I had a reprieve, so to speak. I do not of my own knowledge have any knowledge why it was called off that morning. All I know, they came in and took my blood pressure. Didn't take nothing else.

I don't remember what my next independent recollection is. It's been so long I don't accurately remember. I remember coming to, saying 'Please don't hurt me no more.' I came to in the seclusion room that I was in prior to the shock treatment. I was in the seclusion room. A doctor was standing over me.

Q. Who was the doctor?

A. Dr. Frierson, and he asked me where I hurt and I didn't know where I hurt at that time, and finally after I come out of it, they took me out on an ambulance and took an X-ray."

From the above which appears on pages 16 and 17 of the record, the Commission apparently found that the plaintiff contradicted himself and actually didn't remember what occurred from the time they took his blood pressure one morning until after he came to in a seclusion room with Dr. Frierson standing over him, and the Commission could have found from the circumstances testified to that the reason he didn't was because of some sedatives given him. We are of the opinion that in making this finding, the Full Commission did not commit prejudicial error.

[6, 7] Plaintiff contends that the Full Commission committed error in finding and concluding that Dr. William Frierson, employee of the defendant, was not negligent in his treatment of the plaintiff. The burden of proof as to this issue was on the plaintiff. Evidence is usually not required in order to establish and justify a finding that a party has failed to prove that which he affirmatively asserts. It usually occurs and is based on the absence or lack of evidence. After having carefully read the evidence in the record, we conclude that the findings of fact by the Full Commission on which its final conclusions are based are supported by the evidence, and we are bound thereby. We are also of the opinion that the conclusions of the Commission are proper. We do not reach, or decide, the question of whether the doctrine of *res ipsa loquitur* applies in actions brought under the State Tort Claims Act, G.S. 143-291, *et seq.*

The Decision and Order of the Full Commission entered herein on 7 May 1968 are

Affirmed.

CAMPBELL and MORRIS, JJ., concur.

COLE *v.* CITY OF ASHEVILLE

A. B. COLE, RESIDENT AND TAXPAYER OF THE CITY OF ASHEVILLE, ON BEHALF OF HIMSELF AND OTHER TAXPAYERS OF THE CITY OF ASHEVILLE v. THE CITY OF ASHEVILLE, NORTH CAROLINA, A MUNICIPAL CORPORATION

No. 6828SC400

(Filed 23 October 1968)

Municipal Corporations § 39; Taxation § 6— necessary expense — public bus system

The expense of operating a public bus system is not a "necessary expense" within the meaning of Article VII, § 6 of the Constitution of North Carolina; therefore, a municipality may not pledge its credit or expend tax revenues to support the operation of a public bus system without obtaining the approval of the electorate.

APPEAL by defendant from *Martin, J.*, at the 27 June 1968 Session of BUNCOMBE Superior Court.

In this action, the plaintiff, a resident and taxpayer in the City of Asheville, is seeking to restrain the defendant, City of Asheville, from contracting any debt, or expending any tax moneys in the operation of a local motor bus transportation system without a vote of the people.

The findings of fact made by the trial judge are uncontroverted. The White Bus Transportation Company, which previously operated the bus system in the City of Asheville, ceased operation as a result of receivership action. After a study was made of the transportation problems of the City, various private companies were contacted, but no company would agree to operate a bus system in the City of Asheville. On 2 November 1967 the City of Asheville enacted Ordinance No. 586, entitled "An Ordinance Establishing Administrative Body Known as the Asheville Transit Authority", and thereafter, the City advanced funds to the Transit Authority for the purpose of enabling it to purchase the assets of the White Transportation Company, which formerly provided public bus transportation in the City of Asheville. The Asheville Transit Authority since 2 January 1968, has been operating the public transportation system in the City of Asheville. The City has agreed to provide the necessary funds for the operation of said bus system, and to subsidize any losses of the Asheville Transit Authority for a period of one year, beginning 2 January 1968. The Asheville Transit Authority has stated that it intends to acquire new buses and equipment which will require the expenditure of $350,000 or more.

There were certain findings of fact concerning the bus routes, the number of miles involved, the number of passengers who ride on the buses, and the population of the City of Asheville. It was also found

that to the extent that expenses for operation and modernization of equipment which were not covered by revenues from the transportation system and the sale of city license tags by the City, the City had expended or expected to expend tax funds and had loaned its credit to assure the continued operation of the City bus system.

It was further found, "That the defendant, the City of Asheville, has not submitted the question of contracting a debt, or pledging the City's faith and credit to ATA for the operation of a public transportation system, to the voters in an election held for such purpose."

After making the above findings of facts, the court entered the following conclusions of law:

"1. That the defendant, The City of Asheville, is a municipal corporation, having the powers and authority granted to it by its Charter, and that, with respect to expenditure of tax funds, and the lending of its credit, it is subject to the limitations imposed by its Charter, by the General Statutes of North Carolina, and by the Constitution of North Carolina.

2. That the operation of a public bus or transportation system by The City of Asheville is not a 'necessary expense,' within the meaning of Article VII, of Section 6, of the Constitution of the State of North Carolina, and that therefore, the defendant, The City of Asheville, may not contract any debt, pledge its faith or credit, nor spend any tax levys or collections for the same, unless approved by a majority vote in an election held for that purpose.

3. That the defendant, The City of Asheville, does not have the authority, under its Charter, or under State law, to expend any tax levys or collections for the operation, expansion, or improvement of a public transportation system."

The court then entered the following judgment:

"1. That the defendant, The City of Asheville, be restrained, enjoined, and prohibited from contracting any debt, pledging its faith, loaning its credit, or levying or collecting any taxes, or expending any tax money by or through the Asheville Transit Authority, in the operation of a public transportation system, unless and until the same be submitted to and approved by the voters in an election for such purpose, as required by law.

2. The costs of this action are taxed against the defendant, The City of Asheville."

From the judgment entered, defendant appealed.

Van Winkle, Buck, Wall, Starnes and Hyde by O. E. Starnes, Jr., for defendant appellant.

Carl A. Hyldburg, Jr., and Herbert A. Wallace for plaintiff appellee.

MORRIS, J.

The validity of the ordinance creating an Asheville Transit Authority is not before us. The only error assigned is the failure of the trial court to find as a fact and conclude as a matter of law that the operation of a public transportation system is a necessary expense as the term is used in Article VII, section 6, of the Constitution of the State of North Carolina.

Article VII, section 6, provides:

> "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."

We feel compelled to rule that this case if governed by the recent cases of *Horton v. Redevelopment Commission,* 259 N.C. 605, 131 S.E. 2d 464; *Vance County v. Royster,* 271 N.C. 53, 155 S.E. 2d 790; and *Moody v. Transylvania County,* 271 N.C. 384, 156 S.E. 2d 716.

In *Horton* the Supreme Court held that any provisions of the Urban Redevelopment Law which allowed a municipality to sell bonds, appropriate funds, and to levy taxes to carry out its powers and functions under the Urban Redevelopment Law without the approval of a vote of the qualified voters in the municipality, were repugnant to Article VII, section 6, of the North Carolina Constitution. The Court said that where the expense was for the administration of justice, maintenance of the public peace, or partakes of a governmental nature, or if it is an exercise by the municipality of a portion of the State's delegated sovereignty, then the expense is a necessary expense under Article VII, section 6, and there need not be a vote of the people. The Court says that the term "necessary expense" refers to "the ordinary and usual expenditures reasonably required to enable a county to properly perform its duties as part of the State Government". "The cases declaring certain expenses to have been 'necessary' refer to some phase of municipal government. This Court, so far as we are advised, has given no decision to the con-

trary." The Court gives a summary of those expenses classified as "not necessary".

> "The following have been held not as 'necessary expenses' within the purview of Article VII, section 7, of the State Constitution: a swimming pool, *Greensboro v. Smith,* 239 N.C. 138, 79 S.E. 2d 486; municipal parks and recreational facilities, *Purser v. Ledbetter,* 227 N.C. 1, 40 S.E. 2d 702, support and maintenance of James Walker Memorial Hospital, *Board of Managers v. Wilmington,* 237 N.C. 179, 74 S.E. 2d 749; a hospital, *Sessions v. Columbus County,* 214 N.C. 634, 200 S.E. 418; *Palmer v. Haywood County,* 212 N.C. 284, 193 S.E. 668; *Burleson v. Board of Aldermen,* 200 N.C. 30, 156 S.E. 241; *Nash v. Monroe,* 198 N.C. 306, 151 S.E. 634, a public library, *Westbrook v. Southern Pines,* 215 N.C. 20, 1 S.E. 2d 95; *Jamison v. Charlotte,* 239 N.C. 682, 80 S.E. 2d 904; an airport, *Airport Authority v. Johnson,* 226 N.C. 1, 36 S.E. 2d 803, a chamber of commerce, *Ketchie v. Hedrick, supra;* a drill tower for firemen, *Wilson v. Charlotte,* 206 N.C. 856, 175 S.E. 306."

In *Vance County v. Royster, supra,* the Supreme Court in an opinion by Lake, J., held that the expenditures of tax money, and the contracting of a debt by a county for the purposes of maintaining a county airport was not a "necessary expense" although it was for a public purpose. There the Court said:

> "This provision of our State Constitution, like the provision of Article V, § 4, imposing a limitation upon the power of the State, counties and municipalities to contract debts without a vote of the people, does not deprive the county of any power to contract a debt. It merely declares who shall have the power of decision. The Constitution gives to the people that power by requiring their duly elected representatives to submit the question to them for their approval before the indebtedness is assumed. . . .
>
> * * *
>
> It is not for the court to determine the wisdom of a decision to contract a debt for a county or a city, but it is the duty of the court to determine whether the proposed indebtedness is for a 'necessary expense' within the meaning of the above provision of the Constitution. *Sing v. Charlotte,* 213 N.C. 60, 195 S.E. 271; *Palmer v. Haywood County,* 212 N.C. 284, 193 S.E. 668, 113 A.L.R. 1195; *Starmount Co. v. Hamilton Lakes,* 205 N.C. 514, 171 S.E. 909; *Storm v. Wrightsville Beach,* 189 N.C. 679, 128 S.E. 17."

In *Moody v. Transylvania County, supra,* the Supreme Court was faced with the question of whether an ambulance service was a necessary expense for which a county could legally contract. The Court held that this was not a necessary expense. The following is quoted from *Palmer v. Haywood County,* 212 N.C. 284, 193 S.E. 668:

> "In defining 'necessary expense' it is said in *Henderson v. Wilmington, supra* (191 N.C. 269, 132 S.E. 25), 'We derive practically no aid from the cases decided in other states. . . . We must rely upon our own decisions.' Then, after reviewing numerous cases dealing with the subject of 'necessary expense,' page 278, *Adams, J.,* said: 'The cases declaring certain expenses to be necessary refer to some phase of municipal government. This Court, so far as we are advised, has given no decision to the contrary.' Then, on page 279, continues: 'The decisions heretofore rendered by the Court make the test of a "necessary expense" the purpose for which the expense is to be incurred. If the purpose is the maintenance of the public peace or the administration of justice; if it partakes of a governmental nature or purports to be an exercise by the city of a portion of the State's delegated sovereignty; if in brief, it involves a necessary governmental expense.'
>
> This Court has repeatedly held that the building, maintenance, and operation of public hospitals is not a 'necessary expense.' "

In the present case the following finding of fact, supported by competent evidence, was not excepted to by the City of Asheville:

> "To the extent that the expenses of operating the public transportation system by ATA, including modernization of equipment, and extension of the routes, is not met by revenues from the public transportation system, plus the revenue received by the City of Asheville from the sale of City license tags, under Ordinance 584, the defendant, The City of Asheville, has expended tax funds, or expects to expend tax funds, for said public transportation system, and expects to lend its credit or other financial support to insure the continued operation of the public transportation system established by ATA."

The expense of operating the City bus system by the City of Asheville is not a "necessary expense" within the meaning of Article VII, section 6, of the Constitution of North Carolina. Therefore, the City may not pledge its credit nor expend tax revenues to support

the operation of a bus system without first obtaining approval by submitting the matter to a vote of the people.

The judgment of the trial court is

Affirmed.

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

STATE OF NORTH CAROLINA, EX REL. NORTH CAROLINA UTILITIES COMMISSION, MOTOR CARRIERS PARTICIPATING IN NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC., AGENT, MOTOR FREIGHT TARIFF NO. 8-I, N.C.U.C. NO. 81 v. ATTORNEY GENERAL OF NORTH CAROLINA, THE TOBACCO ASSOCIATION OF THE UNITED STATES AND LEAF TOBACCO EXPORTERS ASSOCIATION

No. 6810UC315

(Filed 23 October 1968)

1. Carriers § 5; Utilities Commission §§ 3, 6— intrastate motor carrier rates — operating ratio of carriers

G.S. 62-146(g) requires the Utilities Commission to determine just and reasonable intrastate common motor carrier rates on the basis of the operating ratios of such carriers, that is, the ratio of their operating expenses to their operating revenues.

2. Carriers § 5; Utilities Commission §§ 3, 6, 9— intrastate motor carrier rates — operating ratio of carriers

An order of the Utilities Commission revising common motor carrier rates for the intrastate transportation of unmanufactured tobacco on the basis of operating ratios which do not reflect any actual separation of interstate and intrastate revenues and expenses or any separation of tobacco revenues and expenses of the carriers involved is contrary to law, and the cause is remanded to the Utilities Commission for the entry of a proper order based on the evidence in the record or for the taking of additional evidence.

APPEAL from North Carolina Utilities Commission (Commission) Order of 19 March 1968.

This proceeding began on 12 June 1967 by the filing by the North Carolina Motor Carriers Association (Motor Carriers Association), as agent, on behalf of various North Carolina intrastate trucking companies, of a tariff of revised rates and charges on the transportation and handling of various tobacco products. The tariff schedules were identified as Motor Freight Tariff No. 8-I, N.C.U.C. No. 81.

They were to become effective 12 July 1967, and Supplement No. 1 thereto was to become effective 24 July 1967. These trucking companies were authorized by the Commission to engage in the intrastate transportation of unmanufactured tobacco, leaf or scrap, in common carriage by motor vehicle between points and places within the State of North Carolina.

The rates involved apply to unmanufactured tobacco, which falls into two general categories: green tobacco, which means barn dried but not redried, and redried tobacco. With regard to green tobacco, the old rates, which had been in effect since 1952, were not based on a uniform mileage scale between all points in North Carolina. They were point to point rates which represented varying differences from a uniform scale depending upon the point of origin involved in a particular shipment. No change was made in the rates applicable to redried tobacco, and except for one variation, the old rates were brought forward. This variation fixed a minimum charge of twenty cents per hundred pounds.

The new rates were designed, primarily, to increase the revenue and, secondarily, to bring the existing rates into closer harmony with a uniform and nondiscriminatory mileage scale of rates. Where the old rates were below the uniform scale, the new rates increased them by a flat ten percent, but they were not to exceed this uniform scale. Where the old rates were in excess of the uniform scale, they were to remain in effect, which meant no reduction in any existing rate. Under the new rates, green tobacco in bundles or sheets carried a charge of six cents per hundred pounds above the charge for green tobacco packed in hogsheads or similar packing. The new rates for less than truckload shipments were double the new rates on tobacco packed in sheets. The minimum charge for the handling of a single shipment, less than a truckload shipment, was increased from two dollars and fifty cents to four dollars. This new rate schedule also included a rate of twenty cents per hundred pounds as a minimum.

By order of 11 July 1967, the application for the new rates was suspended, and an investigation into the justness and reasonableness of the proposed rates was ordered by the Commission. The carriers which proposed to participate in the new schedules were made respondents, and they had the burden of proving the justness and lawfulness of these new rates. Protests were filed by the Flue-Cured Tobacco Cooperative Stabilization Corporation, Tobacco Growers Services, Leaf Tobacco Exporters Association and The Tobacco Association of the United States. The Attorney General of North Carolina intervened on behalf of the using and consuming public.

Commencing 3 January 1968, formal public hearings were conducted by the Commission. On 19 March 1968, the Commission vacated and set aside the suspension order, and it entered an order approving the proposed rates, except in two particulars. One, the minimum charge for a single shipment was revised and made three dollars and fifty cents, rather than the proposed four dollars. Two, where the distance shipped did not exceed twenty miles, the minimum rate was reduced from twenty cents per hundred pounds to eighteen cents per hundred pounds. On 29 April 1968, The Tobacco Association of the United States, the Leaf Tobacco Exporters Association, and the Attorney General of North Carolina filed exceptions and gave notice of appeal to the Court of Appeals.

Thomas Wade Bruton, Attorney General, by George A. Goodwyn, Assistant Attorney General.

Malcolm B. Seawell and Boyce, Lake & Burns by F. Kent Burns, Attorneys for The Tobacco Association of the United States and Leaf Tobacco Exporters Association, appellants.

Bailey, Dixon & Wooten by J. Ruffin Bailey, Attorneys for Motor Carriers, appellees.

Edward B. Hipp and Larry G. Ford, Attorneys for North Carolina Utilities Commission, appellee.

CAMPBELL, J.

The protestants say that the order is improper for four reasons: (1) the Commission failed to find the intrastate operating ratios of the carriers involved and the effect on such ratios of the new rate; (2) there was no competent, material and substantial evidence in view of the entire record to establish a new rate; (3) the Commission compared the new rate with an unregulated interstate rate; (4) the Commission failed to determine operating revenues under the present rates and then compare them to the proposed rates before granting an increase.

[1] The determination of motor carrier rates for intrastate transportation of commodities in North Carolina is fixed by statute. G.S. 62-146(g) provides:

> "In any proceeding to determine the justness or reasonableness of any rate of any common carrier by motor vehicle, there shall not be taken into consideration or allowed as evidence any elements of value of the property of such carrier, good will, earning power, or the certificate under which such carrier is operat-

ing, and such rates shall be fixed and approved, subject to the provisions of subsection (h) hereof, on the basis of the operating ratios of such carriers, being the ratio of their operating expenses to their operating revenues, at a ratio to be determined by the Commission. . . ."

G.S. 62-146(h) provides:

"In the exercise of its power to prescribe just and reasonable rates and charges for the transportation of property in intrastate commerce by common carriers by motor vehicle, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon movement of traffic by the carrier or carriers for which rates are prescribed; to the need in the public interest of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers under honest, economical, and efficient management to provide such service."

An operating ratio of one hundred percent means that for every dollar of freight revenue received, the carrier spends a dollar in operating expenses. When the operating ratio exceeds one hundred percent, it means that the expenses exceed the revenues. The lower the operating ratio, the more profitable the operation is to the carrier.

The carriers say that material and substantial evidence was offered to establish the operating ratios of the motor carriers based on revenues and expenses incurred in the North Carolina operations alone, and that these operating ratios are the ratios set out in the Commission's order; that based thereon, the carriers involved had an operating ratio in excess of ninety-six percent, and that the evidence established that operating expenses were increasing faster than revenues thereby causing an increase in the operating ratio. They further assert that an operating ratio above ninety-five percent fails to provide, in the public interest, adequate and efficient transportation service and that, therefore, the evidence was sufficient to justify the granting of an increase in rates by the Commission. Be this as it may, the Commission in its order (R p 52 and 53) specifically concluded:

"The operating ratios do not reflect any actual separation of interstate and intrastate revenues and expenses or any separa-

tion of tobacco revenues and expenses from those on other traffic.

. . . .

The operating ratios of the carriers hereinbefore enumerated do not reflect a separation of interstate and intrastate revenues and expenses as contemplated by G.S. 62-146(h). . . .

The North Carolina Supreme Court, in *State v. State,* 243 N.C. 12, said that the order of the Utilities Commission increasing intrastate rates of the State rail carriers so that such rates would conform with an increase in interstate rates allowed by the Interstate Commerce Commission was invalid where the order was unsupported by proof of the fair value of the properties of the carriers used and useful in conducting their intrastate business, separate and apart from their interstate business. Although a different section of Chapter 62 governs rate-making for rail carriers, the principle of separating interstate and intrastate revenues and expenses applies to both modes of transportation."

[2] Therefore, even though there may have been evidence presented in the record from which the Commission could have made a proper finding of intrastate experience, the Commission in fact made no such finding. In its own conclusions, it was stated that "[t]he operating ratios do not reflect any actual separation of interstate and intrastate revenues and expenses or any separation of tobacco revenues and expenses from those on other traffic." Thus, the Commission's order fixing rates in the face of this conclusion was contrary to law.

In their brief, the attorneys for the Commission attempted to eliminate this part of the order by dismissing it as "not necessary to the decision." This Court, however, cannot eliminate a portion of an order and insert a new finding. We must take the order as it is written and assume that the Commission intended to rely on it *in toto.*

Paraphrasing Chief Justice Barnhill in *Utilities Commission v. State,* 243 N.C. 685, 91 S.E. 2d 899, this Court fully realizes that the operating ratios for the movement of tobacco in intrastate traffic cannot be determined with mathematical exactitude. But the carriers can no doubt approximate the rateable proportion of their operating ratios from tobacco movements in intrastate traffic and offer evidence of other facts and circumstances in respect thereto sufficient in probative force to enable the Commission to make findings of fact under our statute and to issue such orders as the findings of

fact may warrant. In any event, this Court knows of no statute or rule of law which denies the carriers the right to attempt to do so.

It may well be that the carriers in this case have presented evidence sufficient to justify findings by the Commission in support of the present order. "It is the prerogative of that agency to decide that question. It is an agency composed of men of special knowledge, observation, and experience in their field, and it has at hand a staff trained for this type of work. And the law imposes on it, not us, the duty to fix rates." *Utilities Commission v. State* and *Utilities Commission v. Telegraph Co.*, 239 N.C. 333, 80 S.E. 2d 133.

[2] The public interest demands and requires that adequate and efficient transportation be provided by the carriers, in return for which they are entitled to proper and compensatory rates. However, when the conclusions show that an order, such as the one in the instant case, is based on an erroneous premise, we can only remand it to the Commission for the entry of a proper order with proper findings and conclusions based on the evidence in the record or for the taking of such additional evidence as the Commission may find necessary.

Remanded.

MALLARD, C.J., and MORRIS, J., concur.

D. M. WRIGHT BUILDERS, INC. v. DORA DORRITY BRIDGERS
No. 6814SC314

(Filed 23 October 1968)

1. Vendor and Purchaser § 2— construction of option

An option, being unilateral in its inception, is construed strictly in favor of the maker.

2. Vendor and Purchaser § 2— acceptance of option

Acceptance of an option must be according to the terms of the option.

3. Vendor and Purchaser § 2— acceptance of option — tender of a counter offer

Where a purported option gives the optionee the right to purchase from the owner "lot No. 2 containing 23 and 6/10 acres" at a price of $600 per acre payable in three annual installments, with no provision in the option for the surveying and platting of the lot, the tender by the optionee of an agreement to purchase the land in tracts of eight acres per year for

three years, with the owner to bear expense for the surveying and platting of the property, is ineffectual as an acceptance of the terms of the option.

4. Vendor and Purchaser § 2— unenforceable option

Purported option *is held* void and unenforceable for uncertainty.

5. Contracts § 2— mutuality of agreement

An essential element of every contract is mutuality of agreement.

6. Contracts § 12— construction of ambiguous writing

Ambiguity in a written contract must be resolved against the party who prepared it.

APPEAL by defendant from *Hall, J.*, at the 15 April 1968 Civil Session of DURHAM Superior Court.

Plaintiff filed its complaint 2 December 1965, alleging that on 27 April 1959 defendant granted plaintiff an option in words and form as follows:

"THIS AGREEMENT, made and entered into this the 27th day of April 1959, by and between Dora D. Bridgers, widow, of Durham County, North Carolina, party of the first part, and D. M. Wright Builders, Inc., a North Carolina Corporation, party of the second part.

That lot No. 2 containing 23 and 6/10 acres as shown on map of property of the Dorrity Estate as subdivided July 20, 1916 by E. C. Belvin, Surveyor, is in a separate agreement from the attached agreement which will be entered into October 15, 1959 or at the time of the final agreement between D. M. Wright Builders, Inc. of Durham, North Carolina and Dora D. Bridgers party of the Dorrity Estate. This separate agreement is that the above mention lot No. 2 containing 23 and 6/10 acres will be sold to D. M. Wright Builders, Inc. at $600.00 per acre, with payment number one on October 15, 1960, second payment October 15, 1961 and third and final payment October 15, 1962. In the event this option is exercised the $200.00 paid for this option will be credited upon the first payment of the above mentioned property.

It is understood that the party of the second part intends to develop said property and build dwelling houses thereon for sale, and that upon the execution of this option it will begin immediately to attempt to secure Federal Housing Administration approval of said property for F. H. A. financing; in the event F. H. A. approval is secured and the party of the second part does not exercise this option the $200.00 paid for said option

shall be forfeited and retained by the party of the first part; if, however, the F. H. A. does not approve said property for F. H. A. financing, said $200.00 shall be returned to the party of the second part.

In the event this option is exercised, the parties hereto agree to enter into a contract of sale to carry out the terms, provisions, conditions, and intent expressed in this option.

The party of the first part agree, if said option is exercised, to release said property to the party of the second part, its successors or assigns, by warrenty [sic] deed conveying a good and marketable fee simple title to the property so released, upon payment of the purchase price as herein set out.

This option and all rights hereunder may be assigned by either the party of the first part or the party of the second part, and if assigned by the party of the second part, any and all acts to be performed by it under this option or the contract to be entered into pursuant hereto, may be performed by such assigns, whether such assignment be made before or after the exercise of this option.

IN WITNESS, WHEREOF, I have hereunto set my hands and seals, this the day and year first above written.

s/ DORA D. BRIDGERS (SEAL) ..... (SEAL)"

Plaintiff further alleged that on or before 15 October 1959 and on several occasions thereafter, plaintiff attempted to exercise the option by asking defendant to execute a contract of sale which it tendered to defendant. Plaintiff also alleged its present willingness to perform and the continued refusal of the defendant, and prayed for specific performance.

Defendant answered 31 January 1966, admitting the granting of an option, under seal, but denying that plaintiff ever exercised the option within its terms, contending that any efforts to that end amounted only to counter offers.

The case was submitted to the jury on the following agreed issue: "Did the plaintiff unconditionally exercise the option referred to in the complaint on or before October 15, 1959?" From an affirmative answer by the jury and judgment for plaintiff thereon, defendant appealed.

Nye & Mitchell for plaintiff appellee.

Arthur Vann for defendant appellant.

BRITT, J.

Defendant assigns as error the refusal of the trial court to allow her motion for judgment as of nonsuit interposed at the conclusion of plaintiff's evidence and renewed at the conclusion of all the evidence. The assignment of error is well taken.

Although the parties refer to the paper writing signed by defendant and dated 27 April 1959 as an option, it is doubtful that the document deserves the connotation.

Even if the document is considered an option, the terms are so indefinite as to render its construction impossible. Since both parties — in their pleadings, testimony in the trial court, and briefs and arguments in this Court — consider 15 October 1959 as the operational date, we will consider the document from that standpoint.

[1, 2] An option, being unilateral in its inception, is construed strictly in favor of the maker. *Ferguson v. Phillips,* 268 N.C. 353, 150 S.E. 2d 518. Acceptance of an option must be according to the terms of the option. 2 Strong, N. C. Index 2d, Contracts, § 2; *Winders v. Kenan,* 161 N.C. 628, 77 S.E. 687; *Clark v. Lumber Co.,* 158 N.C. 139, 73 S.E. 793.

[3] The document seems to contemplate that if the plaintiff exercises its option, the parties on 15 October 1959 would enter into a contract of purchase and sale "to carry out the terms, provisions, conditions, and intent expressed in this option." The document refers to one parcel of land, lot No. 2 containing 23.6 acres as shown on a map of the Dorrity Estate. It also provides for $600.00 per acre, "with payment number one on October 15, 1960, second payment October 15, 1961 and third and final payment October 15, 1962." Nothing in the document provides for a division of the 23.6 acres in any manner and particularly into three tracts.

Plaintiff's evidence tended to show that on 5 October 1959, D. M. Wright presented to defendant for her signature an agreement which plaintiff had caused to be prepared. Paragraph numbered 1 was as follows:

> "1. The purchase price to be paid for said property is $600.00 per acre, in lots or tracts not less than 23 acres, the party of the second part to purchase and pay for all of said property within a three year period, said property to be purchased in lots or tracts of not less than 8 acres per year for the first two years and the balance remaining during the three years. The first purchase of not less than 8 acres is $600.00 per acre to be

complete on October 15, 1960, the second purchase by October 15, 1961, and the third and final purchase by October 15, 1962."

Defendant refused to sign the tendered agreement, stating that it did not comply with her agreement of 27 April 1959.

Plaintiff's evidence then showed that on 14 or 15 October 1959, D. M. Wright presented to defendant for her signature another proposed agreement which plaintiff had caused to be prepared. Paragraphs numbered 1 and 2 of that instrument were as follows:

"(1) The party of the second part agrees to purchase on or before October 15, 1960 7.87 acres and will pay the sum of $4,722.00 upon delivery of a proper deed conveying a good and marketable fee simple title to said property, free of encumbrances, the sum of $200.00 which has been heretofore paid by the party of the second part for the option referred to is to be credited against said payment of $4,722.00, making the cash payment due on said October 15, 1960, the sum of $4,522.00; the party of the second part further agrees to purchase an additional 7.87 acres on or before October 15, 1961 and to pay therefor the sum of $4,722.00; the remaining 7.86 acres is to be purchased by the party of the second part on or before October 15, 1962, and to pay therefor the sum of $4,716.00.

(2) In the event the party of the second part desires to purchase said property upon the terms set out in paragraph 1 above, shall give to the party of the first part a 30 days notice, and a survey and plat indicating the acreage desired is to be furnished by the party of the second part, whereupon the party of the first part will have a deed prepared in accordance with said plat and survey; that the expenses of surveying and plating [sic] the outside boundaries of said tract of acreage desired to be purchased is to be borne by the party of the first part, but the party of the second part shall make arrangements for same and see that said plat and survey shall comply with the rules and regulations of all public authorities, and that the same is ready for recordation."

Plaintiff's evidence disclosed that defendant declined to sign the second proposed agreement at that time but indicated that she wanted to send it to her son in Bethesda, Maryland, for him to look over. Later on, after 15 October 1959, she advised Mr. Wright that she would not sign the agreement because it did not comply with the agreement she signed on 27 April 1959.

Assuming, *arguendo*, that the paper writing signed by defendant

was an option, the acceptance attempted by plaintiff was not according to its terms. There was no basis for plaintiff to conclude that it was entitled to purchase the land in three separate tracts. If so, what portion of the 23.6-acre tract would be conveyed in 1960, what portion in 1961, and what portion in 1962?

Paragraph 2 of the second proposed agreement provides for a survey of the property and preparation of a plat and that the expenses of surveying and platting would be borne by defendant. There is no provision in the "option" for a survey or plat or that defendant would pay any expenses in connection therewith. Clearly, the agreement proposed was not in accordance with the "option."

We hold that plaintiff's acceptance, as set forth in either of the two documents which it tendered to defendant for her signature, was not according to the terms of the paper writing dated 27 April 1959.

[4, 5] Viewing the paper writing which defendant signed in its proper light, it was void for uncertainty. We said in *Construction Co. v. Housing Authority,* 1 N.C. App. 181, 160 S.E. 2d 542: "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."

[6] The paper writing signed by defendant was prepared by plaintiff or its agent or attorney. It contains many ambiguities. Any ambiguities found therein must be resolved against the plaintiff. *Coulter v. Finance Co.,* 266 N.C. 214, 146 S.E. 2d 97. *Construction Co. v. Housing Authority, supra.*

We hold that the paper writing dated 27 April 1959 upon which plaintiff bases its action was lacking in sufficient definiteness and clarity to render it an enforceable document.

Defendant's motion for nonsuit made at the close of plaintiff's evidence should have been granted. The judgment of the Superior Court is

Reversed.

BROCK and PARKER, JJ., concur.

DOSSIE ROGERS v. IRVIN NEAL ROGERS AND IRVIN NORMAN ROGERS
No. 6814DC383

(Filed 23 October 1968)

1. **Witnesses § 7; Automobiles § 45— reading from accident report**

In an action for personal injuries and property damage resulting from an automobile accident, it was error to permit an officer on direct examination to contradict his sworn testimony by reading from his accident report after he had stated that he could not testify thereto of his own knowledge and no other proper foundation was made for the admission of the accident report.

2. **Automobiles §§ 33, 90— duty to reduce speed at intersection**

An instruction to the effect that G.S. 20-141(c) requires a motorist to reduce the speed of his vehicle in all circumstances when approaching and crossing an intersection is erroneous, since a motorist traveling within the speed limit is required to decrease his speed at an intersection only when in the exercise of due care he should decrease his speed in order to avoid causing injury to any person or property.

3. **Damages §§ 3, 16— permanent damages — instructions**

It is error for the court to instruct the jury as to permanent injuries and the measure of damages with respect thereto where there is no allegation or evidence of permanent injuries.

4. **Costs § 4— G.S. 6-21.1 — attorney's fee as part of costs**

Under G.S. 6-21.1 the court may allow an attorney's fee to be taxed as part of the costs in a personal injury or property damage action in which the judgment is for $1,000 or less without finding that there has been an unwarranted refusal to pay the claim, such a finding being necessary only when the suit is brought against an insurance company by the insured or beneficiary under a policy issued by such insurance company.

APPEAL by defendants from *Lee, District Court Judge,* 25 March 1968 Civil Session of the District Court of DURHAM County.

Civil action instituted by plaintiff seeking to recover the sum of $300 for property damage and $4,700 for personal injuries alleged to have been incurred as a result of a collision between plaintiff's automobile and an automobile owned by defendant Irvin Neal Rogers (Rogers, Sr.) and operated on 3 April 1966 at about 12:40 P.M. by the defendant Irvin Norman Rogers (Rogers, Jr.). The collision is alleged to have occurred at the intersection of Washington Street and Club Boulevard in the City of Durham at which traffic was controlled by an electric traffic control device.

Plaintiff alleges that the Rogers vehicle was being operated by Rogers, Jr., without keeping a proper lookout, at a speed greater than reasonable and prudent, recklessly in violation of G.S. 20-140, and "in willful and wanton disregard of the traffic light governing

the intersection, in violation of ordinance of the City of Durham and N. C. Gen. Stat. 20-169."

Defendants denied negligence and alleged that plaintiff was contributorily negligent in that he entered the intersection on a red light, entered an intersection after another vehicle traveling from his right to his left had already entered, failed to keep a proper lookout, failed to keep his vehicle under control, and was driving at a speed greater than was reasonable and prudent. Defendant Rogers, Sr., asserts a counterclaim in which he seeks to recover $1,200 as damages to his automobile.

Upon trial, issues were submitted to and answered by the jury as follows:

"1. Was the plaintiff damaged and injured by the negligence of the defendants as alleged in the complaint?

ANSWER: Yes.

2. If so, did the plaintiff, by his own negligence contribute to his injuries and damages as alleged in the answer?

ANSWER: No.

3. What amount, if any, is the plaintiff entitled to recover of the defendants?

ANSWER: $1,000.00

4. Was the defendant, Irvin Neal Rogers, damaged by the negligence of the plaintiff as alleged by the counterclaim?

ANSWER: (blank)

5. What amount, if any, is the defendant, Irvin Neal Rogers, entitled to recover of the plaintiff?

ANSWER: (blank)"

Judgment was rendered on the verdict, and the defendants assigned error and appealed to the Court of Appeals.

Rudolph L. Edwards for plaintiff appellee.

Bryant, Lipton, Bryant & Battle by Alfred S. Bryant for defendant appellants.

MALLARD, C.J.

[1] Defendants contend, and we agree, that it was error to permit the officer to testify by reading from his accident report after he stated that he could not testify thereto of his own knowledge af-

ter refreshing his memory and no other proper foundation was made for the admission of the officer's accident report. The officer also testified that the defendant Irvin Norman Rogers did not tell him anything and then was asked by plaintiff's attorney and answered over defendant's objection, as follows:

"Q. Did he tell you that he speeded up to beat the red light?

A. According to my report, yes sir."

Thus, the witness on direct examination was permitted to contradict his sworn testimony by reading his accident report. This evidence was incompetent and prejudicial. *State v. Walker,* 269 N.C. 135, 152 S.E. 2d 133; see also Stansbury, N. C. Evidence 2d, § 33.

The contention of the defendants that the judge should have nonsuited the case is without merit. There was ample evidence of the negligence of the defendants to require the case to be submitted to the jury. Since the case goes back for a new trial, we refrain from discussing the evidence in detail.

[2] The defendants contend that the court committed error in its charge concerning speed at an intersection when the judge instructed the jury relative to violations of statutes:

"The first one I want to call to your attention is General Statute 20-141 which provides in substance, that no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing, and a violation of that statute would be negligence, and if it were a proximate cause of injury it would be actionable negligence. The same statute fixes a maximum speed in various districts.

We are not concerned with any violations of the stated speed limit, but that same section goes on to say in subsection 'C' that the speed of a vehicle is lower than the maximum limit, shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection.

. . . or if he failed to decrease his speed when approaching the intersection that such conduct would constitute negligence. . . ."

This instruction does not comply with the provisions of G.S. 20-141(c). This statute does not require the driver of a vehicle to reduce the speed of his vehicle in all circumstances when approaching and crossing an intersection.

The fact that the speed of a vehicle is lower than the maximum speed limit at that particular place does not relieve the driver thereof

from the duty to decrease speed when approaching and crossing an intersection, *when in the exercise of due care he should decrease his speed in order to avoid causing injury* to any person or property, and a failure to do so is negligence *per se*, and if the proximate cause of an injury would create liability. *McNair v. Goodwin*, 264 N.C. 146, 141 S.E. 2d 22; *Bass v. Lee*, 255 N.C. 73, 120 S.E. 2d 570; *Hutchens v. Southard*, 254 N.C. 428, 119 S.E. 2d 205; *Primm v. King*, 249 N.C. 228, 106 S.E. 2d 223; *Day v. Davis*, 268 N.C. 643, 151 S.E. 2d 556.

[3] Defendants also contend that the court committed error in its instructions to the jury with reference to the issues of damages. The court instructed the jury as to permanent injuries and the measure of damages with respect thereto. There was no allegation of permanent injury and no evidence has been called to our attention indicating that the injuries of the plaintiff are permanent. It is error to charge on permanent damages if such are not alleged and proven. *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E. 2d 753; *Short v. Chapman*, 261 N.C. 674, 136 S.E. 2d 40. Our Supreme Court has held that it is error to charge on an abstract principle of law that is not raised by the pleadings and supported by the evidence. *Dunlap v. Lee*, 257 N.C. 447, 126 S.E. 2d 62; *Vann v. Hayes*, 266 N.C. 713, 147 S.E. 2d 186.

[4] Defendants also contend that the court committed error in awarding plaintiff's attorney a fee in the amount of $300 and ordering that such be taxed as a part of the costs. We do not agree with defendants' contention that the statute is not clear as to whether the court, before awarding an attorney's fee, must find in all cases that there is an unwarranted refusal to pay the claim. This contention is without merit.

This section of the statute was enacted in 1959 and numbered 6-21.1. After an amendment in 1963, it read in part: "In any personal injury or property damage suit, instituted in a court of record, where the judgment for recovery of damages is one thousand dollars ($1,000.00) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee . . ." to be taxed as a part of the costs.

In 1967 the statute was amended to read as follows:

"§ 6-21.1. Allowance of counsel fees as part of costs in certain cases. — In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there

was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is one thousand dollars ($1,000.00) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs."

From the language used in this statute, it is clear, we think, that it is only when the suit is brought against an insurance company by the insured or beneficiary, as plaintiff, under a policy issued by such insurance company that there must be a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim before attorney fees may be allowed as a part of the costs when the judgment for recovery of damages is one thousand dollars or less. No such finding is required in a personal injury or property damage suit which otherwise meets the statutory requirements.

Defendants propound other questions and make other contentions, all of which have been carefully examined. Some are not presented for determination on this record, some are without merit, and some may not occur on a retrial of this case. We, therefore, do not deem it necessary to discuss them since there must be a

New trial.

CAMPBELL and MORRIS, JJ., concur.

W. T. YANCEY AND WIFE, LAURA C. YANCEY, AND EDWARD A. MORTON AND WIFE, ALICE G. MORTON v. LOUISE H. WATKINS, WIDOW; LOUISE H. WATKINS, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF G. B. WATKINS, DECEASED; LOUISE H. WATKINS, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF G. B. WATKINS, DECEASED, FOR CHARLES THOMAS WATKINS, MINOR; LOUISE H. WATKINS, GUARDIAN OF CHARLES THOMAS WATKINS, A MINOR, AND CAROLYN LOUISE WATKINS CHEATHAM AND HUSBAND, JOHN GORDON CHEATHAM, JR.

No. 689SC271

(Filed 23 October 1968)

1. Estoppel § 4— equitable estoppel — pleading and proof

In order to raise the doctrine of equitable estoppel, the pleadings and the evidence must show, *inter alia*, that (1) the party against whom the

estoppel is alleged had knowledge of the true facts at the time misrepresentation or concealment of a material fact was made, and that (2) the truth respecting the representation was unknown to the party claiming benefit of the estoppel at the time it was made.

2. Partition § 4— plea of sole seizin

Where respondents in a proceeding for partition deny that petitioners own any interest in the land, the proceeding is converted into a civil action to try title.

3. Estoppel § 7— pleading of equitable estoppel

A party relying on the doctrine of equitable estoppel must plead the doctrine with particularity.

4. Appeal and Error § 10— motion to amend pleadings

Court of Appeals denies appellant's motion to be allowed to file additional or amended pleadings pursuant to Rule of Practice 20(c) in order to interpose a plea of estoppel *in pais*, appellant's evidence being insufficient to support the plea.

APPEAL by petitioners Yancey from *Bowman, S.J.*, at the April 1968 Session of GRANVILLE Superior Court.

This was originally a special proceeding to sell land for partition. The petition alleged that petitioners W. T. Yancey and E. A. Morton and respondents were tenants in common of a certain tract of land in Walnut Grove Township, Granville County, containing approximately 178 acres; that said petitioners each owned a one-third interest and respondents owned the remaining one-third; and that actual partition could not be made without injury to some or all of the parties.

Respondents answered and pleaded sole ownership of two-thirds interest in the realty; they admitted that E. A. Morton owned one-third interest but denied that Yancey owned any interest. By consent, an order was entered providing for a sale of the lands, with one-third of the proceeds to be paid to respondents, one-third to petitioners Morton, and the remaining one-third paid into the clerk's office pending final determination of ownership.

Jury trial was waived by all parties. It was stipulated at the trial that petitioners Yancey (appellants) did not have any recorded or unrecorded deed or other paper writing of any nature purporting to convey any interest in the subject property to them.

Appellants' evidence included the following: A deed from T. Lanier, trustee, to R. C. Watkins, dated 3 November 1924, conveying 178-acre tract; a deed for a one-third undivided interest in the land in question from R. C. Watkins and wife to Bessie C. Morton,

containing the following recital: "That Whereas, on the 5th day of November, 1924, R. C. Watkins purchased the land hereinafter described, and by a written contract agreed to convey to S. V. Morton and W. T. Yancey a one-third interest each in said land, upon payment by each of them of $314.50; AND WHEREAS, S. V. Morton, in his lifetime, paid said sum to R. C. Watkins but never procured a deed for his interest in said land * * *"; a deed for a one-third undivided interest in the land in question from Bessie Morton to Edward A. Morton, petitioner herein; records indicating G. B. Watkins was sole heir of R. C. Watkins; a tax abstract for the year 1958 signed by G. B. Watkins, indicating that the lands in issue were listed for taxes in the name of G. B. Watkins, W. T. Yancey and E. A. Morton; paid checks for two-thirds of the taxes on the lands in issue for each of the years 1963, 1964, 1965 and 1966, drawn on the account of G. B. Watkins and W. T. Yancey; record of a bank deposit made in the year 1966 showing checks by Yancey, Watkins and Morton issued to the depositor for survey work; and 1943 tax listings in the name of W. T. Yancey, R. C. Watkins and Bessie Morton. Respondent appellees are heirs at law and beneficiaries under the Last Will and Testament of G. B. Watkins, who died in January 1967.

The evidence disclosed that appellant, W. T. Yancey, and G. B. Watkins jointly owned several parcels of real estate and that the subject property was wooded land.

At the close of petitioners' evidence, respondents' motion for judgment as of nonsuit was allowed. Petitioners Yancey appealed.

Royster & Royster and Hicks & Taylor by Edward F. Taylor for petitioner appellants.

Watkins & Edmundson for respondent appellees.

BRITT, J.

The first question presented by this appeal is whether the pleadings and evidence offered by the appellants, when taken in the light most favorable to them, are sufficient to sustain the doctrine of equitable estoppel and thus withstand a motion for nonsuit.

[1] The essentials of an equitable estoppel (also known as estoppel *in pais*) are set forth in the case of *Boddie v. Bond,* 154 N.C. 359, 70 S.E. 824, as follows:

> "1. Words or conduct by the party against whom the estoppel is alleged, amounting to a misrepresentation or concealment of material facts.

"2. The party against whom the estoppel is alleged must have knowledge, either actual or implied, at the time the representations were made, that they were untrue.

"3. The truth respecting the representations so made must be unknown to the party claiming the benefit of the estoppel at the time they were made and at the time they were acted on by him.

"4. The party estopped must intend or expect that his conduct or representations will be acted on by the party asserting the estoppel, or by the public generally.

"5. The representations or conduct must have been relied and acted on by the party claiming the benefit of the estoppel.

"6. The party claiming the benefit of the estoppel must have so acted, because of such representations or conduct, that he would be prejudiced if the first party be permitted to deny the truth thereof."

These criteria have been repeatedly cited, approved and applied. *In re Will of Covington,* 252 N.C. 546, 114 S.E. 2d 257; *Hawkins v. Finance Corp.,* 238 N.C. 174, 77 S.E. 2d 669; *Self Help Corp. v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889; *Thomas v. Conyers,* 198 N.C. 229, 151 S.E. 270; *Sugg v. Credit Corporation,* 196 N.C. 97, 144 S.E. 554.

Appellants failed to offer sufficient evidence to invoke the doctrine of equitable estoppel. In many respects they failed to meet the criteria set forth in *Boddie v. Bond, supra.* For example, they offered no proof showing knowledge of the true facts by appellees or their predecessor in title as required by criteria 2. Furthermore, assuming that R. C. Watkins and G. B. Watkins made representations to the effect that W. T. Yancey owned one-third interest in the property, Mr. Yancey, of all people, was in position to *know* if he had complied with his alleged agreement with R. C. Watkins and had obtained a deed for his interest in the property; thus, criteria 3 is not met, as the truth respecting the representations was not unknown to W. T. Yancey.

The trial judge properly allowed the motion for judgment as of nonsuit.

[2, 3] Appellees contend that inasmuch as appellants did not plead equitable estoppel, they cannot properly rely on the doctrine. This contention is sound.

Where respondents in a proceeding for partition deny that peti-

tioners own any interest in the land, the proceeding is converted into a civil action to try title. *Skipper v. Yow,* 249 N.C. 49, 105 S.E. 2d 205.

In *Alley v. Howell,* 141 N.C. 113, 53 S.E. 821, the plaintiffs, in an action to try title, alleged that they were "owners and entitled to the possession." It was held that evidence of fraud in the treaty and undue influence were properly excluded, the court saying: "This has been the settled practice and rests upon the principle of fair play, that those matters only should be contested at the trial which come within the scope of the allegations. It is true, the averments here omitted were matters of equitable jurisdiction under the former system of pleading, but it is not on that ground that they are required to be pleaded, but because when the plaintiffs merely allege, as here, that they are 'owners and entitled to the possession,' the defendant has notice only that his legal title is assailed." This was cited in *Toler v. French,* 213 N.C. 360, 196 S.E. 312, which case also held that an equitable defense must be pleaded in order to be proved.

In *Keen v. Parker,* 217 N.C. 378, 8 S.E. 2d 209, it is stated: "But matters in the nature of an estoppel *in pais,* whether relied upon affirmatively, or by way of defense, must be pleaded."

It is fairly clear that a defendant must plead the doctrine of estoppel with particularity, except in cases of ejectment from possession or trespass, or where it is apparent from the face of the record. *Upton v. Ferebee,* 178 N.C. 194, 100 S.E. 310.

[4] Appellants have filed a motion in this Court asking that they be allowed to file additional or amended pleadings as provided in Rule 20(c) in order to interpose a plea of estoppel *in pais,* if in the opinion of the Court such plea is necessary to the equitable determination of the rights of the parties.

Due to the insufficiency of appellants' evidence to support their plea of equitable estoppel, nothing would be gained by granting their motion to amend their pleadings; therefore, the motion is overruled.

The judgment of the Superior Court is

Affirmed.

BROCK and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. GEORGE T. BURGESS, JR.
No. 6814SC253

(Filed 23 October 1968)

1. Criminal Law § 34— evidence of criminal record

In a prosecution for forgery and uttering a forged instrument, the court erred in admitting testimony concerning defendant's prior criminal record where defendant offered no evidence and did not testify in his own behalf.

2. Criminal Law § 162— failure to object at trial

In a prosecution for forgery and uttering a forged instrument, the competency of the identification and introduction of pistols taken from defendant's briefcase and ammunition found in defendant's automobile is not presented on appeal where there was no objection at the trial to the admission of such evidence.

APPEAL by defendant from *Hall, J.*, 5 February 1968 Criminal Session of DURHAM Superior Court.

The defendant was indicted, pleaded not guilty, and upon trial the jury returned a verdict of guilty in a two-count indictment of unlawfully and feloniously forging and uttering a check with intent to defraud. On trial, the evidence of the State tended to show that the defendant, together with an accomplice, filled in the blanks on some stolen checks and cashed them at a clothing and jewelry store in the city of Durham. The evidence also tended to show that the checks were stolen in Richmond and partially completed there and that the defendant came to Durham with the avowed purpose of passing the forged checks, and that the checks were completed on their face by the defendant and were endorsed and cashed by the co-defendant, Ross Robert Allea, who entered a plea of guilty.

Attorney General Thomas Wade Bruton by Assistant Attorney General Bernard A. Harrell for the State.

Norman E. Williams for defendant appellant.

MALLARD, C.J.

[1] In his brief, the defendant asserts that there are four questions presented by his appeal. Only one of these questions is necessary to the disposition of this appeal. It is: Did the court err in allowing the jury to hear testimony concerning the prior criminal record of the defendant when he offered no evidence and did not testify in his own behalf?

During the course of the trial, the solicitor was questioning co-defendant Ross Robert Allea, and the following occurred:

"Q. What, if anything, else did the defendant tell you about himself which led you to believe that he was a person of such experience that you all could carry this off successfully?

A. Well, he was bragging about killing his wife.

OBJECTION.

SUSTAINED.

A. He told me about his previous criminal record, that he had been in prison for several years on several counts.

OBJECTION.

OVERRULED."

The Attorney General with commendable frankness admits in his brief "that the one sentence referred to in the evidence does not appear to be readily relevant to the issues in the case" and that "ordinarily, the admission of such testimony into evidence would undoubtedly constitute fatal and prejudicial error." However, the Attorney General seeks to distinguish this case on the grounds that the admission of this testimony did not constitute prejudicial error. While we agree with the initial contentions of the Attorney General, we are unable to agree with the latter.

In *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364, we find the following: "Since evidence of other crimes is likely to have a prejudicial effect on the fundamental right of the accused to a fair trial, the general rule of exclusion should be strictly enforced in all cases where it is applicable." The present case is a case where strict enforcement of the general rule of exclusion should be strictly adhered to. Here, it would appear that the testimony of his prior criminal record was incompetent and calculated to prejudice the minds of the jurors against the defendant. Where prejudicial and incompetent evidence has been admitted, a new trial will be awarded. *State v. Rinaldi,* 264 N.C. 701, 142 S.E. 2d 604.

[2] The other question we discuss which defendant attempted to raise relates to the identification and introduction of two pistols and some ammunition. The defendant was being tried for forgery and uttering a forged instrument. The evidence tended to show that the defendant had the pistols in his briefcase, and the ammunition was found in the car in which the defendant was riding. The evidence does not show, or infer, that these pistols and this ammunition had any connection with the crimes for which the defendant was being tried. The defendant contends that their admission in evidence was prejudicial error. If anyone, except when on his own premises, shall

wilfully and intentionally carry concealed about his person any pistol or other deadly weapon, he shall be guilty of a misdemeanor. G.S. 14-269. The defendant was not being tried for a violation of this statute. However, the defendant did not make proper objection to the identification and introduction of the pistol and ammunition and, therefore, these questions are not properly presented for decision on the record. Since the case goes back for a new trial, we deem it proper to discuss this phase of the case.

It is established law in North Carolina that "the competency of evidence is not presented when there is no objection or exception to its admission." 7 Strong, N. C. Index 2d, Trials, § 15, p. 277 (1968).

The other questions presented by the defendant are not discussed for the reason that they may not occur on a new trial.

New trial.

CAMPBELL and MORRIS, JJ., concur.

NORTH CAROLINA STATE HIGHWAY COMMISSION v. NANNIE B. MEADOWS THOMAS AND HUSBAND, FRED THOMAS; DR. HAROLD KEENER; W. T. BENNETT, T/D/B/A BENNETT'S DRUG STORE

No. 68SC224

(Filed 23 October 1968)

1. Trial § 33; Damages § 16— instruction on damages

The court must give sufficiently definite instructions on the issue of damages to guide the jury to an intelligent determination of the issue.

2. Trial § 32— purpose of instructions

The purposes of the court's charge to the jury are the clarification of the issues, the elimination of extraneous matters, and the declaration and explanation of the law arising on the evidence in the case.

3. Eminent Domain § 5— highway condemnation — instruction on damages

In highway condemnation proceedings under G.S. Ch. 136 wherein the evidence relating to landowners' damages was lengthy and conflicting, trial court's instruction on measure of damages that "just compensation is had when the balance is struck between the damages, if any, suffered by the landowners," *is held* prejudicial to the landowners.

4. Eminent Domain § 5— highway condemnation — instruction on damages

In highway condemnation proceedings under G.S. Ch. 136, trial court's

instruction that jury could answer the issue of landowners' damages "nothing" *is held* error when all of the evidence introduced by the Highway Commission and the defendants showed that defendants' property had been substantially damaged by the taking and there was no evidence that the property received any benefits from the taking.

5. Eminent Domain § 5— general and special benefits — burden of proof

The burden is on the condemnor to prove the existence of general and special benefits as actual and appreciable, not merely conjectural or hypothetical.

APPEAL by defendants from *Beal, S.J.,* at the 11 December 1967 Civil Session of BUNCOMBE Superior Court.

This is a condemnation case in which the sole issue at the trial was the amount due the defendants as compensation for the taking of their property by the State Highway Commission, pursuant to the provisions of Chapter 136 of the General Statutes. The complaint, declaration of taking and notice of deposit were filed 17 August 1964.

The pleadings and evidence showed the following: Defendants Thomas were the owners of a parcel of business property located on the south side of Haywood Road in the city of Asheville, and more particularly in the business section of the community known as West Asheville. The property contained a frontage of 130.88 feet on Haywood Road, and in the northwestern corner the owners had constructed a two-story business building containing approximately 8320 feet of floor space on both floors, the building fronting 64.5 feet on Haywood Road. The remainder of the land had been paved and used as a parking lot for the use of occupants and patrons of the building. Defendants Keener and Bennett were lessees of portions of the building. The first floor was occupied by a clothing store and a drug store while the upper floor was rented to two doctors, a dentist, and a beautician. Among other business establishments, filling stations, a food store, a cafe, an ice company, and a cleaning firm were adjacent to Haywood Road in the area.

This action arises out of condemnation of the entire parking lot of the defendants for use as a ramp leading to Interstate 40, which was being constructed to cross Haywood Road at this point.

Defendants offered opinion testimony of the net damage ranging from $56,000 to $82,000. Plaintiff's evidence as to damage varied from $18,500 to $21,000. In the testimony, defendants emphasized the practical necessity of off-street parking in making the best use of the property.

Defendants appealed from a jury verdict of $32,500, assigning errors in the admission and exclusion of evidence and in the charge to the jury.

Attorney General T. Wade Bruton, Deputy Attorney General Harrison Lewis and Assistant Attorney General Andrew McDaniel for the State.

Harold K. Bennett for defendant appellants.

BRITT, J.

Defendants assign as error numerous portions of the trial judge's charge to the jury, including the following:

> "Now, gentlemen of the jury, all the landowners claim is that their property shall not be taken for public use without just compensation. Just compensation is had when the balance is struck between the damages, if any, suffered by the landowners."

[1, 2] The amount of compensation due defendants for the taking of their property was the only question to be determined by the jury. It is elementary that under G.S. 1-180 the trial judge "shall declare and explain the law arising on the evidence given in the case." The court must give sufficiently definite instructions on the issue of damages to guide the jury to an intelligent determination of the issue. 7 Strong, N. C. Index 2d, Trial, § 33, citing *Adams v. Service Co.*, 237 N.C. 136, 74 S.E. 2d 332, and *Kee v. Dillingham*, 229 N.C. 262, 49 S.E. 2d 510. The purposes of the court's charge to the jury are the clarification of the issues, the elimination of extraneous matters, and the declaration and explanation of the law arising on the evidence in the case. *Fish Co. v. Snowden*, 233 N.C. 269, 63 S.E. 2d 557.

[3] The evidence in the instant case was very conflicting. Defendants offered twelve witnesses who gave their opinions as to the damage done to the property by the taking; many of the witnesses went into minute detail as to how they arrived at their opinions, and all of the witnesses were cross-examined at length. Their testimony tended to show that defendants suffered damage to the extent of at least $56,000. Plaintiff offered four witnesses who gave their opinions as to the damage, and they were subjected to lengthy cross-examination. The lowest estimate of damage by a plaintiff's witness was $18,500.

With all of the lengthy and conflicting testimony before them, it can be assumed that the jury was listening very intently to the judge's charge "to guide the jury to an intelligent determination of

the issue." How did the jury interpret the trial judge's words "[j]ust compensation is had when the balance is struck between the damages, if any, suffered by the landowners"? Did the jury interpret this to mean that it should "strike a balance" between the lowest figure given by plaintiff's witnesses and the highest figure given by defendants' witnesses? Or, did the term "strike a balance" hold some other meaning for the jury? Of course, we cannot answer these or other questions that might have arisen in the minds of the jury as the result of this instruction. We hold that the instruction was error and that it was prejudicial to the defendants.

[4] Immediately following the portion of the charge above-quoted, the trial judge instructed the jury to determine the fair market value of the entire tract of land, immediately before the taking and immediately after the taking. He then charged:

> "The difference in these two figures will be your answer to the issue. It may be nothing or it may be any amount that you, the jury, find to be just and correct, according to the rules which the Court has laid down for your guidance."

A little later in the charge, he instructed as follows:

> "After you have arrived at a fair market value of the entire tract immediately before and prior to the time of taking, and the fair market value of the remainder of the tract after the taking, under the rules of law which the Court has given to you, and there is no difference, if you should find that there is no difference in the two values, you would answer the issue submitted to you: nothing or none. Should you find that the fair market value of the remaining property has not been diminished or damaged, why then, of course, you would not arrive at any or assess any damage to that particular portion of the property."

Defendants assert that both of said portions of the charge were erroneous, contending that the trial judge erred in charging that the jury could answer the issue "nothing" when all of the evidence introduced by plaintiff and defendants showed that defendants' property had been damaged substantially by the taking, and there was no evidence that the property received any benefits from the taking.

[5] The burden is on the condemnor to prove the existence of general and special benefits as actual and appreciable, not merely conjectural or hypothetical. 3 Strong, N. C. Index 2d, Eminent Domain, § 5, citing *Kirkman v. Highway Commission*, 257 N.C. 428, 126 S.E. 2d 107. The assignments of error are well taken. The last two portions of the charge quoted were particularly objectionable when con-

sidered along with the first portion quoted and, no doubt, tended to confuse the jury even more.

We refrain from discussing the other questions raised in defendants' brief, as they may not recur upon a retrial of this action.

New trial.

CAMPBELL and MORRIS, JJ., concur.

STATE v. CLYDE SILER
No. 6815SC348

(Filed 23 October 1968)

1. Intoxicating Liquor § 12; Criminal Law § 167— evidence in jury view but not introduced

In a prosecution for the illegal possession of nontaxpaid and taxpaid whiskey, it was not prejudicial error for the solicitor to take a number of empty whiskey bottles out of a bag and not introduce them into evidence.

2. Criminal Law § 132— motion to set aside verdict

A motion to set aside the verdict is addressed to the discretion of the trial court, and the court's failure to grant such a motion will not be disturbed where no abuse of discretion is asserted or shown.

3. Criminal Law §§ 134, 142, 150— ambiguous judgment — judgment changed when notice of appeal given

Where the record shows that the court imposed a term of imprisonment and then suspended the sentence and placed defendant on probation, that defendant gave notice of appeal, and that the court ordered "the suspended sentence and probation period be stricken of record in this case," the Court of Appeals *ex mero motu* orders that the judgment be stricken and remands the cause to the Superior Court for resentencing, since it is not clear whether the sentence imposed was ordered stricken, or whether only the part of the judgment suspending the sentence and placing defendant on probation was stricken, and since the record does not reveal whether the judgment was changed because the defendant appealed.

APPEAL by defendant from *Bailey, J.*, 6 May 1968 Session of Superior Court of CHATHAM County.

Defendant was charged in a warrant which reads as follows:

"W. C. Willette being duly sworn, complains and says, that at and in said County, and Matthews Township on or about the 1st day of March, 1968, Clyde Siler did unlawfully, wilfully,

have in his possession a quantity of non-taxpaid whiskey, tax-paid whiskey and beer and did have same for the purpose of sale against the form of the statute in such cases made and provided, and contrary to law and against the peace and dignity of the State."

Upon a plea of not guilty, the jury returned a verdict of guilty of the possession of non-tax-paid whiskey.

The defendant appealed to the Court of Appeals.

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

Seawell, Van Camp & Morgan by William J. Morgan for defendant.

MALLARD, C.J.

[1] The State offered evidence which, in substance, tends to show that the Sheriff of Chatham County, together with other officers, pursuant to a search warrant, searched the premises of the defendant. Upon entering the defendant's house, they found a small quantity of non-tax-paid whiskey, approximately two pints of tax-paid whiskey, "thirty-one cans of beer, several empty whiskey bottles in the kitchen and a number of glasses." The defendant was also being tried for illegal possession of tax-paid whiskey. The record shows that the solicitor "pulled a lot of empty whiskey bottles out of a paper bag," but did not introduce them into evidence. This occurred after the State had introduced a fruit jar in evidence containing a quantity of liquid identified as "a small amount of non-taxpaid whiskey."

The defendant's contention that it was prejudicial error under the State's evidence in this case for the solicitor to take these whiskey bottles out of the bag and not introduce them into evidence is without merit.

[2] There was ample evidence to take the case to the jury and to support the verdict. The defendant testified, "I do not know anything at all about who brought this liquor or who put it in my house." The court did not commit error in failing to set aside the verdict. Such a motion is addressed to the discretion of the trial court, and no abuse of discretion is asserted or shown. 3 Strong, N. C. Index 2d, Criminal Law, § 132 (1967).

There were no exceptions taken, nor errors alleged, relating to

the charge of the court. The defendant had a fair trial, free from prejudicial error.

[3] The following appears in the record:

> "Judgment of the court is let defendant be confined in the common jail of Chatham County for a term of twenty-four (24) months to be assigned to work under the supervision of the North Carolina Department of Correction. Sentence suspended, defendant placed on probation for a period of five (5) years on condition he not use or have in his possession any alcoholic beverages of any description whatsoever during period of probation; pay the costs of this action, and pay this under supervision of probation officer, and further that he not permit any alcoholic beverages of any description on his premises and further that he permit State ABC Officer and the Chatham County Sheriff's Department when in uniform to search premises without a search warrant at any time to determine whether or not he has violated orders. Defendant gives notice of appeal in open court. *The court orders the suspended sentence and probation period be stricken of record in this case.*" (emphasis added)

In the preceding sentence it is not clear whether the prison sentence which the trial judge imposed and then suspended was ordered stricken, or whether only that part of the judgment suspending the sentence and placing the defendant on probation was stricken. Also, the record does not reveal whether the judgment was changed because the defendant appealed. See *State v. Rhinehart,* 267 N.C. 470, 479, 148 S.E. 2d 651; *State v. Patton,* 221 N.C. 117, 19 S.E. 2d 142.

Therefore, *ex mero motu,* it is ordered that the judgment entered herein be stricken and this cause is hereby remanded to the Superior Court of Chatham County in order that the defendant may be resentenced and a proper judgment may be entered upon the jury verdict against him of guilty of the possession of non-tax-paid whiskey.

Remanded.

CAMPBELL and MORRIS, JJ., concur.

APPENDIX:
AMENDMENTS TO RULES

WORD AND PHRASE INDEX

ANALYTICAL INDEX

AMENDMENTS TO SUPPLEMENTARY RULES OF THE SUPREME COURT OF NORTH CAROLINA, 1 N.C.App. 657, AS FOLLOWS:

Delete Rule 3, including amendments thereto adopted April 30, 1968, and insert the following in lieu thereof:

"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, 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) when the appeal is based on involvement of a substantial constitutional question, specify in the notice of appeal the article and section of the Constitution allegedly involved and state was 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).

All appeals under G.S. 7A-30 shall be docketed in the Supreme Court within ten (10) days after giving the required notice of appeal.

The Supreme Court shall calendar the cause for hearing at any time it may deem appropriate after the expiration of twenty-eight (28) days from the date on which the cause was docketed in the Supreme Court.

The appellant's brief must be filed within ten (10) days after the appeal is docketed, and the appellee's brief must be filed within twenty (20) days after the appeal is docketed."

Amend Rule 8 of the Supplementary Rules by substituting the word "ten" for the word "fourteen" in the second sentence, and by substituting the words "twenty days" for the words "twenty-one days" in the third sentence.

Court to be mimeographed within the time required by the rules of this Court, the appeal will be dismissed on motion of appellee unless for good cause shown the Court shall give further time to print the brief.

Delete Rule 29 and insert the following in lieu thereof:

"29. Appellee's Brief.

Within the time required by the rules of this Court, the appellee shall file with the clerk a copy of his brief for mimeographing, and the same shall be noted by the clerk on his docket and a copy furnished by the clerk, on application, to counsel for appellant. It is not required that 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 by the appellee unless for good cause shown the Court shall give appellee further time to file his brief.

Adopted by the Court in conference on 11 December 1968.

HUSKINS, J.
For the Court

AMEND RULE 19, RULES OF PRACTICE IN THE COURT OF APPEALS OF NORTH CAROLINA, BY DELETING PARAGRAPH (d)(2) AND REWRITING RULE 19(d) TO READ AS FOLLOWS:

(d) Evidence — How Stated. The evidence in case 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 this Court will, in its discretion, hear the appeal, dismiss the appeal or remand for a settlement of the case on appeal to conform to this rule. The stenographic transcript of the evidence in the trial court may not be used as an alternative to narration of the evidence.

This amendment shall become effective on July 1, 1969, and shall apply to all appeals docketed for hearing in the Court of Appeals at the Fall Term 1969 and thereafter.

This is to certify that the foregoing amendment to Rule 19(d), Rules of Practice in the Court of Appeals of North Carolina, was prescribed and adopted by the Supreme Court in conference on the 11th day of February, 1969, pursuant to authority contained in G.S. 7A-33.

HUSKINS, J.
For the Supreme Court

AMEND RULE 50, RULES OF PRACTICE IN THE COURT OF APPEALS OF NORTH CAROLINA, BY DELETING SAID RULE AS ADOPTED ON 11 FEBRUARY 1969 AND REWRITING SAME TO READ AS FOLLOWS:

50. Case on Appeal — Extension of Time for Service of.

If it appears that the case on appeal cannot be served within the time provided by statute, rule, or order, the trial judge (or the Chairman of the Industrial Commission or the Chairman of the Utilities Commission as the case may be) may, for good cause and after reasonable notice to the opposing party or counsel, enter an order or successive orders extending the time for service of the case on appeal and countercase or exceptions to the case on appeal, provided this does not alter the provisions of Rule 5 relating to the docketing of the record on appeal.

This is to certify that the foregoing Rule as amended was prescribed and adopted by the Supreme Court in conference on the 18th day of February, 1969.

HUSKINS, J.
For the Supreme Court

WORD AND PHRASE INDEX

Accidental Death — Failure to show death within terms of policy, *Williams v. Ins. Co.*, 520; in automobile accident, *Kinney v. Ins. Co.*, 597; distinguished from accidental means, *Kinney v. Ins. Co.*, 597.

Accidental Killing—Defense of, *S. v. Adams*, 282.

Accomplice — Declarations by during robbery admitted into evidence, *S. v. Russ*, 377; instruction that Treasury Agent was accomplice in making unlawful sale of whiskey, *S. v. Ransom*, 613.

Actionable Negligence—In operation of automobile leaving road without collision, *Maynor v. Townsend*, 19.

Adjoining Property—Cross easements in, *Buie v. Phillips*, 447.

Adjustment of Losses—In determining fire insurance rates, *In re Filing by Fire Ins. Rating Bureau*, 10.

Administrative Law—County Board of Adjustment is quasi-judicial body, *Jackson v. Board of Adjustment*, 408; due process is met by fair hearing before administrative tribunal, *Civil Service Board v. Page*, 34; municipal fireman properly discharged for disobeying order of superior, *Civil Service Bd. v. Page*, 34.

Adultery—Action for alienation of affections and criminal conversation, *Warner v. Torrence*, 384.

Adverse Possession—Of marshlands allegedly owned by State, *S. v. Brooks*, 115.

Affidavit — Requisites of under Tort Claims Act, *Brooks v. University*, 157.

Agency—Husband is not jure mariti the agent of his wife, *Clark v. Morris*, 388

Aiding and Abetting—Words of guilty of added to verdict of not guilty treated as surplusage, *S. v. Hamrick*, 227; instruction that Treasury Agent was aider and abettor in making unlawful sale of whiskey, *S. v. Ransom*, 613.

Airport Authority—Injunction to restrain pending appeal, *Airport Authority v. Irvin*, 341.

Alcoholic—Competency of witness defendant contended was an alcoholic, *S. v. Fuller*, 204.

Alibi—Use of documents of prior convictions to establish, *S. v. Green*, 170; instruction on defense of, *S. v. Lovedahl*, 513.

Alimony—See Divorce and Alimony.

Alienation of Affections—Action for, *Warner v. Torrence*, 384.

Amendment — Of complaint during trial, *Inman v. Harper*, 103; of warrant to allege second offense of shoplifting, *S. v. Thompson*, 508; motion to amend after beginning of trial, *Auto Supply Co. v. Equipment Co.*, 531; appeal from order allowing amendment of pleadings is premature, *Pardue v. Speedway*, 403; amendment of complaint in individual action against insolvent corporation where receiver has been appointed, *Trust Co. v. Berry*, 547.

Anticipated Nuisance — Asphalt plant in subdivision is not, *Dorsett v. Development Corp.*, 120.

Appeal and Error—Judgments and orders appealable, *Pardue v. Speedway*, 403; motion to amend answer, *Moss v. Railway Co.*, 50; to amend pleadings, *Yancey v. Watkins*, 672; form and necessity for exceptions and assignments of error, *Trust Co. v. Berry*, 547; exception to judgment, *Highway Comm. v. Rankin*, 452; *Auto Supply v. Equipment Co.*, 531; motion to strike, *Eaton v. Klopman Mills*, 363; *S. v. Woodlief*, 495; ex-

ception to charge, *Taylor v. Carter*, 78; *Womble v. Morton*, 84; necessary parts of record, *Civil Service Board v. Page*, 34; *Moss v. Railway Co.*, 50; use of stenographic transcript required appendix to the brief, *Inman v. Harper*, 103; *Shephard v. Highway Comm.*, 223; matters properly included in record, *Chambers v. Redevelopment Comm.*, 355; exceptions not brought forward deemed abandoned, *Inman v. Harper*, 103; harmless and prejudicial error in admission of evidence, *Payne v. Lowe*, 369; error cured by verdict, *Pickard v. Burlington Belt Corp.*, 97; setting aside verdict and new trial, *Randleman v. Hudson*, 404; review of findings, *Highway Comm. v. Rankin*, 452; review of judgment on motion to nonsuit, *Kinney v. Ins. Co.*, 597.

Appendix to Brief—Necessity for to set forth pertinent evidence where stenographic transcript filed, *Inman v. Harper*, 103; *Shephard v. Highway Comm.*, 223.

"Apt Time" — Objecting to evidence, *Eaton v. Klopman Mills*, 363.

Argument—Of solicitor that defendants were professional crooks is prejudicial, *S. v. Foster*, 109; of solicitor implying collusion between defendant and his witness rendered harmless, *S. v. Mercer*, 152.

Armed Robbery—Allegation of location of offense, *S. v. Green*, 170.

Arrest—Officer's testimony as to basis of arrest not invasion of province of jury, *S. v. Mercer*, 152.

Asphalt Plant—In subdivision is not anticipated nuisance, *Dorsett v. Development Corp.*, 120.

Assault and Battery—Wilful pointing of gun without legal justification, *S. v. Adams*, 282; secret assault, *S. v. Conyers*, 637; indictment, *S. v. Conyers*, 637; lesser degree of offense, *S. v. Conyers*, 637.

Attorney and Client—Disbarment procedure, *State Bar v. Temple*, 91; necessity for counsel in criminal cases, *Parker v. State*, 27; waiver of attorney in misdemeanor case, *S. v. Morris*, 262; attorney's neglect to file answer imputed to defendant, *Meir v. Walton*, 578.

Attorney Fees—Superior Court may award in appeal from Industrial Commission, *Priddy v. Cab Co.*, 331; additional fees for additional Industrial Commission hearing, *Lewis v. Diamond Mills Co.*, 400; as part of costs, *Rogers v. Rogers*, 668.

Attorney General—Duty of the parties to prepare record or case on appeal in criminal prosecutions, *S. v. Hickman*, 627.

Attractive Nuisance—Death of child in unenclosed swimming pool, *Bell v. Page*, 132.

Authentication—Of photographs, *S. v. Fuller*, 204; of written document, *City of Randleman v. Hinshaw*, 381.

Automobile Collision Insurance—In action to collect amount paid under policy, persons promising to indemnify defendant are not necessary parties, *Casualty Co. v. Hall*, 198.

Automobile Liability Policy — Joinder of automobile liability insurers is proper where plaintiff is in doubt as to correct one, *Torres v. Surety Co.*, 208.

Automobiles—Larceny of where record title is in husband and where wife is in possession, *S. v. Cotten*, 305; recovery under life policy for accidental death, *Kinney v. Ins. Co.*, 597; turning and turning signals. *Petree v. Johnson*, 336; stopping and parking, *Lienthall v. Glass*, 65; passing vehicle traveling in same direction, *Inman v. Harper*, 103; *Petree v. Johnson*, 336; right of way at intersection, *Payne v. Lowe*, 369; speed at intersection, *Rogers v. Rogers*, 668; pedestrians, *Womble v. Morton*, 84; reckless driving, *Nance v. Williams*, 345; burden of proof of wrongful death, *Maynor v. Townsend*, 19; relevancy and competency of evidence

in general, *Goldston v. Chambers*, 291; *Smith v. Dean*, 553; opinion evidence as to speed, *Petree v. Johnson*, 336; *S. v. Woodlief*, 495; nonsuit on issue of negligence, *Lienthall v. Glass*, 65; sufficiency of evidence as to speed, *Womble v. Morton*, 84; *Pelkey v. Bynum*, 183; in turning, *Petree v. Johnson*, 336; identity of driver, *Maynor v. Townsend*, 19; contributory negligence, *Puryear v. Cooper*, 517; *Parker v. Allen*, 436; *Womble v. Morton*, 84; instructions in auto accident cases, *Pelkey v. Bynum*, 183; *Taylor v. Carter*, 78; *Payne v. Lowe*, 369; *Nance v. Williams*, 345; *Rogers v. Rogers*, 668; contributory negligence of passenger, *Lienthall v. Glass*, 65; *Strickland v. Hughes*, 395; negligence of driver imputed to passenger, *Strickland v. Hughes*, 395; presumption of ownership, *S. v. Cotten*, 305; evidence in homicide prosecution, *S. v. Woodlief*, 495; reckless driving, *Nance v. Williams*, 345.

Back Injury—Disability from resulting from employment despite pre-existing disability, *Lewis v. Diamond Mills Co.*, 400.

Badgering Witness — Contention that witness was subjected to, *Eaton v. Klopman Mills*, 363.

Banks and Banking—Creation of constructive trust in favor of bank where money obtained by issuance of worthless checks, *Auto Supply Co. v. Equipment Co.*, 531; collection of checks and drafts, *Bank v. Acceptance Corp.*, 319.

Basis of Arrest—Testimony of officer as to not invasion of province of jury, *S. v. Mercer*, 152.

Belt—Use of to accomplish felonious breaking, *S. v. Williams*, 194.

Bigamy—Father has obligation to support child of bigamous marriage, *Rehm v. Rehm*, 298.

Bill of Particulars—To determine exact location of armed robbery, *S. v. Green*, 170.

Bills and Notes — Endorsement and transfer of ownership, *Bank v. Acceptance Corp.*, 319; presumptions and burden of proof, *Ibid.*

Board of Adjustment—Authority of to grant special exception to mobile home park, *Jackson v. Board of Adjustment*, 408.

Bodily Feeling — Nonexpert testimony as to, *Inman v. Harper*, 103.

Boundaries—Courses and distances and calls to natural monuments, *Smothers v. Schlosser*, 272; junior and senior deeds, *Ibid;* new trial in boundary dispute where description of line not supported by record, *Ibid.*

Breaking and Entering—See Burglary and Unlawful Breakings; insensible and unresponsive verdict in prosecution for requires jury to redeliberate, *S. v. Hamrick*, 227; request for special instructions in prosecution for, *S. v. Parrish*, 587.

Bridge—Negligence by overweight vehicle driving on, *Shephard v. Highway Comm.*, 223.

Brief—Is not part of record on appeal, *Civil Service Bd. v. Page*, 34; *Auto Supply v. Equipment Co.*, 531; necessity for appendix to brief setting forth pertinent evidence where stenographic transcript filed, *Inman v. Harper*, 103; *Shephard v. Highway Comm.*, 223; questions in brief not presented by record on appeal not considered, *Chambers v. Redevelopment Comm.*, 355; exceptions and assignments of error not brought forward and discussed deemed abandoned, *S. v. Green*, 170; *Goldston v. Lynch*, 291; *Trust Co. v. Berry*, 547.

Building — Condemnation of entire building severed by street right of way, *Charlotte v. Robinson*, 429.

Bullets—Admissibility of bullets connected with crime, *S. v. Mercer*, 152.

Burden of Proof—Instruction in favor of party having burden of proof is error, *S. v. Brooks*, 115; in wrong-

ful death action, *Maynor v. Townsend*, 19; is on municipal employee disobeying order to show order unlawful, *Civil Service Bd. v. Page*, 34; is upon State to establish voluntariness of confession made subsequent to an involuntary confession, *S. v. Gibson*, 187; rests on petitioner in processioning proceeding, *Smothers v. Schlosser*, 272; to show fraud in execution of release, *Matthews v. Hill*, 350.

Burglary and Unlawful Breakings—Indictment using disjunctive "or", *Blakeney v. State*, 312; sufficiency of evidence and nonsuit, *S. v. Williams*, 194; *Blakeney v. State*, 312; instructions, *S. v. Green*, 170; *S. v. Martin*, 148; sentence and punishment, *S. v. White*, 398; constutionality of statute imposing death penalty in first degree burglary prosecution, *Parker v. State*, 27.

Burglary Insurance Policy — Proof of loss within terms of, *Clemmons v. Ins. Co.*, 479.

Burning Brush — Landowners' negligence in, *Pickard v. Burlington Belt Corp.*, 97.

Bus Passenger—Bus company not liable for injuries to passenger in lessee's restaurant, *Brady v. Coach Co.*, 174.

Bus System—Operation of public system by city not necessary expense, *Cole v. Asheville*, 652.

Cafeteria—Action for injuries from eating wire in food at State University cafeteria, *Brooks v. University*, 157.

Calls—To natural object control course and distance, *Smothers v. Schlosser*, 272.

Capital Crime — Constitutionality of statute imposing death penalty in first degree burglary prosecution, *Parker v. State*, 27.

Carnal Knowledge — Failure of trial judge to define, *S. v. Withers*, 201.

Carriers—Petition to increase service, *Utilities Comm. v. Petroleum Transportation*, 566; rates, *Utilities Comm. v. Tobacco Association*, 657; liability for injury to passengers, *Brady v. Coach Co.*, 174.

Case on Appeal—Statement of is not essential part of record, *Moss v. Railway Co.*, 50; duty of the parties to prepare in criminal prosecutions, *S. v. Hickman*, 627.

Cement — Negligence in driving overweight truck loaded with on highway bridge, *Shephard v. Highway Comm.*, 223.

Certification of Probate Officer—Separation agreement is void ab initio by failure of probate officer to certify that wife was privately examined, *Trammell v. Trammell*, 166.

Certiorari—Review by of zoning board's decision, *Jackson v. Board of Adjustment*, 408.

Checks—Depository bank is held to be holder in due course, *Bank v. Acceptance Corp.*, 319; endorsement of check "for deposit only" is not restrictive endorsement, *Bank v. Acceptance Corp.*, 319; creation of constructive trust in favor of bank where money was obtained by worthless checks, *Auto Supply Co. v. Equipment Co.*, 531.

Children—Injury of child at railroad crossing accident, *Moss v. Railway Co.*, 50; death of child in unenclosed swimming pool, *Bell v. Page*, 132; habeas corpus proceeding to award custody of minor child, *In re Custody of Pitts*, 211; insufficient findings to hold father in contempt of court for failure to pay child support, *Willis v. Willis*, 219; validity of statute authorizing appearance of guardian ad litem for unborn persons whose interest is contingent, *De Lotbiniere v. Trust Co.*, 252; jurisdiction of general county court in child custody proceeding, *Rehm v. Rehm*, 398; father has obligation to support child of bigamous marriage, *Rehm v. Rehm*, 298; right of child to kill in defense of parent, *S. v. Adams*, 282.

"Children of Her Body"—Rule in Shelley's case, *Summery v. McDowell*, 360.

Church—Not bound by restrictive covenants in previously recorded deeds in subdivision, *Church v. Berry*, 617.

Circumstantial Evidence — Speeding shown by, *Womble v. Morton*, 84; rule of nonsuit same for circumstantial evidence as direct evidence, *S. v. Cotten*, 305; *S. v. Bailiff*, 608.

Class—When members of ascertained, *Edens v. Foulks*, 325.

Clerks of Court—Jurisdiction of in action to recover escheated property, *In re Estate of Nixon*, 422.

Cloud on Title—See Adverse Possession.

Coffee—Action by invitee for injuries from fall on slippery floor from spilled coffee, *Brady v. Coach Co.*, 174.

Collard Greens—Action for injuries received from eating collard greens containing wire at State University cafeteria, *Brooks v. University*, 157.

Colloquial Expression—Of opinion as to speed, *S. v. Woodlief*, 495.

Commissioner of Insurance—Determination of fire insurance rates, *In re Filing by Fire Ins. Rating Bureau*, 10.

Commitment—Admissibility in escape prosecution to show defendant in lawful custody, *S. v. Beamon*, 583.

Common Carrier Rates—Use of operating ratios in determining intrastate motor carrier rates, *Utilities Comm. v. Tobacco Assoc.*, 657.

Common Law—Construction of statutes and ordinances in derogation of common law, *Bell v. Page*, 132; rights of husband and wife as to wife's separate property, *Trammell v. Trammell*, 166.

Common Law Robbery—Evidence does not necessitate submission of issue of, *S. v. Green*, 170.

Compensation Act — See Master and Servant.

Condemnation—Of land for highway, *Highway Comm. v. Matthis*, 233; *Hughes v. Highway Comm.*, 1; *Highway Comm. v. Thomas*, 679; proceedings by owner against Highway Commission for compensation for right of way constitutes lis pendens, *Hughes v. Highway Comm.*, 1.

Confession — Contention that plea of guilty was coerced, *Parker v. State*, 27; rendered involuntary by promise of officer to assist defendant, *S. v. Gibson*, 187; presumed involuntary where accused has previously made involuntary confession, *S. v. Gibson*, 187.

Consideration — New consideration for modification of executed contract, *Britton v. Gabriel*, 213; promise by wife not to separate from husband is not sufficient consideration, *Matthews v. Matthews*, 143; inadequacy of as grounds for cancellation of release, *Matthews v. Hill*, 350.

Consolidation—Of cases rests in trial court's discretion, *Pickard v. Burlington Belt Corp.*, 97.

Constitutional Law—Delegation of authority to municipal corporations, *Jackson v. Board of Adjustment*, 408; vested rights, *De Lotbiniere v. Trust Co.*, 252; right to counsel, *S. v. Morris*, 262; cruel and unusual punishment, *S. v. Morris*, 611; death penalty in first degree burglary prosecution where defendant pleads not guilty, *Parker v. State*, 27.

Construction of Will—Appearance of guardian ad litem for unborn contingent beneficiaries, *De Lotbiniere v. Trust Co.*, 252.

Contempt of Court — Insufficient findings to hold father in contempt of court for failure to pay child support, *Willis v. Willis*, 219.

Contingent Beneficiaries — Validity of appearance by guardian ad litem for in will construction action, *De Lotbienere v. Trust Co.*, 252.

Contingent Remaindermen—Action by to prevent waste, *Edens v. Foulks*, 325.

Continuance—Motion for on ground defendant was prejudiced in eyes of jury when solicitor nonsuited two out of six cases, *S. v. Withers*, 201.

Contracts—Offer, acceptance and mutuality, *Builders v. Bridgers*, 662, consideration, *Britton v. Gabriel*, 213; against public policy, *Matthews v. Matthews*, 143; construction generally, *Builders v. Bridgers*, 662; construction of terms of lease to repair, *Discount Corp. v. Mangel's*, 472; negligent breach of, *Bryan v. Elevator Co.*, 593; materialmen's lien arises only upon a contract, *Clark v. Morris*, 388; action on to divide profits from real estate development does not affect title to land involved, *Mortgage Corp. v. Development Corp.*, 138; action is not removable to county where land situate, *Ibid.*

Contract Carrier Permit—Necessity of showing shipper has need for specific type services to acquire permit, *Utilities Comm. v. Petroleum Transportation*, 566.

Contributory Negligence — In automobile accident cases see Automobiles; nonsuit for, *Lienthall v. Glass*, 65; of pedestrian in wrongful death action, *Womble v. Morton*, 84; in driving overweight truck loaded with cement on highway bridge, *Shephard v. Highway Comm.*, 223; contributory negligence in aiding illegally parked vehicle by failing to see intervening action of third party, *Puryear v. Cooper*, 517; motion for nonsuit in wrongful death action on ground of deceased's contributory negligence, *Parker v. Allen*, 436.

Constructive Trust—Creation of in favor of bank where money was obtained by worthless checks, *Auto Supply Co. v. Equipment Co.*, 531.

Corporations—Liability of corporation for torts of individuals of corporation, *Pickard v. Burlington Belt Corp.*, 97.

Cost Indices — Use of in determining fire insurance rates, *In re Filing by Fire Ins. Rating Bureau*, 10.

Costs — Attorney's fees as part of, *Rogers v. Rogers*, 668.

Counsel—Necessity for counsel in criminal cases, *Parker v. State*, 27; waiver of in misdemeanor case, *S. v. Morris*, 262; counsel's neglect to file answer imputed to defendant, *Meir v. Walton*, 578.

Counterclaim—For goods sold and delivered, *Repair Co. v. Morris & Assocs.*, 72.

County Board of Adjustment—Authority of to grant special exception to mobile home park, *Jackson v. Board of Adjustment*, 408.

County Home—Escape from by prison worker, *S. v. Whitt*, 601.

Course and Distance—Calls to natural objects control, *Smothers v. Schlosser*, 272.

Court of Appeals—See also, in Words and Phrases, Rules of Practice, may set aside jurisdictional findings of Industrial Commission, *Patterson v. Parker & Co.*, 43; jurisdiction to review Industrial Commission's award, *Morgan v. Furniture Industries*, 126; is bound by record, *S. v. Hickman*, 627; exercise of inherent power to remand record for corrections where contradictions appear, *S. v. Hickman*, 627.

Court Maps—In processioning proceeding, *Smothers v. Schlosser*, 272.

Courts—Superior Court may impose severer sentence than that imposed by inferior court, *S. v. Morris*, 262; function of court when trial by jury is waived, *Repair Co. v. Morris & Assocs.*, 72; appeal to Superior Court from clerk of court, *In re Estate of Nixon*, 422; competency of witness in

discretion of court, *S. v. Fuller*, 204; jurisdiction of general county court in child custody proceeding, *Rehm v. Rehm*, 298; expression of opinion by court in stating contentions of the parties, *S. v. Beamon*, 583.

Creditors—Use of proceedings supplemental to execution, *Massey v. Cates*, 162.

Criminal Conversation — Action for, *Warner v. Torrence*, 384.

Criminal Law—Jurisdiction in general, *Blakeney v. State*, 312; *S. v. Green*, 391; exclusive jurisdiction, *S. v. Thompson*, 508; jurisdiction on appeal to Superior Court, *S. v. Thompson*, 508; plea of guilty, *S. v. Morris*, 611; plea of not guilty, *S. v. Patton*, 605; evidence of guilt of other offenses, *S. v. Thompson*, 508; *S. v. Burgess*, 677; commitment issued by clerk admissible to show defendant in lawful custody, *S. v. Beamon*, 583; alibi, *S. v. Green*, 170; admission of articles connected with crime: bullets, *S. v. Mercer*, 152; weapons, *S. v. Russ*, 377; maps and photographs, *S. v. Fuller*, 204; *S. v. Mercer*, 152; *S. v. Russ*, 377; voluntariness and admissibility of confession, *S. v. Gibson*, 187; *S. v. Morris*, 262; acts and declarations of codefendants, *S. v. Russ*, 377; continuance, *S. v. Withers*, 201; presence of fellow inmate witnesses in courtroom, *S. v. Lovedahl*, 513; trial judge under no duty to aid defendant in his defense, *S. v. Morris*, 262; argument of solicitor, *S. v. Mercer*, 152; *S. v. Foster*, 109; nonsuit, *S. v. Adams*, 282; *S. v. Cotten*, 305; *S. v. Bailiff*, 608; directed verdict, *S. v. Woodlief*, 495; instruction on burden of proof, *S. v. Conyers*, 637; application of law to evidence, *S. v. Madam (X)*, 615; *S. v. Lovedahl*, 513; *S. v. Withers*, 201; *S. v. McLean*, 460; expression of opinion by court in charge, *S. v. Patton*, 605; *S. v. Beamon*, 583; instruction on less degree of crime, *S. v. McLean*, 460; *S. v. Parrish*, 587; on contentions of parties, *S. v. Ransom*, 613; *S. v. Beamon*, 583; request for instructions, *S. v. Parrish*, 587; additional instructions, *S. v. Hamrick*, 227; *S. v. Fuller*, 204; sufficiency and effect of verdict, *S. v. Hamrick*, 227; special verdict, *S. v. Peguise*, 526; setting aside verdict, *S. v. Siler*, 683; remand for proper sentence, *S. v. Siler*, 683; severity of sentence, *S. v. Thompson*, 508; *S. v. White*, 398; *S. v. Morris*, 262; nature and grounds of appellate jurisdiction, *S. v. Hickman*, 627; right of State to appeal, *S. v. Peguise*, 526; right of defendant to appeal, *S. v. Siler*, 683; case on appeal, *S. v. Hickman*, 627; certiorari, *S. v. Green*, 391; record on appeal, *S. v. Hickman*, 627; *S. v. Woodlief*, 495; *S. v. Conyers*, 637; correction of record, *S. v. Hickman*, 627; exceptions and assignments of error, *S. v. Green*, 170; *S. v. Cotten*, 305; *S. v. Burgess*, 677; *S. v. Conyers*, 637; harmless and prejudicial error, *S. v. Siler*, 683; *S. v. Parrish*, 587; *S. v. Patton*, 603; postconviction hearings, *Parker v. State*, 27; *S. v. Green*, 391; *S. v. Hamrick*, 227.

Criminal Negligence — Essential to pleading of reckless driving, *Nance v. Williams*, 345.

Criminal Record—Use of to establish alibi, *S. v. Green*, 170.

Cross-Action — For indemnity arising out of breach of express or implied warranty, *Anderson v. Robinson*, 191.

Cross Easements — In adjoining property, *Buie v. Phillips*, 447.

Cross-Examination — Of defendant as to communications with deceased constitutes waiver of Dead Man's Statute, *Smith v. Dean*, 553.

Crossing Accident—Injury of child at, *Moss v. Railway Co.*, 50; instruction on failure of automatic signals in railroad crossing accident, *Jackson v. Jones*, 441.

Cruel and Unusual Punishment — Sentence within statutory limits is not, *S. v. Morris*, 611.

Culpable Negligence — Failure to in-

struct on in homicide prosecution, *S. v. Adams*, 282; in death of automobile passenger, *S. v. Woodlief*, 495.

Custody—Admissibility of commitment in escape prosecution to show defendant in lawful custody, *S. v. Beamon*, 583.

Custody of Children—See Divorce and Alimony; habeas corpus proceeding to award custody of minor child, *In re Custody of Pitts*, 211.

Daily Memorandum—Of personal injuries in auto accident, *Goldston v. Lynch*, 291.

Damages — Sufficiency of pleading of, *Inman v. Harper*, 103; compensatory damages, *Goldston v. Chambers*, 291; instructions on measure of damages, *Highway Comm. v. Thomas*, 679; *Moss v. Railway Co.*, 50; *Rogers v. Rogers*, 668; in condemnation proceedings, *Highway Comm. v. Matthis*, 233; in wrongful death action, *Womble v. Morton*, 82.

Dead Man's Statute — Conversations with deceased third parties, *State Bar v. Temple*, 91; waiver of provisions of, *Smith v. Dean*, 553.

Death—Nature and grounds of action for wrongful death, *Lienthall v. Glass*, 65; *Maynor v. Townsend*, 19; *Parker v. Allen*, 436; damages for wrongful death, *Maynor v. Townsend*, 19; *Womble v. Morton*, 84.

Death Penalty — Constitutionality of statute imposing death penalty in first degree burglary prosecution, *Parker v. State*, 27.

"Declaration of Taking"—In highway condemnation proceedings, *Highway Comm. v. Matthis*, 233.

Declarations—Nonexpert testimony of as to bodily feeling, *Inman v. Harper*, 103; by accomplice during robbery admitted into evidence, *S. v. Russ*, 377.

Declaratory Judgment Act — Nature and grounds of remedy, *Newman Machine Co. v. Newman*, 491; *York v. Newman*, 484; proceedings, *York v. Newman*, 484.

Dedication—Evidence of dedication of road and acceptance thereof by Highway Comm., *Owens v. Taylor*, 178.

Deeds—Reservation of highway right of way in deed, *Hughes v. Highway Comm.*, 1; calls in senior deed control calls in junior deed, *Smothers v. Schlosser*, 272; restrictive covenant in previously recorded deeds in subdivision not binding on church, *Church v. Berry*, 617; restrictive covenant in deed does not limit use to residential purposes, *Dorsett v. Development Corp.*, 120.

Deeds of Separation—Agreement looking to future separation is void, *Matthews v. Matthews*, 143.

Deeds of Trust—See Analytical Index, Mortgages and Deeds of Trust.

Default Judgment—Attorney's neglect imputed to defendant, *Meir v. Walton*, 578.

Defective Statement—Of good cause of action, *Highway Comm. v. Matthis*, 233; *State Bar v. Temple*, 91.

Defenses—Right of defendant to rely on more than one, *S. v. Adams*, 282.

Delegation of Power—Of eminent domain to State agency, *Highway Comm. v. Matthis*, 233.

Demurrer — See Analytical Index, Pleadings § 19.

Department of Mental Health—Action for injuries received during administration of shock treatments by, *Bailey v. Dept. of Mental Health*, 645.

Deposition—Of out-of-state witness in Industrial Commission proceeding, *Hodge v. Robertson*, 216.

Depressive Reaction — Sufficiency of pleading to allege, *Inman v. Harper*, 103.

Directed Verdict—*S. v. Brooks*, 115.

Disability — In Workmen's Compensa-

tion Act defined, *Morgan v. Furniture Industries*, 126.

Disbarment Proceedings—*State Bar v. Temple*, 91.

Discrimination—Objection to composition of grand jury, *Parker v. State*, 27.

Displacement Payment — Action for from municipal redevelopment commission, *Chambers v. Redevelopment Comm.*, 355.

District Court—Jurisdiction of in shoplifting prosecution, *S. v. Thompson*, 508.

Divorce and Alimony—Jurisdiction and procedure in custody and support actions, *Rehm v. Rehm*, 298; *Willis v. Willis*, 219.

Doctrine of Res Ipsa Loquitur—Inapplicable to show owner's negligence in furnishing defective grocery cart, *Colclough v. A & P Tea Co.*, 504; inapplicable in case arising out of elevator accident, *Bryan v. Elevator Co.*, 593.

Doctrine of Respondeat Superior—Presumption of ownership in person in whose name vehicle is registered applies only in civil actions under, *S. v. Cotten*, 305.

Double Indemnity—Recover of for accidental death, *Kinney v. Ins. Co.*, 597.

Double Jeopardy—State has no right to appeal judgment allowing plea of, *S. v. Peguise*, 526.

Driver—Identity of in wrongful death action, *Maynor v. Townsend*, 19; identity of deceased as, *Smith v. Dean*, 553.

Drug Expenses—Evidence of in consolidated action by husband and wife for personal injuries, *Goldston v. Lynch*, 291.

Drunken Driving—Admissibility of evidence of defendant's intoxication without necessity for voir dire examination, *S. v. Morris*, 262.

Due Process—In administrative hearing, *Civil Service Bd. v. Page*, 34.

Duplicity—Waiver of by failing to make motion to quash indictment, *Blakeney v. State*, 312.

Easements—Creation of easement by deed, *Hughes v. Highway Comm.*, 1; creation of easement by implication, *Buie v. Phillips*, 447; injunction to prevent use of air rights easement pending appeal, *Airport Authority v. Irvin*, 341; restrictive covenants in prior recorded deed from grantor, *Church v. Berry*, 617.

Elevator—Res ipsa loquitur is inapplicable in case arising out of elevator accident, *Bryan v. Elevator Co.*, 593.

Eminent Domain—Nature and extent of power, *Highway Comm. v. Matthis*, 233; acts constituting a "taking," *Highway Comm. v. Rankin*, 452; delegation of power, *Highway Comm. v. Matthis*, 233; amount of compensation, *Highway Comm. v. Mode*, 464; *Highway Comm. v. Thomas*, 679; evidence of value, *Highway Comm. v. Matthis*, 233; *Highway Comm. v. Mode*, 464; *Randleman v. Hinshaw*, 381; proceedings to take land and assess compensation, *Hughes v. Highway Comm.*, 1; *Highway Comm. v. Matthis*, 233; *Highway Comm. v. Mode*, 464; *Charlotte v. Robinson*, 429; *Airport Authority v. Irvin*, 341; *Highway Comm. v. Rankin*, 452; condemnation by housing authority, *Chambers v. Redevelopment Comm.*, 355; action by owner for compensation, *Hughes v. Highway Comm.*, 1; time of passage of title, *Hughes v. Highway Comm.*, 1.

Employee — Workmen's Compensation Act applies where five or more are employed, *Patterson v. Parker & Co.*, 43; duty to have employee on duty at swimming pool, *Bell v. Page*, 132.

Employer and Employees—See Master and Servant.

Endorsement—Of check for "deposit

only" is not a restrictive endorsement, *Bank v. Acceptance Corp.*, 319.

Entirety Property—Proceeds from fire insurance policy on, *Forsyth County v. Plemmons*, 373; enforcement of materialmen's liens on, *Clark v. Morris*, 388.

Equitable Estoppel — Pleading and proof of, *Yancey v. Watkins*, 672.

Equity—Court of equity can look behind seal of executed contract, *Britton v. Gabriel*, 213; equitable action of quieting title, *York v. Newman*, 484.

Erroneous Judgment—Where no appeal taken from, parties are bound, *De Lotbiniere v. Trust Co.*, 252.

Escape—Elements of and prosecution for, *S. v. Beamon*, 583; *S. v. Whitt*, 601.

Escheats—Action to recover unclaimed property escheated to University, *In re Estate of Nixon*, 422.

Estates—Nature and incidents of life estates and remainders, *Edens v. Foulks*, 325; action for waste, *Edens v. Foulks*, 325.

Estate Tax — Inclusion of decedent's estate outside State for purpose of computation does not render tax unconstitutional, *Rigby v. Clayton*, 57.

Estoppel—Landowners who elect to receive compensation are estopped from attacking condemnation petition, *Highway Comm. v. Matthis*, 233; equitable estoppel, *Yancey v. Watkins*, 672; easement by, *Buie v. Phillips*, 445.

Evidence—Admission of gruesome photographs and bullets connected with crime, *S. v. Mercer*, 152; autopsy photograph properly admitted, *S. v. Fuller*, 204; photograph of scene of robbery admitted to illustrate testimony, *S. v. Russ*, 377; photoghaph not admitted when authentication evidence is conflicting and photograph is faded reproduction, *Smith v. Dean*, 553; in jury view but not introduced, *S. v. Siler*, 683; admissibility of evidence of defendant's intoxication while operating motor vehicle without necessity for voir dire examination, *S. v. Morris*, 262; statement of accomplice during robbery admitted, *S. v. Russ*, 377; of prior convictions where defendant offered no evidence in own behalf, *S. v. Burgess*, 677; admissibility of commitment in escape prosecution to show defendant in lawful custody, *S. v. Beamon*, 583; sufficiency of to support findings of fact, *Repair Co. v. Morris & Assocs.*, 72; rule of nonsuit same for circumstantial evidence as direct evidence, *S. v. Cotten*, 305; *S. v. Bailiff*, 608; exclusion of witness' testimony not prejudicial when record fails to show what answer would have been, *S. v. Patton*, 605; failure to object to misstatement of in instructions, *Womble v. Morton*, 84; new trial in Industrial Commission for newly discovered evidence, *Shelton v. Dry Cleaners*, 528; presumption that person may have issue as long as he lives, *De Lotbiniere v. Trust Co.*, 252; transactions or communications with decedent, *State Bar v. Temple*, 91; *Smith v. Dean*, 553; authentication of written offer by municipality to give landowner access to water and sewer lines, *Randleman v. Hinshaw*, 381; declarations as to bodily feeling, *Inman v. Harper*, 103; nonexpert opinion evidence, *S. v. Cotten*, 305; qualification of expert, *Highway Comm. v. Matthis*, 233.

"Evidence Tending to Show"—Instruction on, *Womble v. Morton*, 84.

Exceptions and Assignments of Error—Not brought forward and discussed in brief deemed abandoned. *S. v. Green*, 170; *Goldston v. Lynch*, 291; *S. v. Cotten*, 305; *Trust Co. v. Berry*, 547; exception to evidence not objected to presents no question for review, *Eaton v. Klopman Mills*, 363; to signing and entry of judgment, *Auto Supply Co. v. Equipment Co.*, 531.

Excusable Neglect—Attorney's neglect

imputed to defendant, *Meir v. Walton*, 578.

Execution — On judgment of general county court, *Rehm v. Rehm*, 298; supplementary proceedings, *Massey v. Cates*, 162.

Exhibits — Admissibility of gruesome photographs and bullets connected with crime, *S. v. Mercer*, 152.

Expert Testimony—In eminent domain proceedings as to value of land, *Highway Comm. v. Matthis*, 233.

Expression of Opinion — By court in stating contentions of the parties, *S. v. Beamon*, 583; by court as to speed of defendant's automobile, *S. v. Patton*, 605.

Extradition—Right to try person not properly extradited, *S. v. Green*, 391.

Fair Market Value—Testimony as to of automobile in larceny prosecution, *Goldston v. Lynch*, 291; consideration of mineral deposits in determining, *Highway Comm. v. Mode*, 464.

Federal Agents—Subpœna of, *State Bar v. Temple*, 91.

Felonious Intent—Necessity of for conviction of felony of breaking and entering, *S. v. Green*, 221; failure of court to use word "felonious" preceding words "intent to kill," *S. v. Conyers*, 637.

"Festival in the Park"—Dismissal of fireman for refusing to erect tents for, *Civil Service Bd. v. Page*, 34.

Findings of Fact—Jurisdictional findings by Industrial Commission are not binding on appeal, *Patterson v. Parker & Co.*, 43; sufficiency of evidence to support, *Repair Co. v. Morris & Assocs.*, 72; when supported by evidence are binding on appeal. *Lewis v. Diamond Mills, Co.*, 400; *Utilities Comm. v. Petroleum Transportation*, 566.

Fire — Duty of landlord to rebuild premises destroyed by fire, *Discount Corp. v. Mangel's*, 272; duties and liabilities of person starting fire on his own land, *Pickard v. Burlington Belt Corp.*, 97.

Fire Insurance—Establishing rates, *In re Filing by Fire Ins. Rating Bureau*, 10; proceeds from on entirety property, Forsyth County v. Plemmons, 373.

Fireman—Dismissal for disobeying orders, *Civil Service Bd. v. Page*, 34.

"For Deposit Only"—Endorsement of check not restrictive endorsement, *Bank v. Acceptance Corp.*, 319.

Foreseeability—In instructions, use of "prevision" in sense of omniscience rather than, *Jackson v. Jones*, 441.

Forged Instrument — Prosecution for, *S. v. Burgess*, 677.

Former Jeopardy—State has no right to appeal judgment allowing plea of, *S. v. Peguise*, 526.

Fraud—*Matthews v. Hill*, 350; *Auto Supply Co. v. Equipment Co.*, 531.

Fraudulent Transfer—Of property to defeat execution, *Massey v. Cates*, 162.

Future Damages—Failure of instruction to limit award to present cash value of loss, *Moss v. Railway Co.*, 50.

General Assembly—Powers of to classify and discriminate for purposes of inheritance taxation, *Rigby v. Clayton*, 57; power of eminent domain, *Highway Comm. v. Matthis*, 233.

Grand Jury—Challenge to composition of, *Parker v. State*, 27.

Grocery Cart — Injury of customer from, *Colclough v. A & P Tea Co.*, 504.

Guardian Ad Litem—Validity of appearance of for contingent beneficiaries in action to construe a will, *De Lotbiniere v. Trust Co.*, 252.

Guilty—Effect of plea in challenge to composition of grand jury, *Parker v.*

State, 27; contention that plea of guilty was coerced, *Parker v. State*, 27; verdict of not guilty may not thereafter be changed to guilty, *S. v. Hamrick*, 227; motion to withdraw plea of after sentence has been imposed, *S. v. Morris*, 611.

Gun—Use or threatened use of in robbery, *S. v. Green*, 170; 14 year old boy's use of in shooting father in defense of mother, *S. v. Adams*, 282.

Habeas Corpus—Proceeding to award custody of minor child, *In re Custody of Pitts*, 211; application for considered as post-conviction petition under G.S. 15-217, *S. v. Hamrick*, 227; review of habeas corpus judgment is by certiorari, *S. v. Green*, 391.

Harmless and Prejudicial Error — In admission or exclusion of evidence, see Analytical Index, Appeal and Error § 49, Criminal Law § 169; in admission of evidence of defendant's guilt in post-conviction proceeding, *Parker v. State*, 27; cured by verdict, *Pickard v. Burlington Belt Corp.*, 97; use of word "slaughter" by solicitor in argument held not prejudicial, *S. v. Mercer*, 152; interchange of names in charge harmless error, *S. v. Parrish*, 587.

Hay Baler — Death caused by not within terms of accident policy, *Williams v. Ins. Co.*, 520.

Hearsay Evidence—Motion to strike, *S. v. Mercer*, 152.

Hernia—Not injury arising out of and in course of employment, *Eaton v. Klopman Mills*, 363.

Highway Commission—Evidence of dedication of road and acceptance thereof by, *Owens v. Taylor*, 178; power of eminent domain, *Highway Comm. v. Matthis*, 233; acquisition of right of way by, *Hughes v. Highway Comm.*, 1; proceedings by owner for compensation for land taken, *Hughes v. Highway Comm.*, 1; time of passage of title to right of way to Highway Comm., *Hughes v. Highway Comm.*, 1; tort action against Highway Commission, *Shepherd v. Highway Comm.*, 223.

Highway Right of Way—Acquisition of by Highway Commission, *Hughes v. Highway Comm.*, 1; proceeding by owner for compensation for, *Hughes v. Highway Comm.*, 1; time of passage of title to Highway Comm., *Hughes v. Highway Comm.*, 1; condemnation proceedings by owner against Highway Commission for compensation for constitutes lis pendens, *Hughes v. Highway Comm.*, 1; reservation of by deed, *Hughes v. Highway Comm.*, 1.

Holder in Due Course — Depository bank is held to be, *Bank v. Acceptance Corp*, 319.

Homicide—Right of child to kill in defense of mother, *S. v. Adams*, 282; plea of self-defense, *S. v. Adams*, 282; sufficiency of evidence of first degree murder, *S. v. Mercer*, 152; instructions on manslaughter, *S. v. Adams*, 282.

Hospital—Action for injuries received during administration of shock treatments at State Hospital, *Bailey v. Dept. of Mental Health*, 645.

Hung Jury—Instruction urging jury to reach verdict, *S. v. Fuller*, 204.

Husband and Wife—Agency of one spouse for the other, *Clark v. Morris*, 388; contracts and conveyances between, *Matthews v. Matthews*, 143; *Trammell v. Trammell*, 166; requisites and validity of separation agreements, *Trammell v. Trammell*, 166; *Matthews v. Matthews*, 143; termination and survivorship of estate by entireties, *Forsyth County v. Plemmons*, 373; alienation of affections, *Warner v. Torrence*, 384; criminal conversation, *Warner v. Torrence*, 384; title to automobile in husband but wife in possession in larceny prosecution, *S. v. Cotten*, 305; father has obligation to support child of bigamous marriage, *Rehm v. Rehm*, 298.

Identification of Victim—Variance between indictment and proof, *S. v. Foster*, 109.

Identity of Driver—Of automobile in wrongful death action, *Maynor v. Townsend*, 19; of deceased as driver, *Smith v. Dean*, 553.

Impeachment — Of verdict, *Highway Comm. v. Matthis*, 233.

Implication — Easement by, *Buie v. Phillips*, 445.

Income—Distributed to those having vested right in estate, *De Lotbiniere v. Trust Co.*, 252.

Indemnity—Cross-action for indemnity arising out of breach of express or implied warranty, *Anderson v. Robinson*, 191; persons promising to indemnify defendant are not necessary parties to action, *Casualty Co. v. Hall*, 198.

Independent Contractor — Liability of for breach of employer's non-delegable duty, *Pickard v. Burlington Belt Corp.*, 97.

Indictment and Warrant — Form and sufficiency of, *S. v. Green*, 170; duplicity in indictment, *Blakeney v. State*, 312; identification of victim, *S. v. Foster*, 109; time for making motion to quash, *Parker v. State*, 27; variance, *S. v. Cotten*, 305.

Indigent Defendant — Necessity for counsel in criminal cases, *Parker v. State*, 27; judge has no duty to aid indigent in defense of his case, *S. v. Morris*, 262.

Industrial Commission—See also Master and Servant; has duty to make specific findings of fact as to claimant's right to compensation, *Morgan v. Furniture Industries*, 126; is sole judge of credibility and weight of evidence, *Morgan v. Furniture Industries*, 126; is primarily an administrative agency with limited jurisdictional power, *Hodge v. Robertson*, 216; jurisdiction under Tort Claims Act, *Brooks v. University*, 157; duty of Commission to hear additional evidence, *Eaton v. Klopman Mills*, 363; new trial for newly discovered evidence, *Shelton v. Dry Cleaners*, 528; motion to introduce additional evidence upon remand to, *Bailey v. Dept. of Mental Health*, 645.

Infants—See Children.

Inheritance Tax—Inclusion of decedent's estate outside State for purpose of computation does not render tax unconstitutional, *Rigby v. Clayton*, 57.

Injunctions—To restrain occupancy or use of land, *Charlotte v. Robinson*, 429; *Airport Authority v. Irvin*, 341; *Dorsett v. Development Corp.*, 120.

Insanity—Defendant's testimony as to his mental ability at time of offense, *S. v. Mercer*, 152.

Insolvent Corporation—Assets of under receivership are not subject to preferred claim of creditors, *Auto Supply Co. v. Equipment Co.*, 531; judgment rendered in independent action after appointment of receiver for does not create a lien on the property against the receiver, *Trust Co. v. Berry*, 547.

Instructions—On sudden emergency in automobile accident cases, *Taylor v. Carter*, 78; not supported by allegations of speeding at intersection are erroneous, *Pelkey v. Bynum*, 184; sufficiency of evidence for instruction on reckless driving, *Nance v. Williams*, 345; use of "prevision" in sense of omniscience rather than "foreseeability," *Jackson v. Jones*, 441; misstatement of contentions, *Taylor v. Carter*, 78; failure to apply law to evidence, *Pickard v. Burlington Belt Corp.*, 97; instruction in favor of party having burden of proof, *S. v. Brooks*, 115; failure to object to misstatement of evidence, *Womble v. Morton*, 84; jury informed that instructions given at party's request, *Womble v. Morton*, 84; evidence insufficient to require submission of issue of common law robbery, *S. v. Green*, 170; after jury has failed to reach verdict, *S. v.*

Fuller, 204; to find defendant guilty, breaking and entering must be done with intent to commit felony, *S. v. Green*, 221; failure of court to instruct on culpable negligence in homicide prosecution, *S. v. Adams*, 282; reference to "wrongdoers" and "defendants" in action against multiple defendants is not prejudicial error, *Goldston v. Lynch*, 291; on term "evidence tending to show"—*Womble v. Morton*, 84; failure of trial judge to define "carnal knowledge" in instructions, *S. v. Withers*, 201; on less degree of felonious breaking and entering, *S. v. Williams*, 194; for less degree of crime of armed robbery, *S. v. McLean*, 460; on defense of alibi, *S. v. Lovedahl*, 513; on credibility of intoxicated witness, *Daniels v. Causey*, 456; expression of opinion in stating contentions, *S. v. Beamon*, 583; request for special instructions in criminal case, *S. v. Parrish*, 587; interchange of names in charge harmless error, *S. v. Parrish*, 587; failure to restrict consideration of co-defendant's testimony, *S. v. Parrish*, 587; expression of opinion as to speed of defendant's automobile, *S. v. Patton*, 605; failure to define reasonable doubt not error, *S. v. Bailiff*, 608; *S. v. Conyers*, 637; instruction that Treasury Agent was aider and abettor in making unlawful sale of whiskey, *S. v. Ransom*, 613; failure of court to use word "felonious" preceding words "intent to kill," *S. v. Conyers*, 637; as to permanent injuries, *Rogers v. Rogers*, 668; on damages for highway condemnation, *Highway Comm. v. Thomas*, 679.

Insurance—Construction and operation of policy, *Clemmons v. Ins. Co.*, 479; *Williams v. Ins. Co.*, 520; accident policy, definitions, *Kinney v. Ins. Co.*, 597; visible wound, *Kinney v. Ins. Co.*, 597; insured's violation of law, *Kinney v. Ins. Co.*, 597; actions on accident policy, *Kinney v. Ins. Co.*, 597; *Williams v. Ins. Co.*, 520; fire insurance policy, *Forsyth County v. Plemmons*, 373; fire insurance rates, *In re Filing by Fire Ins. Rating Bureau*, 10; burglary insurance, *Clemmons v. Ins. Co.*, 479; lessor's covenant to maintain fire insurance for restoration of premises, *Discount Corp., v. Mangel's*, 472.

Intent—Necessity of felonious intent for conviction of felony of breaking and entering, *S. v. Green*, 221.

Intent to Kill—Failure of court to use word "felonious" preceding words "intent to kill," *S. v. Conyers*, 637.

Intersection—Collision at intersection controlled by electric signals, *Pelkey v. Bynum*, 183; court need not define in absence of request, *Payne v. Lowe*, 369; testimony as to speed at, *Rogers v. Rogers*, 668.

Intervening Action—Contributory negligence by failing to see intervening action of third party, *Puryear v. Cooper*, 517.

Intoxication—Admissibility of evidence of defendant's intoxication while operating motor vehicle without necessity for voir dire examination, *S. v. Morris*, 262; empty whiskey bottles in jury view but not introduced in evidence, *S. v. Siler*, 683; failure of passenger to move to position of safety because of, *Lienthall v. Glass*, 65; credibility of intoxicated witness, *Daniels v. Causey*, 456; instruction that Treasury Agent was aider and abettor in making unlawful sale of whiskey, *S. v. Ransom*, 613.

Intrastate Motor Carrier Rates—Use of operating ratios in determining, *Utilities Comm. v. Tobacco Assoc.*, 657.

Involuntary Conversion—Proceeds from fire policy on entirety property do not result from, *Forsyth County v. Plemmons*, 373.

Invitee—Duty of proprietor to, *Brady v. Coach Co.*, 174; *Lanier v. Roses Stores*, 501; *Colclough v. A & P Tea Co.*, 504.

Issue—Presumption that person may have as long as he lives, *De Lotbiniere v. Trust Co.*, 252.

I

Issues—In wrongful death action where identity of driver is disputed, *Maynor v. Townsend*, 19.

Joinder—Of automobile liability insurers is proper where plaintiff is in doubt as to correct one, *Torres v. Surety Co.*, 208; as additional parties defendant persons promising to indemnify defendant properly denied, *Casualty Co. v. Hall*, 198.

Judge—Has no duty to aid an indigent in defense of his case, *S. v. Morris*, 262; function of when jury trial waived, *Repair Co. v. Morris & Assocs.*, 72.

Judgments—Setting aside for excusable neglect, *Meir v. Walton*, 578; parties concluded, *De Lotbiniere v. Trust Co.*, 233; judgment changed when notice of appeal given, *S. v. Siler*, 683.

Jure Mariti—Husband is not jure mariti the agent of his wife, *Clark v. Morris*, 388.

Jurisdiction—Jurisdictional findings by Industrial Commission, *Patterson v. Parker & Son*, 43; of general county court in child custody prosecution, *Rehm v. Rehm*, 298; to try person brought illegally into State, *S. v. Green*, 391; of clerk of court in action to recover unclaimed property paid by clerk to University, *In re Estate of Nixon*, 422; of Superior Court of appeal of criminal conviction in District Court, *S. v. Thompson*, 508.

Jury—Officer's testimony as to basis of arrest not invasion of province of jury, *S. v. Mercer*, 152; jurors are presumed to understand meaning of English words as ordinarily used, *S. v. Withers*, 201; objection to composition of grand jury, *Parker v. State*, 27; return of quotient verdict, *Highway Comm. v. Matthis*, 233; impeachment of verdict, *Highway Comm. v. Matthis*, 233; informed that instructions given at party's request, *Womble v. Morton*, 84; instruction urging jury to reach verdict, *S. v. Fuller*, 204; redeliberation by jury where verdict insensible, *S. v. Hamrick*, 227; right to jury trial in declaratory judgment action, *York v. Newman*, 484; evidence in jury view but not introduced, *S. v. Siler*, 683.

Laborers' and Materialmen's Liens—Enforcement of on entirety property, *Clark v. Morris*, 388.

Landlord and Tenant—Construction of lease, *Discount Corp. v. Mangel's*, 472; liability of landlord to invitees of tenant, *Brady v. Coach Co.*, 174; liability for damage to property and duty to repair, *Discount Corp. v. Mangel's*, 472.

Larceny—Presumption from recent possession, *S. v. Cotten*, 305; trade-in value of stolen auto, *S. v. Cotten*, 305; sufficiency of evidence, *S. v. Bailiff*, 608; *S. v. Cotten*, 305; sentence, *S. v. White*, 398.

Lease—Duty of landlord to rebuild premises destroyed by fire, *Discount Corp. v. Mangel's*, 472.

Left Turn—*Petree v. Johnson*, 336.

Legislature—See General Assembly.

Lesser Degree of Crime—Instructions on for felonious breaking and entering, *S. v. Williams*, 194; evidence insufficient to require submission of issue of common law robbery, *S. v. Green*, 170; instruction on for armed robbery, *S. v. McLean*, 460; failure to submit question of simple assault in prosecution for secret assault not error, *S. v. Conyers*, 637.

Lessee—Liability of landlord for injuries to invitee of, *Brady v. Coach Co.*, 174.

Liens — Enforcement of materialmen's liens on entirety property, *Clark v. Morris*, 388; judgment rendered in independent action after appointment of receiver for insolvent corporation does not create a lien on the property against the receiver, *Trust Co. v. Berry*, 547.

Life Estate—Forfeiture of for waste, *Edens v. Foulks*, 325.

Life Insurance Policy — Action for double indemnity for accidental death, *Kinney v. Ins. Co.*, 597.

Limitation of Actions — Time from which statute begins to run, *In re Estate of Nixon*, 422; plea of statute not available in disbarment proceedings, *State Bar v. Temple*, 91; applicability of statute to action for recovery of property paid by clerk to University, *In re Estate of Nixon*, 422.

Lis Pendens — Condemnation proceedings by owner against Highway Commission for compensation for highway right of way constitutes lis pendens, *Hughes v. Highway Comm.*, 1.

Malpractice — Disbarment of attorney for, *State Bar v. Temple*, 91; action for injuries received during administration of shock treatments by State Hospital, *Bailey v. Dept. of Mental Health*, 645.

Manslaughter — See Analytical Index, Homicide; in death of automobile passenger, *S. v. Woodlief*, 495.

Maps — Requisites of in processioning proceeding, *Smothers v. Schlosser*, 272.

Marital Obligations—Contract to perform is void, *Matthews v. Matthews*, 143.

Marshlands — Adverse possession of marshlands allegedly owned by State, *S. v. Brooks*, 115.

Master and Servant—Liability of contractee for injuries to third persons, *Pickard v. Burlington Belt Corp*, 97; construction of Compensation Act, *Bailey v. Dept. of Mental Health*, 645; employees subject to Act, *Patterson v. Parker & Co.*, 43; causal relation between employment and injury, *Eaton v. Klopman Mills*, 363; hernia, *Eaton v. Klopman Mills*, 363; nature and extent of jurisdiction of Industrial Commission, *Hodge v. Robertson*, 216; *Morgan v. Furniture Industries*, 126; hearing of additional testimony, *Eaton v. Klopman Mills*, 363; out of state deposition, *Hodge v. Robertson*, 216; findings and award of Commission, *Morgan v. Furniture Industries*, 126; review in Court of Appeals, *Lewis v. Diamond Mills Co.*, 400; *Eaton v. Klopman Mills*, 363; *Morgan v. Furniture Industries*, 126; *Patterson v. Parker & Co.*, 43; *Shelton v. Dry Cleaners*, 528; proceedings after remand, *Bailey v. Dept. of Mental Health*, 645; costs and attorneys fees, *Priddy v. Cab Co.*, 331; *Lewis v. Diamond Mills Co.*, 400.

Materialmen's Liens — See Laborers' and Materialmen's Liens.

Medical History—Testimony by physician as to given by plaintiff, *Inman v. Harper*, 103.

Memorandum — Of effect of personal injuries in auto accident, *Goldston v. Lynch*, 291.

Mental Anguish—Sufficiency of pleading to allege, *Inman v. Harper*, 103.

Mental Capacity — Defendant's testimony as to his mental capacity at time of offense, *S. v. Mercer*, 152.

Mineral Deposits — Compensation for land containing, *Highway Comm. v. Mode*, 464.

Minors—See Children.

Misjoinder of Parties and Causes of Action—Joinder of automobile liability insurers is proper where plaintiff is in doubt as to correct one, *Torres v. Surety Co.*, 208.

Misstatement of Evidence—Failure to object to in instructions, *Womble v. Morton*, 84.

Mobile Home Park — Authority of county board of adjustment to grant special exception to, *Jackson v. Board of Adjustment*, 408.

Mortgages and Deeds of Trust—Trustor's action against cestui for accounting for wrongful cutting and

removal of timber from land secured by deed of trust, *Carroll v. Parker*, 573.

Motion—To quash on objection to racial composition of grand jury, *Parker v. State*, 27; to set aside verdict as against greater weight of evidence, *Bell v. Page*, 132; to strike unresponsive and hearsay testimony, *S. v. Mercer*, 152; for nonsuit, see Analytical Index, Criminal Law §§ 105 et seq, 176; Trial §§ 19 et seq.; for continuance on ground defendant was prejudiced in eyes of jury when solicitor nonsuited two out of six cases, *S. v. Withers*, 201; defective statement of good cause of action not grounds for motion to dismiss, *State Bar v. Temple*, 91; to strike after answer filed, *State Bar v. Temple*, 91; for change of venue in action affecting title to real estate, *Mortgage Corp. v. Development Corp.*, 138; for appointment of receiver in proceedings supplemental to execution, *Massey v. Cates*, 162; for additional findings by Industrial Commission, *Eaton v. Klopman Mills*, 363; appeal from order allowing motion to amend is premature, *Pardue v. Speedway*, 403; to set aside verdict, *City of Randleman v. Hudson*, 404; *S. v. Siler*, 683; to amend after beginning of trial, *Auto Supply v. Equipment Co.*, 531; for new trial in Industrial Commission for newly discovered evidence, *Shelton v. Dry Cleaners*, 528; to withdraw plea of guilty after sentence has been imposed, *S. v. Morris*, 611; to introduce additional evidence upon remand to Industrial Commission, *Bailey v. Dept. of Mental Health*, 645.

Motor Carrier Rates—Use of operating ratios in determining, *Utilities Comm. v. Tobacco Assoc.*, 657.

Municipal Airport Authority — Injunction to restrain pending appeal, *Airport Authority v. Irvin*, 341.

Municipal Civil Service Board—Notice of charges and fair hearing, *Civil Service Bd. v. Page*, 34.

Municipal Corporations — Legislative control and powers of, *Randleman v. Hinshaw*, 381; nature and extent of police power, *Bell v. Page*, 132; zoning ordinances, *Jackson v. Bd. of Adjustment*, 408; operation of bus system not necessary expense, *Cole v. Asheville*, 652; discharge of fireman for disobeying order, *Civil Service Bd. v. Page*, 34.

Municipal Ordinance—Liability of landowner violating ordinance relating to unenclosed swimming pool, *Bell v. Page*, 132.

Municipal Redevelopment Commission —Action for displacement payment from, *Chambers v. Redevelopment Comm.*, 355.

Mutuality of Agreement—Essential element of a contract, *Builders v. Bridgers*, 662.

Natural Object—Calls to control course and distance, *Smothers v. Schlosser*, 272.

"Nearest of Kin"—Devise to does not permit representation, *Edens v. Foulks*, 325.

Necessary Expense—Operation of bus system by city not, *Cole v. Asheville*, 652.

Necessary Parties—Persons promising to indemnify defendant are not, *Casualty Co. v. Hall*, 198.

Neglect—Of attorney in failing to file answer imputed to defendant, *Meir v. Walton*, 578.

Negligence—Acts and omissions constituting negligence, *Lanier v. Roses Stores*, 501; *Strickland v. Hughes*, 395; arising from breach of contract, *Bryan v. Elevator Co.*, 593; questions of law and fact, *Pelkey v. Bynum*, 183; res ipsa loquitur, *Bryan v. Elevator Co.*, 593; contributory negligence, *Lienthall v. Glass*, 65; *Taylor v. Carter*, 78; proximate cause, *Jackson v. Jones*, 441; attractive nuisance, *Bell v. Page*, 132; liabilities and duties to invitees, *Lanier*

v. Roses Stores, 501; *Colclough v. A & P*, 504; *Brady v. Coach Co.*, 174; landowner's negligence in burning brush, *Pickard v. Burlington Belt Corp.*, 97; in operation of automobile leaving road without collision, *Maynor v. Townsend*, 19; by speeding shown by circumstantial evidence, *Womble v. Morton*, 84; in driving overweight vehicle on highway bridge, *Shephard v. Highway Comm.*, 223; in turning across path of oncoming vehicle, *Petree v. Johnson*, 336; criminal negligence essential to pleading of reckless driving, *Nance v. Williams*, 345; of driver imputed to owner-passenger, *Strickland v. Hughes*, 395; contributory negligence by failing to see intervening action of third party, *Puryear v. Cooper*, 517; by administration of shock treatments by State Hospital, *Bailey v. Dept. of Mental Health*, 645.

Negotiable Instrument—See Analytical Index, Bills and Notes and Banks and Banking.

Negroes—Objection to composition of grand jury, *Parker v. State*, 27.

Newly Discovered Evidence—New trial in Industrial Commission for, *Shelton v. Dry Cleaners*, 528.

Non-Delegable Duty—Liability of independent contractor for breach of employer's non-delegable duty, *Pickard v. Burlington Belt Corp.*, 97.

Nonexpert Testimony—Of declarations of bodily feeling, *Inman v. Harper*, 103; as to fair market value of automobile in action for damages, *Goldston v. Lynch*, 291; as to fair market value of automobile in larceny prosecution, *S. v. Cotten*, 305.

Nonsuit—See Analytical Index, Criminal Law §§ 104 et seq., 176; Trial §§ 19 et seq.; rule same for circumstantial evidence as for direct evidence, *S. v. Cotten*, 305; motion for in wrongful death action on ground of deceased's contributory negligence, *Parker v. Allen*, 436; on appeal from nonsuit both competent and incompetent evidence considered, *Kinney v. Ins. Co.*, 597.

N. C. Workmen's Compensation Act—See Master and Servant.

Not Guilty—Constitutionality of statute imposing death penalty in first degree burglary prosecution, *Parker v. State*, 27; verdict of may not thereafter be changed to guilty, *S. v. Hamrick*, 227; effect of plea of, *S. v. Patton*, 605.

Notice—Of hearing by administrative agency, *Civil Service Bd. v. Page*, 34.

Nuisance — Construction of asphalt plant in subdivision not anticipated nuisance, *Dorsett v. Development Corp.*, 120.

Obstruction—Liability of railroad for growth of weeds at crossing, *Moss v. Railway Co.*, 50.

Officer—Testimony of as to basis of arrest not invasion of province of jury, *S. v. Mercer*, 152.

Oiled Floors—Duty of proprietor to warn of recently oiled floors, *Lanier v. Roses Stores*, 501.

Operating Ratios—Use of in determining intrastate motor carrier rates, *Utilities Comm. v. Tobacco Assoc.*, 657.

Opinion Evidence—Testimony of officer as to basis of arrest not invasion of province of jury, *S. v. Mercer*, 152; as to fair market value of automobile in action for damages, *Goldston v. Lynch*, 291; as to fair market value of automobile in larceny prosecution, *S. v. Cotten*, 305; in automobile accident case, *Petree v. Johnson*, 336; as to speed, *S. v. Woodlief*, 495.

Option—Acceptance of must be in accordance with terms, *Builders v. Bridgers*, 662.

"Or"—Allegation that defendant "did break or enter," *Blakeney v. State*, 312.

Ordinance—Liability of landowner violating municipal ordinance relating to unenclosed swimming pool, *Bell v. Page*, 132.

"Out" Conveyances — Restrictions imposed upon property by out conveyances by prior recorded title holders, *Church v. Berry*, 617.

Out of and In Course of Employment—Hernia held not injury arising, *Eaton v. Klopman Mills*, 363.

Overweight Vehicle — Evidence of in driving on highway bridge, *Shephard v. Highway Comm.*, 223.

Ownership—Of stolen property, *S. v. Cotten*, 305.

Parent and Child—Right to custody of child, *In re Custody of Pitts*, 211; husband has obligation to support child of bigamous marriage, *Rehm v. Rehm*, 298; right of child to kill in defense of parent, *S. v. Adams*, 282.

Parked or Stopped Vehicle — With bright lights facing oncoming traffic, *Lienthall v. Glass*, 65; contributory negligence in hitting, *Parker v. Allen*, 436; contributory negligence in aiding illegally parked vehicle by failing to see intervening action of third party, *Puryear v. Cooper*, 517.

Parties — Necessary parties, *York v. Newman*, 484; *Casualty Co. v. Hall*, 198; parties defendant, *Torres v. Surety Co.*, 208; trustee for minor children is necessary party in quieting title, *York v. Newman*, 484.

Partition—Plea of sole seisin, *Yancey v. Watkins*, 672.

Passenger — Not contributorily negligent in failing to move to position of safety when intoxicated, *Lienthall v. Glass*, 65.

Pecuniary Loss—Showing of in wrongful death action, *Maynor v. Townsend*, 19; *Lienthall v. Glass*, 65; *Womble v. Morton*, 84.

Pedestrian—Contributory negligence of in failing to yield right of way, *Womble v. Morton*, 84.

Permanent Injuries—Instruction as to, *Rogers v. Rogers*, 668.

Permanent Partial Disability—Resulting from employment despite pre-existing disability, *Lewis v. Diamond Mills Co.*, 400.

Permit—Necessity of showing shipper has need for specific type services to acquire contract carrier permit, *Utilities Comm. v. Petroleum Transportation*, 566.

Personal Property—No statutory remedy for quieting title to, *Newman Machine Co. v. Newman*, 491.

Personal Transactions — Testimony as to with deceased, *Smith v. Dean*, 553.

Petition—Should be considered as post-conviction petition although entitled "habeas corpus," *S. v. Hamrick*, 227.

Photographs—Admission of gruesome photographs of crime, *S. v. Mercer*, 152; of scene of robbery for illustrative purpose, *S. v. Russ*, 377; authentication of, *S. v. Fuller*, 204; *Smith v. Dean*, 553.

Physical Condition—Lay testimony as to declaration of, *Inman v. Harper*, 103.

Physicians and Surgeons — Testimony as to declarations of bodily feeling, *Inman v. Harper*, 103.

Pistol—Failure to object to admission of in evidence, *S. v. Burgess*, 677.

Plea of Former Jeopardy—State has no right to appeal judgment allowing, *S. v. Peguise*, 526.

Plea of Guilty—Effect of on challenge to composition of grand jury, *Parker v. State*, 27; contention that plea was coerced, *Parker v. State*, 27; motion to withdraw plea after sentence has been imposed, *S. v. Morris*, 611.

Plea of Not Guilty — Constitutionality of statute imposing death penalty in first degree burglary prosecution, *Parker v. State*, 27; effect of plea, *S. v. Patton*, 605.

Pleadings—Statement of cause of action, *Highway Comm. v. Matthis*, 233; joinder of causes of action, *Torres v. Surety Co.*, 208; cross-action against co-defendant, *Anderson v. Robinson*, 191; demurrer, *State Bar v. Temple*, 91; *Auto Supply Co. v. Equipment Co.*, 531; motion to amend, *Auto Supply Co. v. Equipment Co.*, 531; *Inman v. Harper*, 103; necessity for proof, *Lienthall v. Glass*, 65; motion to strike, *State Bar v. Temple*, 91; competency of witness who defendant claimed was an alcoholic, *S. v. Fuller*, 204; of reckless driving, *Nance v. Williams*, 345; alleging fraud in receivership proceedings, *Auto Supply Co. v. Equipment Co.*, 531; pleading and proof of equitable estoppel, *Yancey v. Watkins*, 672.

Police Officer—Testimony of by reading from accident report, *Rogers v. Rogers*, 668.

Pool—Death of child in unenclosed swimming pool, *Bell v. Page*, 132.

Possession — Of property in larceny prosecution, *S. v. Cotten*, 305.

Post-Conviction Hearing—Purpose defined, *Parker v. State*, 27; application attacking judgment for error in recording jury verdict considered as, *S. v. Hamrick*, 227; no appeal lies from, *S. v. Green*, 391.

Pre-Existing Disability — finding that back injury resulted from employment despite, *Lewis v. Diamond Mills Co.*, 400.

Preferred Claim — Preferences in receivership proceedings, *Auto Supply Co. v. Equipment Co.*, 531.

Premises—Description of in breaking and entering prosecution, *Blakeney v. State*, 312.

Present Capacity—To take in possession, *Edens v. Foulks*, 235.

Presumptions—Jurors are presumed to understand meaning of English words as ordinarily used, *S. v. Withers*, 201; subsequent confession presumed involuntary where accused has previously made involuntary confession, *S. v. Gibson*, 187; that person may have issue as long as he lives, *De Lotbiniere v. Trust Co.*, 252; from recent possession of stolen automobile, *S. v. Cotten*, 305; of ownership in person in whose name vehicle is registered does not apply in criminal actions, *S. v. Cotten*, 305; that endorsement of check "for deposit only" was done with full authority of payee, *Bank v. Acceptance Corp.*, 319; of correctness of facts not in record, *S. v. Woodlief*, 495; of ownership arising from possession of money, *Auto Supply Co. v. Equipment Co.*, 531.

Prevision—In instructions use of prevision in sense of omniscience rather than foreseeability, *Jackson v. Jones*, 441.

Prima Facie—Showing of negligence in operation of automobile leaving road without collision, *Maynor v. Townsend*, 19.

Prior Convictions — Documents of to establish alibi, *S. v. Green*, 170; testimony as to when defendant did not testify and offered no evidence in own behalf, *S. v. Burgess*, 677.

Prior Consistent Statements — Exclusion of not error, *Inman v. Harper*, 103.

Prior Good Faith Negotiations—Necessity for allegations of in condemnation proceedings, *Charlotte v. Robinson*, 429; *Highway Comm. v. Mode*, 464.

Prisoner—Contention by prisoner that he was induced to escape by prison authorities, *S. v. Beamon*, 583; escape by prisoner while working at county home, *S. v. Whitt*, 601.

Private Road—Right of way at intersection of with public road, *Payne v. Lowe*, 369.

Probate Officer—Failure of to certify that wife was privately examined

voids separation agreement ab initio, *Trammell v. Trammell*, 166.

Probation—Stricken when notice of appeal given, *S. v. Siler*, 683.

Processioning Proceeding — Purpose of is to establish true boundary, *Smothers v. Schlosser*, 272.

Promise—To assist defendant renders confession involuntary, *Pelkey v. Bynum*, 183.

Proof of Claim—Amendment of in receivership proceedings, *Auto Supply Co. v. Equipment Co.*, 531; *Trust Co. v. Berry*, 547.

Property—Title and right to possession of personalty, *Auto Supply Co. v. Equipment Co.*, 531.

Proprietor—Duty of to invitee, *Brady v. Coach Co.*, 174; *Lanier v. Roses Stores*, 501; *Colclough v. A & P Tea Co.*, 504.

"Prospective Loss Experience" — Determination of fire insurance rates, *In re Filing of Fire Ins. Rating Bureau*, 10.

Proximate Cause—Instruction on, *Jackson v. Jones*, 441.

Public Bus System—Operation of by city is not necessary expense, *Cole v. Asheville*, 652.

Public Officer—Acts of presumed valid, *Civil Service Bd. v. Page*, 34.

Public Policy — Contract to perform marital obligation is void as against, *Matthews v. Matthews*, 143.

Public Record or Document—Authentication of, *City of Randleman v. Hinshaw*, 381.

Punctuation — Appellate court not bound by punctuation of court reporter, *S. v. Conyers*, 637.

Punishment—Superior Court may impose severer sentence than that imposed by inferior court, *S. v. Morris*, 262; maximum single sentence for multiple counts, *S. v. White*, 398; within statutory limits is not cruel and unusual, *S. v. Morris*, 611.

Quarry Site—Special benefits in condemnation proceedings, *Highway Comm. v. Mode*, 464.

Quashal—Motion to quash on objection to racial composition of grand jury, *Parker v. State*, 27.

Quieting Title—Equitable and statutory remedies of, *York v. Newman*, 484; *Newman Machine Co. v. Newman*, 491; actions to remove cloud on title, *York v. Newman*, 484.

Quotient Verdict—Motion for new trial in highway condemnation on ground that verdict was, *Highway Comm. v. Matthis*, 233.

Races — Objection to composition of grand jury, *Parker v. State*, 27.

Railroads—Crossing accidents, *Moss v. Railway Co.*, 50; warnings or protective devices at crossings, *Jackson v. Jones*, 441.

Rape—*S. v. Withers*, 201.

Rates — Establishing fire insurance rates, *In re Filing by Fire Ins. Rating Bureau*, 10; use of operating ratios in determining intrastate motor carrier rates, *Utilities Comm. v. Tobacco Assoc.*, 657.

Rating Bureau—Determination of fire insurance rates, *In re Filing by Fire Ins. Rating Bureau*, 10.

Real Estate—Action on contract to divide profits from development of does not affect title to land involved, *Mortgage Corp. v. Development Corp.*, 138; action is not removable to county where land situate, *Ibid.*

Reasonable Doubt—Failure of court to define not error, *S. v. Bailiff*, 608; *S. v. Conyers*, 637.

Receivers—Title and control of property and business, *Trust Co. v. Berry*, 547; filing of claims and actions against receiver, *Auto Supply Co. v. Equipment Co.*, 531; *Trust Co. v.*

Berry, 547; preferences in receivership proceedings, *Auto Supply Co. v. Equipment Co.*, 531; appointment of receiver in proceedings supplemental to execution, *Massey v. Cates*, 162.

Recent Possession — Presumption from possession of stolen automobile, *S. v. Cotten*, 305.

Reckless Driving—Pleading effectively, *Nance v. Williams*, 345.

Record—Statement of case on appeal is not essential part of record. *Moss v. Railway Co.*, 50; brief is not part of, *Civil Service Bd. v. Page*, 34; *Auto Supply Co. v. Equipment Co.*, 531; questions in brief not presented by record on appeal are not considered, *Chambers v. Redevelopment Comm.*, 355; duty of the parties to prepare in criminal prosecutions, *S. v. Hickman*, 627; correction of in Court of Appeals, *S. v. Hickman*, 627; of effect of personal injuries in auto accident, *Goldston v. Lynch*, 291.

Redevelopment Commission — Action for displacement payment from, *Chambers v. Redevelopment Comm.*, 355.

Reference—Compulsory reference, *Britton v. Gabriel*, 213.

Refreshing Recollection of Witness — Allowing witness to read from a report made by him, *Eaton v. Klopman Mills*, 363; testimony of police officer by reading from his accident report, *Rogers v. Rogers*, 668.

Registration—Creates no presumption of vehicle ownership in automobile larceny prosecution, *S. v. Cotten*, 305.

Regular Employee — Workmen's Compensation Act applies where five or more are employed, *Patterson v. Parker & Co.*, 43.

Release—Fraud as grounds for cancellation, *Matthews v. Hill*, 350.

Remainderman — Action to prevent waste by contingent remaindermen, *Edens v. Foulks*, 325.

Representation—Devise to nearest of kin does not permit, *Edens v. Foulks*, 325.

Resentencing—Where judgment changed upon defendant's giving notice of appeal, *S. v. Siler*, 683.

Reservation—Of highway right of way, *Hughes v. Highway Comm.*, 1.

Residential Use—Property not limited to by restrictive covenant, *Dorsett v. Development Corp.*, 120.

Res Ipsa Loquitur — Inapplicable to show owner's negligence in furnishing defective grocery cart, *Colclough v. A & P Tea Co.*, 504; is inapplicable in case arising out of elevator accident, *Bryan v. Elevator Co.*, 593.

Res Judicata—Will construction binding upon unborn contingent beneficiaries represented by guardian ad litem, *De Lotbiniere v. Trust Co.*, 252.

Respondeat Superior—Presumption of ownership in person in whose name vehicle is registered applies only in civil actions under doctrine of, *S. v. Cotten*, 305.

Restaurant—Duty of proprietor to patron, *Brady v. Coach Co.*, 174.

Restrictive Covenants — Property not limited to residential use by, *Dorsett v. Development Corp.*, 120; in prior recorded deed from grantor, *Church v. Berry*, 617.

Restrictive Endorsement—Endorsement of check "for deposit only" is not, *Bank v. Acceptance Corp.*, 319.

Retroactive Legislation—May affect contingent interests but not vested rights of beneficiaries of will, *De Lotbiniere v. Trust Co.*, 252.

Rifle—Fourteen year old boy's use of in shooting father in defense of mother, *S. v. Adams*, 282.

Right to Counsel—Necessity for counsel in criminal cases, *Parker v. State*, 27; waiver of counsel in misdemeanor case, *S. v. Morris*, 262.

Right of Way—Acquisition of by Highway Commission, *Hughes v. Highway Comm.*, 1; proceedings by owner for compensation for, *Hughes v. Highway Comm.*, 1; time of passage of title to Highway Comm., *Hughes v. Highway Comm.*, 1; condemnation proceedings by owner against Highway Commission for compensation for constitutes lis pendens, *Hughes v. Highway Comm.*, 1; reservation of by deed, *Hughes v. Highway Comm.*, 1; at intersection of public and private roads, *Payne v. Lowe*, 369; condemnation of entire building severed by street right of way, *Charlotte v. Robinson*, 429.

Robbery—Indictment, *S. v. Green*, 170; sufficiency of evidence, *S. v. Richardson*, 523; *S. v. Green*, 170; instruction on lesser degree of crime, *S. v. Green*, 170; *S. v. McLean*, 460.

Rule in Shelley's Case—In devise to "children of her body," *Summey v. McDowell*, 360.

Rules of Practice—Statement of case on appeal is not essential part of record on appeal, No. 19(a), *Moss v. Railway Co.*, 50; brief is not part of record on appeal, No. 19, *Civil Service Bd. v. Page*, 34; *Auto Supply Co. v. Equipment Co.*, 531; what record on appeal shall contain, No. 19, *S. v. Hickman*, 627; exceptions not brought forward deemed abandoned, No. 19(c), *S. v. Green*, 170; *S. v. Cotten*, 305; necessity for appendix to brief setting forth pertinent evidence where stenographic transcript filed, No. 19(d)(2), *Inman v. Harper*, 103; *Shephard v. Highway Comm.*, 223; motion to amend answer on appeal, No. 20(c), *Moss v. Railway Co.*, 50; motion to amend pleadings, No. 20(c), *Yancey v. Watkins*, 672; assignments of error not brought forward and argued in brief deemed abandoned, No. 28, *Goldston v. Lynch*, 291; *Trust Co. v. Berry*, 547.

Safety Statute—Wilful violation of is culpable negligence, *S. v. Woodlief*, 495.

Sales—Counterclaim to rescind and recover purchase price, *Repair Co. v. Morris & Assocs.*, 72.

Sanity — Defendant's testimony as to his sanity at time of offense, *S. v. Mercer*, 152.

Seals—Court of equity may look behind seal of executed contract, *Britton v. Gabriel*, 213.

Secret Assault—Prosecutions for, *S. v. Conyers*, 637.

Secret Service Agent — Subpœna of, *State Bar v. Temple*, 91.

Segregation of Witnesses—In criminal cases, *S. v. Lovedahl*, 513.

Seizure—Of property by Highway Commission for right of way, *Hughes v. Highway Comm.*, 1.

Self-Defense—Right of child to kill in defense of parent, *S. v. Adams*, 282.

Sentence—Superior Court may impose severer sentence than that imposed by inferior court, *S. v. Morris*, 262; maximum single sentence for multiple counts, *S. v. White*, 398; for shoplifting, *S. v. Thompson*, 508; within statutory limits is not cruel and unusual, *S. v. Morris*, 611.

Separation Agreement—Is void ab initio by failure of probate officer to certify that wife was privately examined, *Trammell v. Trammell*, 166; agreement looking to future separation is void, *Matthews v. Matthews*, 143.

Service Road—Access to highway from, *Highway Comm. v. Rankin*, 452.

Services of Wife—Husband has right to, *Matthews v. Matthews*, 143.

Sewer Service—Furnishing to nonresidents, *City of Randleman v. Hinshaw*, 381.

Shelley's Case—Rule in not applicable in devise to "children of her body," *Summey v. McDowell*, 360.

Shock Treatments—Action for injuries received during administration of, *Bailey v. Dept. of Mental Health*, 645.

Shoplifting—Appeal of conviction in District Court to Superior Court, *S. v. Thompson*, 508.

Signals—Collision at intersection controlled by, *Pelkey v. Bynum*, 183; purpose of, *Payne v. Lowe*, 369; instruction on failure of automatic signals at railroad crossing, *Jackson v. Jones*, 441.

"Slaughter"—Use of word in homicide prosecution, *S. v. Mercer*, 152.

Slippery Floor—Action by invitee for injuries caused by, *Brady v. Coach Co.*, 174.

Sole Seizin—Plea of in partitioning proceedings, *Yancey v. Watkins*, 672.

Solicitor — Argument that defendants were professional crooks is prejudicial, *S. v. Foster*, 109; argument implying collusion between defendant and his witness rendered harmless, *S. v. Mercer*, 152; duty of the parties to prepare record or case on appeal in criminal prosecutions, *S. v. Hickman*, 627.

Special Benefits—To landowner in condemnation proceedings, *Highway Comm. v. Mode*, 464; *Highway Comm. v. Thomas*, 679.

Special Exceptions — Authority of county board of adjustment to grant to mobile home park, *Jackson v. Board of Adjustment*, 408.

Special Verdict — Order allowing defendant's plea of former jeopardy and dismissing charge does not constitute, *S. v. Peguise*, 526.

Specific Type of Service—Necessity of showing shipper has need for to acquire contract carrier permit, *Utilities Comm. v. Petroleum Transportation*, 566.

Speeding — Shown by circumstantial evidence, *Womble v. Morton*, 84; duty to decrease speed at intersection, *Pelkey v. Bynum*, 183; *Rogers v. Rogers*, 668; opinion evidence as to, *S. v. Woodlief*, 495; allegations that speed resulted from stuck accelerator, *S. v. Patton*, 605.

State — Power of eminent domain, *Highway Comm. v. Matthis*, 233; may not appeal from judgment allowing plea of former jeopardy, *S. v. Peguise*, 526; nature and construction of Tort Claims Act, *Bailey v. Dept. of Mental Health*, 645; negligence of State employee and contributory negligence of person injured, *Brooks v. University*, 157; *Bailey v. Dept. of Mental Health*, 645; *Shephard v. Highway Comm.*, 223; appeal and review of proceedings under Tort Claims Act, *Bailey v. Dept. of Mental Health*, 645.

State Highway Commission—Power of eminent domain, *Highway Comm. v. Matthis*, 233; acquisition of right of way by, *Hughes v. Highway Comm.*, 1; proceedings by owner for compensation for land taken by, *Hughes v. Highway Comm.*, 1; time of passage of title to right of way to Highgway Comm., *Hughes v. Highway Comm.*, 1.

State Hospital—Action for injuries received during administration of shock treatments, *Bailey v. Dept. of Mental Health*, 645.

Statement of Case on Appeal—Is not essential part of record, *Moss v. Railway Co.*, 50.

Statute of Limitations — Plea of not available in disbarment proceedings, *State Bar v. Temple*, 91; applicability of to action for recovery of property paid by clerk to University, *In re Estate of Nixon*, 422.

Statutes—In derogation of common law must be strictly construed, *Bell v. Page*, 132.

Stenographic Transcript—Necessity for appendix to brief setting forth pertinent evidence, *Inman v. Harper*, 103.

Stone Deposits—Compensation for land containing, *Highway Comm. v. Mode*, 464.

Stop Lights—Collision at intersection controlled by, *Pelkey v. Bynum*, 183; purpose of, *Payne v. Lowe*, 369.

Stopped or Parked Vehicle — With bright lights facing oncoming traffic, *Lienthall v. Glass*, 65; contributory negligence in hitting, *Parker v. Allen*, 436; contributory negligence in aiding illegally parked vehicle by failing to see intervening action of third party, *Puryear v. Cooper*, 517.

Street—Evidence of dedication of road and acceptance thereof by Highway Comm., *Owens v. Taylor*, 178.

Street Right-of-Way—Condemnation of entire building severed by, *Charlotte v. Robinson*, 429.

Subdivision—Value of proposed subdivision subject to condemnation, *Highway Comm. v. Matthis*, 233; asphalt plant in is not anticipated nuisance, *Dorsett v. Development Corp.*, 120; restrictive covenants not implied from prior deeds conveying lots in subdivision, *Church v. Berry*, 617.

Subpœnas — Failure to comply with Federal rules for summoning Federal agent, *State Bar v. Temple*, 91.

Subsequent Confession—Presumed involuntary when prior confession involuntary, *S. v. Gibson*, 187.

Sudden Emergency—In automobile accident cases, *Taylor v. Carter*, 78.

Superior Court—Jurisdiction of on appeal of criminal conviction in District Court, *S. v. Thompson*, 508.

Survey—Of lands involved in processioning proceeding, *Smothers v. Schlosser*, 272; calls to natural objects control course and distance, *Smothers v. Schlosser*, 272.

Surviving Occupant—May not identify deceased as driver, *Smith v. Dean*, 553.

Suspended Sentence — Stricken when notice of appeal given, *S. v. Siler*, 683.

Swimming Pool—Death of child in unenclosed swimming pool, *Bell v. Page*, 132.

"Taking"—Declaration of in highway condemnation action, *Highway Comm. v. Matthis*, 233.

Taxation—Uniform rule and discrimination, *Rigby v. Clayton*, 57; necessary expense and necessity for vote, *Cole v. Asheville*, 652; inheritance and succession taxes, *Rigby v. Clayton*, 57.

Tenant—Liability of landlord for injuries to invitee of, *Brady v. Coach Co.*, 174.

Tenancy by Entirety — Proceeds from fire insurance policy on property held by, *Forsyth County v. Plemmons*, 373; enforcement of materialmen's liens on entirety property, *Clark v. Morris*, 388.

Tents—Dismissal of fireman for refusing to erect tents when ordered to do so, *Civil Service Bd. v. Page*, 34.

Threatened Use of Firearm—In robbery, *S. v. Green*, 170.

Timber—Trustor's action against trustee for accounting for wrongful cutting and removal of timber from land secured by deed of trust, *Carroll v. Parker*, 573.

Title—Of automobile in husband, wife in possession in larceny prosecution, *S. v. Cotten*, 305.

Tobacco — Intrastate motor carrier rates for transportation of unmanufactured, *Utilities Comm. v. Tobacco Assoc.*, 657.

Tort Claims Act—Evidence of negligence by State University employee insufficient to support recovery, *Brooks v. University*, 157; contributory negligence in driving overweight truck on highway bridge, *Shephard v. Highway Comm.*, 223; motion to

introduce additional evidence upon remand to Industrial Commission, *Bailey v. Dept. of Mental Health*, 645.

Torts—Tort liability of corporation and individual stockholders, *Pickard v. Burlington Belt Corp.*, 97; liability of independent contractor for breach of employer's non-delegable duty, *Pickard v. Burlington Belt Corp.*, 97; rights inter se of defendants joined by plaintiff, *Anderson v. Robinson*, 191; release from liability and covenants not to sue, *Matthews v. Hill*, 350.

Tractor—Death caused by tractor pulling hay baler not within terms of accident policy, *Williams v. Ins. Co.*, 520; secret assault while driving, *S. v. Conyers*, 637.

Transfer—Of property to defeat execution, *Massey v. Cates*, 162.

Trade-in-Value—Evidence of in automobile larceny prosecution, *S. v. Cotten*, 305.

Traffic Signals — Collision at intersection controlled by, *Pelkey v. Bynum*, 183; purpose of, *Payne v. Lowe*, 369.

Traumatic Neurosis — Sufficiency of pleading to allege, *Inman v. Harper*, 103.

Treasury Agent — Instruction that Agent was aider and abettor in making unlawful sale of whiskey, *S. v. Ransom*, 613.

Trees—Injunction to prevent airport authority from cutting on air rights easement pending appeal, *Airport Authority v. Irvin*, 341; action for wrongfully cutting and removing trees from land secured by deed of trust, *Carroll v. Parker*, 573.

Trespass—Action by State for to remove cloud on title in marshlands allegedly owned by State. *S. v. Brooks*, 115.

Trial—Stipulations, *Smothers v. Schlosser*, 272; consolidation of actions for trial, *Pickard v. Burlington Belt Corp.*, 97; apt time in making objection, *Eaton v. Klopman Mills*, 363; nonsuit, *Bryan v. Elevator Co.*, 593; *Lienthall v. Glass*, 65; *Maynor v. Townsend*, 19; directed verdict, *S. v. Brooks*, 115; form and sufficiency of instructions, *Highway Comm. v. Thomas*, 679; *Womble v. Morton*, 84; statement of evidence and application of law thereto in instructions, *Pelkey v. Bynum*, 183; *Payne v. Lowe*, 369; *Womble v. Morton*, 84; *Pickard v. Burlington Belt Corp.* 97; expression of opinion in charge, *Goldston v. Chambers*, 291; credibility of witness, *Daniels v. Causey*, 456; request for instructions, *Jackson v. Jones*, 441; form and sufficiency of verdict, *Smith v. Dean*, 553; *Highway Comm. v. Matthis*, 233; impeaching verdict, *Highway Comm. v. Matthis*, 233; setting aside verdict, *Randleman v. Hudson*, 404; *Bell v. Page*, 132; waiver of jury trial, *Repair Co. v. Morris & Assocs.*, 72.

Trustee—For minor children is necessary party in quieting title, *York v. Newman*, 484; trustor's action against cestui for accounting for wrongful cutting and removal of timber from land secured by deed of trust, *Carroll v. Parker*, 573.

Trusts—Income and persons entitled thereto, *De Lotbiniere v. Trust Co.*, 233; constructive trusts, *Auto Supply Co. v. Equipment Co.*, 531.

Turning—Causing accident, *Petree v. Johnson*, 336.

Unborn Contingent Beneficiaries—Having vested rights, *De Lotbiniere v. Trust Co.*, 252.

Unclaimed Property—Paid by clerk of court as escheated fund to University, *In re Estate of Nixon*, 422.

Unenclosed Swimming Pool — Death of child in, *Bell v. Page*, 132.

Uniform Declaratory Judgment Act — See Analytical Index, Declaratory Judgment Act.

University of North Carolina—Action

to recover unclaimed property escheated to, *In re Estate of Nixon*, 422.

Unjust Enrichment — Creation of constructive trust in money obtained by issuance of worthless checks, *Auto Supply Co. v. Equipment Co.*, 531.

Unknown Beneficiaries—Action to recover from University funds originally held by clerk of court for, *In re Estate of Nixon*, 422.

Utilities Commission — Contract carriers, *Utilities Comm. v. Petroleum Transportation*, 566; motor carrier rates, *Utilities Comm. v. Tobacco Assoc.*, 657; appeal and review, *Utilities Comm. v. Petroleum Transportation*, 566.

Uttering Forged Instrument—Prosecution for, *S. v. Burgess*, 677.

Vagueness — Contract void for, *Matthews v. Matthews*, 143.

Valuable Consideration — Promise by wife not to separate from husband is not, *Matthews v. Matthews*, 143.

Value of Property — Evidence as to value in eminent domain proceedings, *Highway Comm. v. Matthis*, 233; in larceny statute means fair market value, *S. v. Cotten*, 305.

Variance — Between indictment and proof, *S. v. Foster*, 109; in indictment charging larceny from the person in lawful possession but not owner of property, *S. v. Cotten*, 305.

Vendor and Purchaser—Duration of option or contract, performance or tender, *Builders v. Bridgers*, 662.

Venue — Action involving title to or right to possession of property, *Mortgage Corp. v. Development Corp.*, 138.

Verdict — Error cured by, *Pickard v. Burlington Belt Corp.*, 97; directed verdict, *S. v. Brooks*, 115; impeachment of, *Highway Comm. v. Matthis*, 233; instructions urging jury to reach, *S. v. Fuller*, 204; redeliberation by jury where verdict insensible, *S. v. Hamrick*, 227; motion to set aside rests in trial judge's discretion, *City of Randleman v. Hudson*, 404; *S. v. Siler*, 683; *Bell v. Page*, 132; motion for new trial in highway condemnation on ground that verdict was quotient verdict, *Highway Comm. v. Matthis*, 233; verdict of not guilty may not thereafter be changed to guilty, *S. v. Hamrick*, 227; words guilty of aiding and abetting added to verdict of not guilty treated as surplusage, *S. v. Hamrick*, 227.

Vested Rights—Legislature may not destroy, *De Lotbiniere v. Trust Co.*, 252.

Visible Injury — Recovery under life policy for death resulting from, *Kinney v. Ins., Co.*, 597.

Vote—Necessity of for expenditure of tax revenue for public bus system, *Cole v. Asheville*, 652.

Waiver—Of objection to racial composition of grand jury, *Parker v. State*, 27; of counsel in misdemeanor case, *S. v. Morris*, 262; of jury trial in civil action, *Repair Co. v. Morris & Assocs.*, 72; of duplicity in indictment by failing to make motion to quash, *Blakeney v. State*, 312; by failure to object to misstatement of evidence, *Womble v. Morton*, 84; of provisions of Dead Man's Statute, *Smith v. Dean*, 553; by bank of status as collecting agent, *Bank v. Acceptance Corp.*, 319.

Warning—Necessity for before attempting to pass vehicle, *Inman v. Harper*, 103.

Warranty — Cross-action for indemnity arising out of breach of express or implied warranty, *Anderson v. Robinson*, 191.

Waste — Action for by remainderman, *Edens v. Foulks*, 325.

Water Service—Furnishing to nonresidents, *City of Randleman v. Hinshaw*, 381.

"Waylaying and Otherwise" — Indict-

ment for secret assault by, *S. v. Conyers*, 637.

Weapons—Admissibility of used in robbery, *S. v. Russ*, 377.

Weeds — Liability of railroad for growth of weeds at crossing, *Moss v. Railway Co.*, 50.

Wills—Validity of statute authorizing appearance of guardian ad litem for unborn persons whose interest is contingent, *De Lotbiniere v. Trust Co.*, 252; rule in Shelley's case, *Summey v. McDonald*, 360; time of vesting of estate and whether estate is vested or contingent, *Edens v. Foulks*, 325; representation, *Edens v. Foulks*, 325; actions to construe wills, *De Lotbiniere v. Trust Co.*, 233.

Wire — Action for injuries received from eating collard greens containing wire at State University cafeteria, *Brooks v. University*, 157.

Witnesses—Competency of, *S. v. Fuller*, 204; reading from report or memorandum, *Rogers v. Rogers*, 668; *Eaton v. Klopman Mills*, 363; *Goldston v. Chambers*, 291; subpœna of Secret Service Agents, *State Bar v. Temple*, 91; contention that witness was badgered, *Eaton v. Klopman Mills*, 363; credibility of intoxicated witness, *Daniels v. Causey*, 456; deposition of out-of-state witness in Industrial Commission proceeding, *Hodge v. Robertson*, 216; segregation of witnesses in criminal cases, *S. v. Lovedahl*, 513; exclusion of witness' testimony not prejudicial when record fails to show what answer would have been, *S. v. Patton*, 605.

Workmen's Compensation Act — See Master and Servant.

"Wrongdoer"—Reference to in instruction in action against multiple defendants is not prejudicial, *Goldston v. Lynch*, 291.

Wrongful Death—Necessity for pecuniary loss, *Maynor v. Townsend*, 19; *Lienthal v. Glass*, 65; *Womble v. Morton*, 84; of pedestrian, *Womble v. Morton*, 84; motion for nonsuit on ground of deceased's contributory negligence, *Parker v. Allen*, 436; identity of deceased as driver by surviving occupant, *Smith v. Dean*, 553.

Zoning — Authority of county zoning board to grant special exception to mobile homes, *Jackson v. Board of Adjustment*, 408.

ANALYTICAL INDEX

ADMINISTRATIVE LAW.

§ 4. Procedure, Hearings and Orders of Administrative Boards and Agencies.

Requirement of due process is met by a fair hearing before an administrative tribunal, together with the right to know the claims of opposing parties. *Civil Service Board v. Page*, 34.

§ 5. Appeal, Certiorari and Review as to Administrative Orders.

Municipal fireman is properly discharged for disobeying order of superior officer to help erect tents for a "Festival in the Park." *Civil Service Bd. v. Page*, 34.

ADVERSE POSSESSION.

§ 1. In General.

Adverse possession defined. *S. v. Brooks*, 115.

§ 25. Sufficiency of Evidence.

In this action by the State for trespass, the evidence is sufficient to justify a jury finding of ownership of marshlands in the defendant on theory of 30 years adverse possession. *S. v. Brooks*, 115.

APPEAL AND ERROR.

§ 6. Judgments and Orders Appealable.

Appeal from order allowing amendment to complaint pursuant to G.S. 1-131 is dismissed as premature. *Pardue v. Speedway*, 403.

§ 10. Demurrers and Motions in Court of Appeals.

Defendant's motion to amend its answer in the Court of Appeals is allowed. *Moss v. Railway Co.*, 50.

Appellant's motion in the Court of Appeals to be allowed to amend pleadings to interpose a plea of equitable estoppel is denied. *Yancey v. Watkins*, 672.

§ 24. Form and Necessity for Objections, Exceptions and Assignments of Error in General.

Exceptions not brought forward as assignments of error nor discussed in appellant's brief are deemed abandoned. *Trust Co. v. Berry*, 547.

§ 26. Exceptions and Assignments of Error to Judgment.

Exception to the judgment does not present for review the findings of fact or the evidence. *Highway Comm. v. Rankin*, 452.

An exception to the signing and entry of judgment limits review to errors of law appearing on fact of record. *Auto Supply v. Equipment Co.*, 531.

§ 30. Objections, Exceptions, and Assignments of Error to Evidence and Motions to Strike.

"Apt time" in making objection defined. *Eaton v. Klopman Mills*, 363.

Admission of evidence will not be reviewed on appeal unless timely objection is made in trial court. *S. v. Woodlief*, 495.

APPEAL AND ERROR—*Continued.*

§ 31. Exceptions and Assignments of Error to Charge.

Where the court is not informed of its error in stating the evidence or the contentions of the parties, an objection thereto cannot be sustained on appeal. *Taylor v. Carter*, 78; *Womble v. Morton*, 84.

§ 40. Necessary Parts of Record Proper.

A brief is not a part of the record on appeal, *Civil Service Board v. Page*, 34; *Auto Supply v. Equipment Co.*, 531; nor is a statement of case on appeal, *Moss v. Railway Co.*, 50.

§ 41. Form and Requisites of Transcript.

Where appellant submits evidence in the form of a stenographic transcript, he must also affix an appendix to his brief setting forth the testimony relied upon to support his exceptions. *Inman v. Harper*, 103; *Shephard v. Highway Comm.*, 223.

§ 42. Conclusiveness and Effect of Record, Matters Properly Included.

Questions set forth in the brief which are not presented in the record will not be decided on appeal. *Chambers v. Redevelopment Comm.*, 355.

§ 45. Effect of Failure to Discuss Exceptions and Assignments of Error Therein.

Exceptions not brought forward in the brief are deemed abandoned. *Inman v. Harper*, 103.

§ 49. Harmless and Prejudicial Error in Admission of Evidence.

The exclusion of testimony will not be held prejudicial when the record fails to show the intended answer of the witness. *Payne v. Lowe*, 369.

§ 53. Error Cured by Verdict.

Appellant cannot be prejudiced by ruling of trial court relating to admission of evidence where jury returns a verdict in its favor. *Pickard v. Burlington Belt Corp.*, 97.

§ 54. Discretionary Matters.

Trial court's order setting verdict aside and awarding a new trial is not reviewable on appeal in the absence of abuse of discretion. *City of Randleman v. Hudson*, 404.

§ 57. Review of Findings.

Findings which present mixed questions of law and fact are reviewable on appeal. *Highway Comm. v. Rankin*, 452.

§ 59. Review of Judgments on Motion to Nonsuit.

On appeal from judgment of nonsuit, both competent and incompetent evidence must be considered. *Kinney v. Ins. Co.*, 597.

ASSAULT AND BATTERY.

§ 5. Assault With a Deadly Weapon.

The intentional pointing of a gun is in violation of the statute only if done without legal justification. *S. v. Adams*, 282.

ASSAULT AND BATTERY—*Continued.*

§ 6. Secret Assault.

Evidence held sufficient for jury in secret assault prosecution. *S. v. Conyers*, 637.

§ 11. Indictment and Warrant.

Indictment charging defendant with secret assault "by waylaying and otherwise" held sufficient. *S. v. Conyers*, 637.

§ 15. Instructions Generally in Criminal Prosecution.

In felonious assault prosecution, failure of court to use "felonious" preceding the words "intent to kill" in the charge is not error. *S. v. Conyers*, 637.

§ 16. Necessity of Submitting Question of Guilt of Lesser Degree of Offense.

In prosecution for felonious assault, failure to submit issue of simple assault is not error. *S. v. Conyers*, 637.

ATTORNEY AND CLIENT.

§ 10. Disbarment Procedure.

In this proceeding by the State Bar to disbar an attorney, the allegations are held sufficient to withstand the attorney's demurrer, and there is sufficient evidence to be submitted to the jury of the attorney's misconduct in engaging in various criminal and unethical practices. *State Bar v. Temple*, 91.

ATTORNEY GENERAL.

Respective duties of Attorney General and solicitor in preparing record on appeal in criminal cases are defined. *S. v. Hickman*, 627.

AUTOMOBILES.

§ 9. Turning and Turning Signals.

In making a left turn on a highway, a motorist is required to exercise reasonable care to determine that his intended movement can be made in safety. *Petree v. Johnson*, 336.

§ 10. Stopping and Parking.

The statute G.S. 20-161.1 is violated when a vehicle is left standing at nighttime with bright lights burning in the face of oncoming traffic even though the car is on the shoulder of the road. *Lienthall v. Glass*, 65.

§ 16. Passing Vehicle Traveling in Same Direction.

In this automobile accident case, there is no error in the failure of the court to charge that the warning required of a motorist before attempting to pass a vehicle traveling in the same direction must be timely given. *Inman v. Harper*, 103.

§ 17. Right Side of Road and Passing Vehicles Traveling in Same Direction.

A motorist has the right to assume, and to act on the assumption, that the driver of a vehicle approaching from the opposite direction will comply with statutory requirements before making a left turn across his path. *Petree v. Johnson*, 336.

AUTOMOBILES—*Continued.*

§ 19. Right of Way at Intersections.

Court is not required to define "highway" and "intersection." *Payne v. Lowe*, 369.

The erection of stop signs on an intersecting highway notifies the public that traffic on one is favored over the other and that a motorist facing a stop sign must yield. *Payne v. Lowe*, 369.

§ 33. Speed at Intersections.

Instruction requiring motorist to reduce speed at intersections in all circumstances is erroneous. *Rogers v. Rogers*, 668.

§ 40. Pedestrians.

In this action for the wrongful death of a pedestrian, the trial court's charge on the pedestrian's duty to yield the right of way to oncoming traffic is held not prejudicial error. *Womble v. Morton*, 84.

§ 43. Pleadings and Parties in Actions for Negligent Operation.

To plead reckless driving effectively, a party must allege facts showing a violation of specific rules of the road in a criminally negligent manner. *Nance v. Williams*, 345.

§ 44. Presumptions and Burden of Proof.

In a counterclaim for wrongful death arising out of an automobile accident, there is sufficient evidence to make out a prima facie case of negligence in plaintiff's allowing his automobile to leave the road. *Maynor v. Townsend*, 19.

§ 45. Relevancy and Competency of Evidence in General.

Daily memoranda kept by plaintiffs of effects of automobile injuries held inadmissible. *Goldston v. Chambers*, 291.

In action instituted prior to 22 June 1967, G.S. 8-51 prohibits testimony by a surviving occupant in an action against deceased's estate based on driver negligence that deceased was driving the automobile when the accident occurred. *Smith v. Dean*, 553. Plaintiff's introduction of defendant's admission that he was driving the automobile when the accident occurred waives the protection of G.S. 8-51 as to that transaction and renders competent testimony by defendant that plaintiff's intestate was the driver. *Ibid.*

§ 46. Opinion Testimony as to Speed and Other Facts at Scene.

Although it would have been permissible for the defendant to testify that "if plaintiff had stayed on the highway, there wasn't a thing in the world in her way, not a thing," its exclusion is not prejudicial where it appears that the testimony was merely cumulative of other testimony offered by defendant and would not have altered the verdict. *Petree v. Johnson*, 336.

In manslaughter prosecution, statement by witness that he could not swear defendant was driving over 100 miles per hour does not render incompetent his previous testimony giving an opinion that defendant was driving at that speed. *S. v. Woodlief*, 495.

§ 50. Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

In this action for wrongful death, there is sufficient evidence of defendant's negligence in parking with bright lights facing oncoming traffic. *Lienthall v. Glass*, 65.

AUTOMOBILES—*Continued.*

§ 51. Sufficiency of Evidence on Issue of Excessive Speed Generally.

Issue of defendant's negligence by speeding held supported by circumstantial evidence at accident scene. *Womble v. Morton*, 84.

§ 57. Sufficiency of Evidence of Exceeding Reasonable Speed at Intersection and Failing to Yield Right of Way.

In this action arising out of a collision at an intersection controlled by stop lights there is sufficient evidence of defendant's negligence in entering the intersection. *Pelkey v. Bynum*, 183.

§ 58. Sufficiency of Evidence in Turning.

Evidence of defendant's negligence in failing to see that he could safely make a left turn across the highway in the path of plaintiff's approaching automobile is sufficient to be submitted to the jury. *Petree v. Johnson*, 336.

§ 66. Identity of Driver of Vehicle.

In an action for wrongful death arising out of an automobile accident, question of the identity of the driver of the car is a jury question. *Maynor v. Townsend*, 19.

Where identity of driver is in dispute, separate issues should be submitted to jury with respect to identity of driver and negligence. *Ibid.*

The presence of the owner in his car at the time of a wreck raises no presumption that he was the operator. *Ibid.*

§ 73. Nonsuit on Ground of Contributory Negligence.

Evidence held to disclose contributory negligence by plaintiff in that he knew defendant's vehicle was illegally parked and had equal opportunity to foresee intervening action of third vehicle which struck defendant's vehicle. *Puryear v. Cooper*, 517.

§ 76. Contributory Negligence in Hitting Stopped Vehicle.

Evidence in wrongful death action discloses contributory negligence by the deceased as a matter of law in hitting a stopped vehicle on the highway. *Parker v. Allen*, 436.

§ 88. Sufficiency of Evidence of Contributory Negligence to go to Jury.

In these accident cases, there is sufficient evidence to be submitted to the jury on the issue of contributory negligence. *Taylor v. Carter*, 78; *Womble v. Morton*, 84.

§ 90. Instructions in Automobile Accident Cases.

The court's instruction on the issue of defendant's operating a vehicle at a speed greater than reasonable held erroneous. *Pelkey v. Bynum*, 183. Evidence is held sufficient to justify trial court's instruction with respect to doctrine of sudden emergency. *Taylor v. Carter*, 78.

Court is not required to define "highway" and "intersection." *Payne v. Lowe*, 369.

The court properly charged that the right of way in this intersection accident was governed by the provisions of G.S. 20-158(a) and not by G.S. 20-156(a). *Ibid.* Instruction incorporating the provisions of G.S. 20-140 without further instructions as to what facts the jury might find from the evidence that would constitute reckless driving is erroneous. *Nance v. Williams*, 345. Evidence in this case held insufficient to show culpable negligence justifying an instruction on reckless driving. *Ibid.*

AUTOMOBILES—*Continued.*

Instruction requiring motorist to reduce speed at intersection in all circumstances is erroneous. *Rogers v. Rogers*, 668.

§ 91. Issues and Verdict.

Where identity of driver is in dispute, separate issues should be submitted to jury with respect to identity of driver and negligence. *Maynor v. Townsend*, 19.

§ 94. Contributory Negligence of Guest or Passenger.

Whether plaintiff's intestate was contributorily negligent in riding with an intoxicated driver is held question for jury. *Lienthall v. Glass*, 65.

Failure of intoxicated person to move to position of safety is not contributory negligence. *Ibid.*

Evidence presents jury question as to whether owner-passenger of automobile was contributorily negligent in riding with defendant who suddenly increased speed to 80 miles per hour before the accident. *Strickland v. Hughes*, 395.

§ 95. Negligence of Driver Imputed to Guest or Passenger.

A driver's negligence is not imputed to an owner-passenger of an automobile when the owner-passenger sues the driver for injuries resulting from the driver's negligence; like any other passenger, however, the owner-passenger must take reasonable precautions to protect himself from injury. *Strickland v. Hughes*, 395.

§ 105. Sufficiency of Evidence on Issue of Respondeat Superior.

The presumption of ownership of an automobile created by G.S. 20-71.1 applies only in a civil action. *S. v. Cotten*, 305.

§ 113. Sufficiency of Evidence and Nonsuit in Homicide Prosecution.

Evidence that defendant drove his automobile at 100 miles per hour and ignored pleas to slow down is held sufficient to go to jury in manslaughter prosecution. *S. v. Woodlief*, 495.

§ 118. Elements of Offense of Reckless Driving.

Sufficiency of pleadings and evidence in wrongful death action of violation of reckless driving statute. *Nance v. Williams*, 345.

BANKS AND BANKING.

§ 9. Collection of Checks and Drafts.

Bank is found to be a holder in due course of a check deposited with it where evidence shows that bank waived its status as a collecting agent for the depositor. *Bank v. Acceptance Corp.*, 319.

BILLS AND NOTES.

§ 7. Endorsement, Transfer and Ownership.

Endorsement of a check "for deposit only" is not a restrictive endorsement. *Bank v. Acceptance Corp.*, 319.

§ 19. Defenses and Competency of Parol Evidence.

Depository bank which holds a check as a holder in due course holds it free

BILLS AND NOTES—*Continued.*

of any defense the drawer may have against the payee. *Bank v. Acceptance Corp.*, 319.

Where plaintiff bank of deposit was properly found to be a holder in due course of the check deposited with it by defendant's payee, defendant's evidence that the payee procured the check by submitting to it fraudulently fabricated insurance contracts is irrelevant and is properly excluded in plaintiff's action to recover the amount of the check. *Ibid.*

§ 20. Presumptions and Burden of Proof, Sufficiency of Evidence.

A depository bank is not required to prove the identity or the extent of the authority of the particular person who stamps an endorsement "for deposit only" on the back of a check. *Bank v. Acceptance Corp.*, 319.

BOUNDARIES.

§ 2. Courses and Distances and Calls to Natural Monuments.

A call to a natural object controls course and distance. *Smothers v. Schlosser*, 272.

§ 6. Junior and Senior Deeds.

Where a junior deed calls for a corner or line in a prior deed as the dividing line between adjoining tracts, the dividing line must be located from the description in the prior deed. *Smothers v. Schlosser*, 272.

§ 8. Nature and Essentials of Proceedings.

Burden of proof in a processioning proceeding rests upon petitioner. *Smothers v. Schlosser*, 272.

§ 15. Verdict and Judgment.

New trial awarded in boundary dispute where description of adjudged boundary line is not supported by record. *Smothers v. Schlosser*, 272.

BURGLARY AND UNLAWFUL BREAKINGS.

§ 3. Indictment.

Indictment charging that defendant "did break or enter" a certain building is not fatally defective in the use of the disjunctive "or." *Blakeney v. State*, 312. Indictment describing the premises in the language of G.S. 14-54 is held sufficient. *Ibid.*

§ 5. Sufficiency of Evidence and Nonsuit.

There is sufficient evidence of defendant's guilt of felonious breaking and entering to be submitted to the jury, but the evidence is insufficient to support an instruction on defendant's guilt of nonfelonious breaking and entering. *S. v. Williams*, 194.

Proof of either a breaking or entry is sufficient to convict under G.S. 14-54. *Blakeney v. State*, 312.

§ 6. Instructions.

In a prosecution for felonious breaking and entering, the court must charge that the breaking was done with intent to commit a felony. *S. v. Green*, 170.

§ 7. Verdict and Instructions as to Possible Verdicts.

Where the evidence points unerringly to defendant's intent to commit a

BURGLARY AND UNLAWFUL BREAKINGS—*Continued.*

felony, the trial court need not instruct the jury as to defendant's guilt of non-felonious breaking and entering. *S. v. Martin*, 148.

§ 8. Sentence and Punishment.

Sentence of five to ten years for felonious breaking and entering is valid. *S. v. White*, 398.

CARRIERS.

§ 2. State License and Franchise; Petition to Increase Service.

Contract carrier permit was improperly granted where applicant offered no proof that his shipper has a need for a specified type of service not otherwise available by existing means of transportation. *Utilities Comm. v. Petroleum Transportation*, 566.

§ 5. Rates and Tariffs.

Utilities Commission's order revising intrastate motor carrier rates for unmanufactured tobacco on the basis of operating ratios which do not reflect any actual separation of interstate and intrastate revenues nor any separation of tobacco revenues and expenses is contrary to law. *Utilities Comm. v. Tobacco Association*, 657.

§ 19. Liability for Injury to Passengers.

Bus company is not liable for injury to bus passenger occurring in restaurant operated by lessees of bus company. *Brady v. Coach Co.*, 174.

CLERKS OF COURT.

§ 2. Jurisdiction to Enter Judgments.

Clerk of court has no jurisdiction in action to recover unclaimed funds paid by the clerk to the University. *In re Estate of Nixon*, 422.

§ 12. Liabilities of Clerk and Surety for Funds Paid Into Office.

No statute of limitations bars an action by the beneficiaries of funds held by the clerk under G.S. 46-34 until the clerk has refused a demand for payment. *In re Estate of Nixon*, 422.

CONSTITUTIONAL LAW.

§ 8. Delegation of Authority to Municipal Corporations.

County zoning ordinance is not unconstitutional as naked and arbitrary delegation of power to board of adjustment. *Jackson v. Board of Adjustment*, 408.

§ 23. Scope of Protection of Due Process; Vested Rights.

Legislature may not interfere with vested rights, but may enact valid statute affecting contingent interests. *De Lotbinere v. Trust Co.*, 252.

§ 29. Right to Indictment and Trial by Duly Constituted Jury.

The statute which imposes the death penalty in cases where defendant is convicted after a plea of not guilty to a charge of first degree burglary and the jury fails to recommend life imprisonment is not unconstitutional. *Parker v. State*, 27.

CONSTITUTIONAL LAW—*Continued.*

§ 32. Right to Counsel.

In prosecution for misdemeanor, the defendant not being represented by counsel, it was not necessary that trial court find that defendant intelligently waived representation by counsel; nor was the trial judge obligated to actively assist defendant in the presentation of his defense. *S. v. Morris*, 262.

§ 36. Cruel and Unusual Punishment.

Punishment not exceeding statutory limit is not cruel or unusual. *S. v. Morris*, 611.

CONTRACTS.

§ 2. Offer and Acceptance and Mutuality.

Mutuality of agreement is essential element of a contract. *Builders v. Bridgers*, 662.

§ 4. Consideration.

Issue as to whether there was new consideration for the modification of an executed contract is properly submitted to the jury. *Britton v. Gabriel*, 213.

§ 6. Contracts Against Public Policy Generally.

A contract between husband and wife whereby one spouse agrees to perform obligations imposed by law as part of the marital duties is without consideration and is void as against public policy. *Matthews v. Matthews*, 143.

§ 12. Construction of Contracts Generally.

Ambiguous writing in contract is construed against the maker. *Builders v. Bridgers*, 662.

§ 15. Negligent Breach of Contractual Duties.

To recover for injury arising out of negligent breach of contract, plaintiff must show that the breach of contractual duty was a proximate cause of his injury. *Bryan v. Elevator Co.*, 593.

CORPORATIONS.

§ 27. Liability of Corporation for Torts.

Where the record shows that three individual defendants were doing business as a corporation, nonsuit as to the individual defendants was proper. *Pickard v. Burlington Belt Corp.*, 97.

COSTS.

§ 4. Items of Costs and Amount of Allowance.

Court may allow an attorney's fee to be taxed as part of the costs in a personal injury or property damage action in which the judgment is for $1000 or less without finding that there was an unwarranted refusal to pay the claim. *Rogers v. Rogers*, 668.

COUNTIES.

§ 5. County Zoning.

The legislature may delegate to a zoning board of adjustment the authority as a quasi-judicial body to determine facts and therefrom to draw conclusions as a basis of its official action. *Jackson v. Bd. of Adjustment*, 408.

COUNTIES—*Continued.*

In determining the sufficiency of the standard by which a zoning board of adjustment is to be guided, the purpose and intent of the ordinance may be considered. *Ibid.*

Decision of a county board of adjustment is subject to review by the Superior Court in a proceeding in the nature of certiorari. G.S. 153-266.17. *Ibid.*

County zoning ordinance which delegates to board of adjustment authority to give a mobile home park a special exception in an A-1 agricultural district is held not unconstitutional. *Ibid.*

COURTS.

§ 6. Appeal to Superior Court from the Clerk.

Upon appeal from a proceeding before the clerk of court in which the clerk had no jurisdiction, the Superior Court has power to hear and determine all aspects of the case. *In re Estate of Nixon*, 422.

CRIMINAL LAW.

§ 13. Jurisdiction in General.

A sufficient warrant or indictment is an essential of jurisdiction. *Blakeney v. State*, 312. The State may try and imprison a person improperly or illegally brought within this jurisdiction. *S. v. Green*, 391.

§ 16. Exclusive Jurisdiction.

District Court has exclusive original jurisdiction in shoplifting prosecution. *S. v. Thompson*, 508.

§ 18. Jurisdiction on Appeal to Superior Court.

Upon appeal from conviction in District Court, trial in Superior Court is *de novo* and may be had upon original accusation of District Court. *S. v. Thompson*, 508.

Superior Court may impose a lighter or heavier sentence than that imposed by the District Court. *Ibid.* Where defendant was convicted in District Court upon a warrant charging him with shoplifting, the Superior Court upon appeal has no authority to allow the State to amend the warrant to charge defendant with a second offense of shoplifting. *Ibid.*

§ 23. Plea of Guilty.

Motion to withdraw guilty plea after sentence has been imposed is addressed to discretion of trial court. *S. v. Morris*, 611.

§ 24. Plea of Not Guilty.

Defendant's plea of not guilty casts upon State the burden to prove all essential elements of the offense and also challenges the credibility of the State's evidence. *S. v. Patton*, 605.

§ 34. Evidence of Guilt of Other Offenses.

Evidence of other offenses is inadmissible if its only relevancy is to show the character of the accused or his disposition to commit the offense charged. *S. v. Thompson*, 508.

Court erred in admitting evidence of defendant's prior criminal record. *S. v. Burgess*, 677.

CRIMINAL LAW—*Continued.*

§ 36.1. Evidence of Alibi.

The trial court did not err in excluding evidence offered by defendant on the question of his defense of alibi. *S. v. Green*, 170.

§ 40. Evidence and Record at Former Trial or Proceeding.

In escape prosecution, commitment issued under hand and official seal of clerk of Superior Court is admissible to show defendant was in lawful custody. *S. v. Beamon*, 583.

§ 42. Articles Connected With the Crime.

Bullets connected with the commission of a crime are admissible as exhibits. *S. v. Mercer*, 152.

Weapons used in the commission of a robbery are admissible in evidence. *S. v. Russ*, 377.

§ 43. Maps and Photographs.

Photographs in these criminal prosecutions were properly admitted in evidence. *S. v. Fuller*, 204; *S. v. Mercer*, 152.

Photographs of the scene of the crime are admissible for illustrative purposes. *S. v. Russ*, 377.

§ 75. Tests of Voluntariness of Confessions; Admissibility in General.

Confession of 15 year old defendant is rendered involuntary where the officer to whom it was made promised he would assist the defendant. *S. v. Gibson*, 187.

In prosecution for drunken driving, testimony of officers as to defendant's intoxicated condition is admissible without necessity for voir dire examination where officers merely testified from their observation of defendant's behavior. *S. v. Morris*, 262.

§ 76. Determination and Effect of Admissibility of Confession.

Confession made subsequent to involuntary confession is presumed involuntary. *S. v. Gibson*, 187.

§ 79. Acts and Declarations of Companions and Codefendants.

Statements made by one defendant in the presence of another while perpetrating a common offense are competent against the other. *S. v. Russ*, 377.

§ 91. Time of Trial and Continuance.

The trial court did not err in denying defendant's motion for continuance on the ground that the solicitor refused to prosecute on two charges. *S. v. Withers*, 201.

§ 98. Presence of Defendant.

In trial of two prison inmates, trial court did not abuse its discretion in denying defendants' motion that their witnesses, who were fellow inmates, be present in the courtroom during trial. *S. v. Lovedahl*, 513.

§ 99. Conduct of Court During Trial.

Since trial judge must remain impartial, he is under no duty to actively aid defendant in the presentation of his defense. *S. v. Morris*, 262.

§ 102. Argument and Conduct of Solicitor During Trial.

In a prosecution for first degree murder the solicitor's use of the word

CRIMINAL LAW—*Continued.*

"slaughter" was not prejudicial to defendant. *S. v. Mercer*, 152. Solicitor's jury argument that defendants were professional crooks and hoods is held prejudicial. *S. v. Foster*, 109.

§ 104. Consideration of Evidence on Motion to Nonsuit.

Rules for consideration of evidence on motion for nonsuit. *S. v. Richardson*, 523; *S. v. Adams*, 282.

§ 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. Cotten*, 305.

§ 106. Rules as to Sufficiency of Evidence to Overrule Motion to Nonsuit.

Rules as to sufficiency of evidence to overrule motion to nonsuit. *S. v. Cotten*, 305; *S. v. Bailiff*, 608.

§ 109. Directed Verdict.

Motion for directed verdict of not guilty challenges the sufficiency of the evidence to go to the jury. *S. v. Woodlief*, 495.

§ 112. Instructions on Burden of Proof.

Failure to define "reasonable doubt" is not error. *S. v. Bailiff*, 608; *S. v. Conyers*, 637.

§ 113. Statement of Evidence and Application of Law Thereto.

The trial court must apply the law to the evidence arising in the case. *S. v. Madam (X)*, 615.

Trial court's instructions relating to the defense of alibi are held without error. *S. v. Lovedahl*, 513.

The jury is presumed to understand the meaning of the words "carnal knowledge" and in absence of special request, the court need not define them. *S. v. Withers*, 201.

It not only is unnecessary but it is undesirable for a trial judge to give instructions on abstract possibilities unsupported by evidence. *S. v. McLean*, 460.

§ 114. Expression of Opinion by Court on Evidence in Charge.

In speeding prosecution trial court's remark is constituted an expression of opinion on the evidence and is prejudicial. *S. v. Patton*, 605. Prohibition against the court's expressing an opinion on the evidence applies to the manner of stating the contentions of the parties. *S. v. Beamon*, 583.

§ 115. Instructions on Lesser Degrees of Crime and Possible Verdicts.

Submission to the jury of a lesser included offense is not required where there is no evidence of such offense. *S. v. McLean*, 460.

Trial court adequately instructed jury in joint trial of two codefendants that they could either convict or acquit one or both defendants. *S. v. Parrish*, 587.

§ 118. Charge on Contentions of the Parties.

A fundamental misconstruction of defendant's contentions is prejudicial.

CRIMINAL LAW—*Continued.*

S. v. Ransom, 613. Objections to the statement of the contentions should be brought to the trial judge's attention at the trial. *S. v. Beamon*, 583.

§ 119. Request for Instructions.

Where the special instructions requested by defendant are not supported by the evidence, the court is not required to give such instructions either verbatim or in substance. *S. v. Parrish*, 587.

§ 122. Additional Instructions After Initial Retirement of Jury.

Where the jury returns an insensible and unresponsive verdict, the court may require the jury to redeliberate and return a proper verdict. *S. v. Hamrick*, 227.

The trial court did not err in urging the jury to agree upon a verdict. *S. v. Fuller*, 204.

§ 124. Sufficiency and Effect of Verdict in General.

A verdict of not guilty of one degree of the crime charged but guilty of aiding and abetting is a verdict of not guilty, the words guilty of aiding and abetting being mere surplusage. *S. v. Hamrick*, 227.

§ 125. Special Verdicts.

A special verdict is that by which the jury finds the facts only, leaving the judgment to the court. *S. v. Peguise*, 526.

§ 126. Unanimity and Acceptance of Verdict.

A verdict is a substantial right, and whenever the verdict is complete, sensible and responsive to the bill of indictment, it must be accepted by the court. *S. v. Hamrick*, 227.

Where the jury returns a verdict of not guilty, it may not upon redeliberation return a verdict of guilty of that crime. *S. v. Hamrick*, 227.

§ 132. Setting Aside Verdict as Contrary to Weight of Evidence.

Motion to set aside verdict is addressed to discretion of trial court. *S. v. Siler*, 683.

§ 134. Form and Requisites of Judgments or Sentence in General.

Where the judgment is ambiguous, cause is remanded for proper sentencing. *S. v. Siler*, 683.

§ 138. Severity of Sentence and Determination Thereof.

Superior Court may impose lighter or heavier sentence than that imposed by District Court. *S. v. Thompson*, 508.

Sentence of 12 months for first offense of shoplifting is excessive. *Ibid.*

Single sentence upon conviction of more than one count which does not exceed the maximum for any single count is valid. *S. v. White*, 398.

Upon appeal from an inferior court, the Superior Court has the power to impose a greater sentence than that imposed by the inferior court. *S. v. Morris*, 262.

§ 142. Suspended Sentences and Judgments.

Where it is not clear whether court struck entire sentence imposed or only portion of judgment relating to probation, cause is remanded for resentencing. *S. v. Siler*, 683.

CRIMINAL LAW—*Continued.*

§ 146. Nature and Grounds of Appellate Jurisdiction in Criminal Cases in General.

Where record on appeal is inconsistent as to major issues raised on appeal, the Court of Appeals exercises its inherent jurisdiction and orders a new trial. *S. v. Hickman*, 627.

§ 149. Right of State to Appeal.

The State has no right to appeal from a judgment allowing a plea of former jeopardy. *S. v. Peguise*, 526.

§ 150. Right of Defendant to Appeal.

Where record shows that judgment may have been changed because defendant appealed, cause is remanded for proper sentencing. *S. v. Siler*, 683.

§ 154. Case on Appeal.

Respective duties of solicitor and defendants in respect to the preparation of the record on appeal are defined; also defined are the respective duties and responsibilities of the solicitor and Attorney General in preparing record on appeal. *S. v. Hickman*, 627.

§ 156. Certiorari.

No appeal lies from a habeas corpus judgment, review being available only by certiorari. *S. v. Green*, 391.

§ 157. Necessary Parts of Record Proper.

The record on appeal should consist of a plain, accurate and concise statement of what the record shows occurred in the trial court. Rule of Practice in the Court of Appeals No. 19. *S. v. Hickman*, 627.

§ 158. Conclusiveness and Effect of Record and Presumptions as to Matters Omitted.

The charge is presumed correct when not included in the record. *S. v. Woodlief*, 495.

Where the record on appeal contains contradictory and inconsistent statements as to circumstances surrounding defendant's pleas of guilty and nolo contendere and as to matters relating to defendant's opportunity for cross-examination, the Court of Appeals vacates judgment and orders a new trial. *S. v. Hickman*, 627. Court of Appeals is not bound by punctuation employed by court reporter in transcribing the charge. *S. v. Conyers*, 637.

§ 160. Correction of Record.

Unless record on appeal is contradictory and inconsistent as to questions raised on appeal, the record on appeal is not subject to correction after solicitor's approval thereof. *S. v. Hickman*, 627.

§ 161. Form and Requisites of Exceptions and Assignments of Error in General.

Exceptions not properly set out in the record will be deemed abandoned. *S. v. Green*, 170.

Questions not presented by exceptions and assignments of error will not be considered on appeal. *S. v. Cotten*, 305.

§ 162. Objections, Exceptions, and Assignments of Error to Evidence.

Competency of evidence is not presented on appeal where no objection to its admission is made at the trial. *S. v. Burgess*, 677.

CRIMINAL LAW—*Continued.*

§ 163. Exceptions and Assignments of Error to Charge.

A single assignment of error presenting exceptions to several parts of the charge is ineffectual where one of the parts is correct. *S. v. Conyers*, 637.

§ 167. Harmless and Prejudicial Error in General.

Evidence in jury view but not introduced held not prejudicial in this case. *S. v. Siler*, 683.

§ 168. Harmless and Prejudicial Error in Instructions.

Trial court did not err in failing to restrict consideration of codefendant's testimony which implicated defendant. *S. v. Parrish*, 587. Trial court's error in using defendants' names interchangeably in the charge is not prejudicial. *Ibid.*

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Exclusion of testimony cannot be held prejudicial when record fails to show what witness would have testified. *S. v. Patton*, 603.

§ 181. Post-conviction Hearing.

Purpose of Post-conviction Hearing Act defined. *Parker v. State*, 27. In this Post-conviction Hearing, there is sufficient evidence to show that defendant's plea of guilty in former trial was voluntary. *Ibid.*

No appeal lies from a post-conviction judgment, review being available only by certiorari. *S. v. Green*, 391.

Although a petition attacking a criminal conviction is entitled a habeas corpus petition, it should be considered as a post-conviction petition under G.S. 15-217, et seq., when the substance of the petition and the relief sought thereunder bring it under that Act. *S. v. Hamrick*, 227.

DAMAGES.

§ 12. Necessity for and Sufficiency of Pleading of Damages.

Allegations in this case for injuries arising out of an automobile accident are sufficient to admit evidence that plaintiff suffers from a traumatic neurosis and depressive reaction. *Inman v. Harper*, 103.

§ 13. Competency and Relevancy of Evidence on Issue of Compensatory Damages.

Daily memoranda kept by plaintiffs as to effects of injuries in automobile accident held inadmissible. *Goldston v. Chambers*, 291.

§ 16. Instructions on Measure of Damages.

Trial court must give sufficiently definite instructions on the issue of damages. *Highway Comm. v. Thomas*, 679.

Trial court erred in failing to instruct jury that any award on account of future damages should be limited to the present cash value of such damages. *Moss v. Railway Co.*, 50.

Instruction as to permanent damages is error where permanent injuries were not alleged or proved. *Rogers v. Rogers*, 668.

DEATH.

§ 3. Nature and Grounds of Action for Wrongful Death.

In wrongful death action, plaintiff must allege and prove intestate's death, defendant's negligence and pecuniary loss of the estate. *Lienthall v. Glass*, 65. In wrongful death action, nonsuit motion should be denied when all of the evidence is sufficient to make out a prima facie case of actionable negligence. *Maynor v. Townsend*, 19.

Rules relating to nonsuit for contributory negligence are applicable in wrongful death action. *Parker v. Allen*, 436.

§ 7. Determination of Life Expectancy; Damages.

The Wrongful Death Act does not permit the recovery of nominal or punitive damages. *Maynor v. Townsend*, 19.

Direct evidence of earnings is not essential, it being sufficient to present evidence of decedent's health, age, industry, means and business. *Ibid.*

There is sufficient evidence to be submitted to the jury on the issue of pecuniary loss to decedent's estate as a result of wrongful death. *Ibid; Womble v. Morton*, 84.

DECLARATORY JUDGMENT ACT.

§ 1. Nature and Grounds of Remedy.

The mere threat of an action to rescind sale of personal property, i.e., corporate stock, does not constitute an actual controversy under the Declaratory Judgment Act. *Newman Machine Co. v. Newman*, 491. An action to quiet title to real estate constitutes a justiciable controversy under the Declaratory Judgment Act. *York v. Newman*, 484.

§ 2. Proceedings.

There is a statutory provision for a jury trial to determine issues of fact in cases under the Declaratory Judgment Act. *York v. Newman*, 484.

DEDICATION.

§ 1. Nature, Methods, and Elements of Dedication.

The evidence is sufficient to show the dedication of a street by the owners of a subdivision in recording a plat thereof, and to show acceptance of the dedication by the State Highway Comm. *Owens v. Taylor*, 178.

DEEDS.

§ 14. Reservations and Exceptions.

Deed held sufficient to reserve title to highway rights of way in the grantors. *Hughes v. Highway Comm.*, 1.

§ 19. Restrictive Covenants Generally.

Grantee is not bound by restrictive covenant in previously recorded deed from his grantor conveying other lots in the same subdivision unless such a deed clearly and specifically imposes a restriction on grantee's property, an implied intention to make the restrictions applicable to all lots in the subdivision being insufficient. *Church v. Berry*, 617.

§ 20. Restrictive Covenants to Subdivision Developments.

Restrictive covenant in deed did not limit use of the property to residential purposes and defendants could not be restrained from constructing asphalt plant in the subdivision. *Dorsett v. Development Corp.*, 120.

DIVORCE AND ALIMONY.

§ 22. Jurisdiction and Procedure Generally in Custody and Support Action.

Where consent judgment affecting custody and support of children is entered in husband's divorce action instituted in the general county court, that court retains jurisdiction of the children and parents so as to hear wife's petition for exclusive custody and support of minor son. *Rehm v. Rehm*, 298.

§ 23. Support.

To hold a father in contempt for the willful failure to support his children under a court decree, there must be a finding that defendant possessed the means to comply with the order. *Willis v. Willis*, 219.

EASEMENTS.

§ 2. Creation of Easement by Deed or Agreement.

Deed held sufficient to reserve title to highway rights of way in the grantors. *Hughes v. Highway Comm.*, 1.

§ 3. Creation of Easement by Implication or Necessity.

Complaint held insufficient to establish easement in a road on defendant's land by implication or estoppel where properties of plaintiff and defendant were not developed in relation to each other. *Buie v. Phillips*, 447.

EMINENT DOMAIN

§ 1. Nature and Extent of Power.

Eminent domain is the power of the State or some agency authorized by it to take or damage private property for a public purpose upon payment of just compensation. *Highway Comm. v. Matthis*, 233.

§ 2. Acts Constituting a "Taking".

In highway condemnation case, defendants are held to have reasonable access to main highway by service road abutting their property. *Highway Commission v. Rankin*, 452.

§ 4. Delegation of Power.

The General Assembly prescribes the manner in which the power of eminent domain may be exercised. *Highway Comm. v. Matthis*, 233.

§ 5. Amount of Compensation.

In determining compensation in eminent domain proceedings, the existence of valuable mineral deposits in the land taken constitutes an element which may be considered insofar as it influences the market value of the land, but the award may not be reached by separately evaluating the land and the deposit. *Highway Comm. v. Mode*, 464.

In highway condemnation trial, court's instruction that jury could answer issue of landowner's damages "nothing" is error when all of the evidence shows that the property had been substantially damaged by the taking. *Highway Comm. v. Thomas*, 679. Condemnor has the burden to prove general and special benefits. *Ibid.*

§ 6. Evidence of Value.

In condemnation proceeding instituted by the Highway Commission, the

EMINENT DOMAIN—*Continued.*

trial court did not err (1) in excluding landowner's testimony as to the value of a proposed subdivision, and (2) in excluding testimony of real estate appraiser who did not see landowner's property until more than three years after date of the taking. *Highway Comm. v. Matthis*, 233.

In highway condemnation proceedings, the landowners are entitled to have the jury consider the existence of a stone deposit discovered on the land during construction of the highway insofar as it influences the fair market value of the land at the time of the taking. But admission of testimony placing a separate valuation on the stone deposit is error. *Highway Comm. v. Mode*, 464. Opinion testimony as to the highest and best use of the property may not be based partially on "evidence in this case." *Ibid.* Highway Commission is entitled to have the jury consider evidence of increased value as a quarry site for the stone deposit upon the question of general or special benefits. *Ibid.*

In a proceeding by a municipality to condemn an easement for water and sewer lines outside the city limits, it was prejudicial error for the court to admit in evidence without proper identification and authentication a written offer by the municipality to give respondent landowner access to water and sewer lines. *Randleman v. Hinshaw*, 381.

§ 7. Proceedings to Take Land and Assess Compensation, Generally.

State Highway Commission can acquire right of way easement by purchase, donation, dedication, prescription or condemnation. *Hughes v. Highway Comm.*, 1.

In a G.S. Ch. 140 or 136 condemnation proceeding, complaint which fails to allege that the Commission and the landowners are unable to agree on the price of land sought to be condemned is held to allege a defective statement of a good cause of action. *Highway Comm. v. Matthis*, 233; *Highway Comm. v. Mode*, 464; *Charlotte v. Robinson*, 429.

In highway condemnation proceeding, landowners have no standing to attack the Commission's complaint alleging defective statement of a good cause of action where defendants have received the sum paid into court as Commissioners' estimate of just compensation. *Ibid.*

Superior Court may restrain municipal airport from removing trees from condemned property pending appeal by the landowners to Superior Court when the right and necessity to condemn the property are at issue. *Airport Authority v. Irvin*, 341. City of Charlotte is given authority by Chapter 740, Session Laws of 1967, to condemn an entire building which is severed by a proposed street. *Charlotte v. Robinson*, 429. Court has authority under G.S. 136-108 to determine whether defendants in a highway condemnation case have been denied reasonable access to main highway. *Highway Comm. v. Rankin*, 452.

§ 9. Condemnation by Housing Authority.

Complaint merely alleging that plaintiff is entitled to displacement payment of $2500 from defendant municipal redevelopment commission is subject to demurrer. *Chambers v. Redevelopment Comm.*, 355.

§ 13. Action by Owner for Compensation or Damages.

Proceedings by owner under G.S. 136-19 and G.S. 40-11 et seq. to recover compensation for property appropriated for highway right of way. *Hughes v. Highway Comm.*, 1.

§ 15. Time of Passage of Title.

Time of passage of title of highway right of way to Highway Commission. *Hughes v. Highway Comm.*, 1.

ESCAPE.

§ 1. Elements of, and Prosecution for, the Offense.

In escape prosecution, a commitment issued under the hand and official seal of the clerk of Superior Court is admissible to show defendant was in lawful custody. *S. v. Beamon*, 583. Escape from county home while serving sentence confining defendant to county jail and assigning him to work in county home is punishable under G.S. 14-256. *S. v. Whitt*, 601.

ESCHEATS.

Just claim for unclaimed funds voluntarily paid by clerk of court to University has been presented where it appears that petitioners are legal successors in interest to the person for whom the clerk originally held the funds. *In re Estate of Nixon*, 422. No statute of limitations is applicable to an action to recover unclaimed property paid to the University until there has been a demand and refusal to pay. *Ibid.*

ESTATES.

§ 3. Nature and Incidents of Life Estates and Remainders in General.

Where a remainder is limited to a person not *in esse* or not ascertained, it is contingent. *Edens v. Foulks*, 325.

For a remainder to be vested, the remainderman must have a present capacity of taking possession if the possession were to become vacant. *Ibid.*

§ 5. Actions for Waste.

A contingent remainderman may not maintain an action for waste and forfeiture against the life tenant in possession. *Edens v. Foulks*, 325. A contingent remainderman is entitled to an injunction to prevent a person in possession from committing future waste. *Ibid.*

ESTOPPEL.

§ 4. Equitable Estoppel.

Elements of equitable estoppel. *Yancey v. Watkins*, 672.

§ 7. Burden of Proof and Competency of Evidence.

Party relying on the doctrine of equitable estoppel must plead the doctrine with particularity. *Yancey v. Watkins*, 672.

EVIDENCE.

§ 4. Presumptions in General.

It is presumed that a person may have issue as long as he lives. *De Lotbiniere v. Trust Co.*, 252.

§ 11. Transactions or Communications with Decedent.

Testimony in disbarment proceeding is not violative of deadman's statute. *State Bar v. Temple*, 91.

In action instituted prior to 22 June 1967, G.S. 8-51 prohibits testimony by a surviving occupant in an action against deceased's estate based on driver negligence that deceased was driving the automobile when the accident occurred. *Smith v. Dean*, 553. Plaintiff's introduction of defendant's admission that he was driving the automobile when the accident occurred waives the protection of G.S. 8-51 as to that transaction and renders competent testimony by defend-

EVIDENCE—*Continued.*

ant that plaintiff's intestate was the driver. *Ibid.* Plaintiff's cross-examination of defendant as to certain communications with deceased is held to constitute a waiver of the protection of G.S. 8-51 as to the matters inquired about. *Ibid.*

§ 25. Relevancy and Competency of Photographs.

Admissibility and establishing accuracy of photographs. *Smith v. Dean*, 554.

§ 28. Public Records and Documents.

In a proceeding by municipality to condemn an easement for water and sewer lines outside the city limits, it was prejudicial error for the court to admit in evidence without proper identification and authentication a written offer by the municipality to give respondent landowner access to the water and sewer lines. *Randleman v. Hinshaw*, 381.

§ 29. Accounts and Private Writings.

Before any writing may be admitted into evidence it must be authenticated in some manner. *Randleman v. Hinshaw*, 381.

§ 39. Declarations as to Bodily Feeling.

In an action for personal injuries, testimony by lay witness of statements made to him by plaintiff as to her physical and mental condition is properly admitted into evidence. *Inman v. Harper*, 103.

§ 45. Nonexpert Opinion Evidence.

Nonexpert may give opinion as to value. *S. v. Cotten*, 305.

§ 48. Competency and Qualification of Experts.

Where a party tendering a witness fails to request that the witness be qualified as an expert and the witness has not been found to be an expert when hypothetical questions are asked, exclusion of the expert's testimony will not be reviewed on appeal. *Highway Comm. v. Matthis*, 233.

EXECUTION.

§ 3. Issuance and Return of Execution.

The holder of a money judgment in a general county court may have execution issue from the general county court or from the Superior Court. *Rehm v. Rehm*, 298.

§ 16. Supplementary Proceedings.

In this statutory proceeding supplemental to execution, a motion by judgment creditor for appointment of receiver is sufficient to withstand demurrer. *Massey v. Cates*, 162.

FIRES.

§ 1. Duties and Liabilities of Persons Starting Fire on His Own Land.

A violation of the statutes imposing standard of care upon persons who undertake to burn brush and grass constitutes negligence. *Pickard v. Burlington Belt Corp.*, 97.

FRAUD.

§ 1. Nature and Elements of Fraud.

The essential elements of fraud are defined. *Auto Supply Co. v. Equipment Co.*, 531.

FRAUD—*Continued.*

§ 9. Pleadings.

In order to allege fraud by a corporation in knowingly issuing worthless checks, creditor-bank's proof of claim against insolvent corporation in receivership proceedings must allege as an element of fraud that the creditor-bank reasonably relied upon some representation by the corporation. *Auto Supply Co. v. Equipment Co.*, 531.

GRAND JURY.

§ 3. Challenge to Composition.

Objection to composition of the grand jury is deemed waived unless raised in apt time by motion to quash; if the objection is made in apt time, a subsequent plea of guilty does not waive the objection. *Parker v. State*, 27.

HABEAS CORPUS.

§ 3. Determination of Right to Custody of Children.

The decision to award custody of a minor is vested in the discretion of the trial judge. *In re Custody of Pitts*, 211.

In this habeas corpus proceeding to determine the custody of minor children, there is sufficient evidence to support award of the children to the mother. *Ibid.*

§ 4. Review.

No appeal lies from a habeas corpus judgment, review being available only by certiorari. *S. v. Green*, 391.

HIGHWAYS AND CARTWAYS.

§ 1. Powers and Functions of Highway Commission in General.

The Highway Commission has been expressly granted the power of eminent domain by the Legislature, and the Commission must follow the prescribed procedures set out in the applicable statutes. *Highway Comm. v. Matthis*, 233.

§ 4. What Constitutes a State Highway or Public Road.

Proceedings by the State Highway Commission to condemn property for highway right of way. *Hughes v. Highway Comm.*, 1.

§ 9. Actions Against the Commission.

Contributory negligence by driving truck exceeding weight limitations upon highway bridge. *Shepherd v. Highway Comm.*, 223.

HOMICIDE.

§ 10. Defense of Others.

A child has the right to kill his father in defense of the child's mother. *S. v. Adams*, 282.

§ 13. Pleas.

A defendant may rely on the plea of self-defense and accident. *S. v. Adams*, 282.

§ 21. Sufficiency of Evidence and Nonsuit.

There is sufficient evidence to be submitted to the jury on the question of defendant's guilt of first degree murder of his wife. *S. v. Mercer*, 152.

HOMICIDE—*Continued.*

§ 27. Instructions on Manslaughter.

In a prosecution of a 14 year old defendant for manslaughter of his father, failure of the court to instruct on the issue of culpable negligence as nullifying defendant's plea of accident, and the failure to instruct as to the law of self-defense which arose upon the evidence, entitles defendant to a new trial. *S. v. Adams*, 282.

HUSBAND AND WIFE.

§ 3. Agency of One Spouse for the Other.

The husband is not presumed from the marital relationship to be an agent of his wife, and if such agency is relied upon, it must be proven. *Clark v. Morris*, 388.

§ 4. Contracts and Conveyances Between Husband and Wife.

A contract between husband and wife whereby one spouse agrees to perform certain marital duties imposed by law is without consideration and is void as against public policy. *Matthews v. Matthews*, 143.

All transactions of the wife with her husband in regard to her separate property were held void at common law. *Trammell v. Trammell*, 166.

§ 10. Requisites and Validity of Separation Agreements.

Separation agreement between spouses which was executed without certification that the wife was privately examined is void ab initio. *Trammell v. Trammell*, 166. An agreement looking to a future separation of husband and wife is void as against public policy. *Matthews v. Matthews*, 143.

§ 17. Termination and Survivorship of Estate by Entireties.

Proceeds from fire policy on entirety property become personalty held by husband and wife as tenants in common. *Forsyth County v. Plemmons*, 373.

§ 24. Alienation in General.

In an action for actual and punitive damages for the alienation of the affections of plaintiff's wife by the defendant and for his criminal conversation with her, there is no error in the fact that the original complaint joined the two causes of action together in one paragraph and requested damage in a lump sum without differentiating the amount sought to be recovered in each. *Warner v. Torrence*, 384.

§ 25. Competency and Relevancy of Evidence of Alienation.

Evidence in husband's action is insufficient to show alienation of his wife's affections by defendant but is sufficient to support a jury finding of defendant's guilt of criminal conversation. *Warner v. Torrence*, 384.

§ 27. Criminal Conversation in General.

In an action for actual and punitive damages for the alienation of the affections of plaintiff's wife by the defendant and for his criminal conversation with her, there is no error in the fact that the original complaint joined the two causes of action together in one paragraph and requested damage in a lump sum without differentiating the amount sought to be recovered in each. *Warner v. Torrence*, 384.

§ 28. Competency and Sufficiency of Evidence in Criminal Conversation.

Adultery in action for criminal conversation may be shown by circumstantial evidence. *Warner v. Torrence*, 384.

HUSBAND AND WIFE—*Continued.*

Evidence in husband's action is insufficient to show alienation of his wife's affections by defendant but is sufficient to support a jury finding of defendant's guilt of criminal conversation. *Ibid.*

INDICTMENT AND WARRANT.

§ 7. Form, Requisites and Sufficiency in General.

An indictment charging robbery with firearms need not allege the exact location where the offense occurred. *S. v. Green*, 170.

§ 8. Joinder of Counts and Duplicity.

Defendant waives duplicity in indictment by going to trial without making motion to quash. *Blakeney v. State*, 312.

§ 11. Identification of Victim.

Variance between the indictment and proof as to the identification of the corporate defendant does not merit quashal of the indictment. *S. v. Foster*, 109.

§ 15. Time for Making Motion to Quash.

The presiding judge has discretionary power to permit the accused to make a motion to quash the indictment up to the time the petit jury is sworn and impaneled. *Parker v. State*, 27.

§ 17. Variance Between Averment and Proof.

No fatal variance occurs where indictment charges larceny of property from a specified person who the evidence discloses was not the owner but was in lawful possession. *S. v. Cotten*, 305.

INFANTS.

§ 6. Appointment, Duties and Authority of Guardian Ad Litem.

G.S. 1-65.2 is held to have validated the appearance in a 1936 action to construe a will by a guardian ad litem in behalf of minor and unborn contingent beneficiaries, but did not validate his appearance in behalf of unborn persons having a vested interest in the estate. *De Lotbinere v. Trust Co.*, 233.

INJUNCTIONS.

§ 7. Injunction to Restrain Occupancy or Use of Land.

Where complaint in G.S. Chapt. 136 condemnation alleges a defective statement of a good cause of action, defendants are entitled to order restraining the taking of their property. *Charlotte v. Robinson*, 429. Superior Court may grant restraining order preventing municipal airport authority from cutting trees on condemned property pending appeal by landowners to Superior Court where the right and necessity to condemn the property are at issue. *Airport Authority v. Irvin*, 341.

The courts are reluctant to grant injunctive relief for an anticipated nuisance. *Dorsett v. Development Corp.*, 120.

INSURANCE.

§ 6. Construction and Operation of Policy.

Where language of policy is clear and unambiguous, the court must give the language its plain and obvious meaning. *Clemmons v. Ins. Co.*, 479; *Williams v. Ins. Co.*, 520.

INSURANCE—*Continued.*

§ 45. Accident Policy — Definitions.

In construing accident policy, "death by accidental means" refers to the occurrence which produces the result, while "accidental death" refers to the result itself. *Kinney v. Ins. Co.*, 597.

§ 47. Visible Contusion or Wound.

Evidence that insured's skull was crushed in automobile accident held sufficient to show accidental death resulting from an accidental injury visible on the surface of the body within terms of policy. *Kinney v. Ins. Co.*, 597.

§ 58. Insured's Violation of Law.

Where plaintiff's evidence makes a prima facie showing of accidental death within terms of an accident policy, insurer's evidence tending to show the death was excluded from coverage because it resulted from insured's participation in a felony does not justify nonsuit. *Kinney v. Ins. Co.*, 597.

§ 67. Actions on Accidental Policies.

In action on accident policy, nonsuit is proper if plaintiff's evidence fails to show coverage or shows exclusion from coverage; when defendant's evidence shows plaintiff does not have a case or that defendant has a complete defense, defendant's remedy is by motion for a peremptory instruction. *Kinney v. Ins. Co.*, 597.

In action on policy of insurance providing benefits for accidental injury or death, plaintiff's evidence failed to show that death of deceased occurred within policy terms providing benefits if deceased at time of accident was riding in or on a motor-driven machine. *Williams v. Ins. Co.*, 520.

When the plaintiff (1) fails to show coverage under the insuring clause or (2) establishes an exclusion while making out his *prima facie* case, nonsuit is proper. *Ibid.*

§ 113. Fire Insurance Generally.

A fire insurance policy is a personal contract. *Forsyth County v. Plemmons*, 373.

§ 116. Fire Insurance Rates.

At a rehearing upon a request by the Rating Bureau for an increase in fire insurance rates, it is error for the Commissioner of Insurance to refuse to admit and consider the latest cost index statistics which became available only after the request for an increase in rates had been filed. *In re Filing by Fire Ins. Rating Bureau*, 10.

In determining the "adjustment of losses," the Commissioner of Insurance has the discretion to reject the "trending projection" method proposed by the Rating Bureau and to use a method by which greater weight is given to the actual loss experience in the more recent years in the study period. *In re Filing by Fire Ins. Rating Bureau*, 10.

§ 134. Persons Entitled to Payment on Fire Policy.

Proceeds from a fire policy on entirety property become personalty held by husband and wife as tenants in common. *Forsyth County v. Plemmons*, 373.

§ 142. Actions on Burglary and Theft Policies.

In action on policy of burglary insurance, the evidence was insufficient to show a felonious exit from the burglarized premises within terms of policy requiring evidence of physical damage to premises. *Clemmons v. Ins. Co.*, 479.

INTOXICATING LIQUOR.

§ 12. Competency and Relevancy of Evidence.

In prosecution for illegal possession of nontaxpaid and taxpaid whiskey, empty whiskey bottles in jury view but not introduced in evidence held not prejudicial. *S. v. Siler*, 683.

§ 19. Instructions.

In prosecution for unlawful sale of taxpaid whiskey, where defendant's evidence negates a sale to A.T.U. officer, the court's instruction that defendant contended the officer was her accomplice in making the sale is prejudicial. *S. v. Ransom*, 613.

JUDGMENTS.

§ 24. Setting Aside Judgment for Mistake, Surprise, or Excusable Neglect.

To set aside a judgment under G.S. 1-220, the movant must show excusable neglect. *Meir v. Walton*, 578.

§ 25. What Conduct Justifies Relief.

Where defendant turned the suit papers over to an attorney and thereafter made no inquiry with respect thereto, the neglect of the attorney to take action to defend the suit is imputable to defendant. *Meir v. Walton*, 578.

§ 36. Parties Concluded.

A 1936 judgment construing a will is res judicata as to minor and unborn contingent beneficiaries who were represented by a guardian ad litem in that action. *De Lotbiniere v. Trust Co.*, 233.

LABORERS' AND MATERIALMEN'S LIENS.

§ 1. Nature and Grounds of Lien of Contractor or Person Dealing Directly with Owner.

Laborers' and materialmen's liens arise out of debtor-creditor relationship. *Clark v. Morris*, 388.

§ 2. Contract with Husband or Wife.

In housing contractor's action to obtain lien against real estate held by defendants as tenants by the entirety, the evidence is insufficient to show the husband and wife were acting as partners in the building of a house; consequently, no lien attaches to the property. *Clark v. Morris*, 388.

LANDLORD AND TENANT.

§ 6. Construction of Lease, Generally.

Construction of a lease which would lead to a harsh or unreasonable result should be avoided if possible. *Discount Corp. v. Mangle's*, 472.

§ 8. Liability for Damage to Property; Duty to Repair.

Where property is demised in a good condition and state of repair, the tenant and not the landlord is liable for injuries to invitees of the tenant. *Brady v. Coach Co.*, 174.

Lease which covered only a portion of the building and which contained a covenant to repair does not impose obligation on the lessor to rebuild in case the entire building is destroyed by fire. *Discount Corp v. Mangle's*, 472.

LARCENY.

§ 3. Degrees of the Crime.

"Value" as used in G.S. 14-72 means fair market value. *S. v. Cotten*, 305.

§ 5. Presumptions and Burden of Proof.

Presumption arising from recent possession of stolen property. *S. v. Cotten*, 305.

§ 6. Competency and Relevancy of Evidence.

In automobile larceny prosecution, owner may give opinion as to trade-in value of automobile. *S. v. Cotten*, 305.

§ 7. Sufficiency of Evidence and Nonsuit.

Evidence held sufficient to be submitted to jury in prosecution for larceny. *S. v. Bailiff*, 608.

Evidence held sufficient to overrule nonsuit in automobile larceny prosecution. *S. v. Cotten*, 305. No fatal variance occurs where indictment charges larceny of an automobile from the wife and the evidence discloses that record title was in the husband but that the wife was in lawful possession. *Ibid.*

§ 8. Instructions.

G.S. 20-71.1 creates no presumption of vehicle ownership in a larceny prosecution. *S. v. Cotten*, 305.

§ 10. Judgment and Sentence.

Sentence of five to ten years for felonious larceny is valid. *S. v. White*. 398.

LIMITATION OF ACTIONS.

§ 4. Accrual of Right of Action and Time from Which Statute Begins to Run.

No statute of limitations is applicable in action to recover unclaimed property paid by clerk of court to the University until there has been a demand and refusal to pay. *In re Estate of Nixon*, 422.

LIS PENDENS.

A proceeding in condemnation under G.S. 136-19 and G.S. 40-11 *et seq.* instituted by the owner prior to the owner's conveyance of the property in question may be carried on and perfected as if no conveyance had been made, G.S. 40-26, and the proceeding constitutes a *lis pendens* so that persons acquiring title by *mesne* conveyance from the owner after the proceeding was begun take title to the land subject to the special proceeding and the judgment entered therein. *Highway Comm. v. Hughes*, 1.

MASTER AND SERVANT.

§ 21. Liability of Contractee for Injuries to Third Persons.

The employer of an independent contractor may not escape liability by delegating to the contractor the duty to exercise due care where injurious consequences must be expected to arise from the work to be executed. *Pickard v. Burlington Belt Corp.*, 97.

MASTER AND SERVANT—*Continued.*

§ 47. Nature and Construction of Compensation Act.

Workmen's Compensation Act should be liberally construed. *Bailey v. Dept. of Mental Health*, 645.

§ 48. Employers Subject to Compensation Act.

The term "regularly employed" connotes employment of the same number of persons throughout the period with some constancy. *Patterson v. Parker & Co.*, 43.

There are insufficient facts to indicate that the employer had five or more employees at the time of the accident, and consequently the Industrial Commission has no jurisdiction in the matter. *Patterson v. Parker & Co.*, 43.

§ 56. Causal Relation Between Employment and Injury.

Unless the injury can be fairly traced to the employment as a contributing proximate cause, it does not arise out of the employment. *Eaton v. Klopman Mills, Inc.*, 363.

§ 65. Hernia and Back Injuries.

Finding by the Industrial Commission that plaintiff's hernia was not an injury arising out of and in the course of employment is supported by competent evidence. *Eaton v. Klopman Mills*, 363.

§ 69. Amount and Items of Recovery Generally.

"Disability" as used in the Workmen's Compensation Act means impairment of wage earning capacity rather than physical impairment. *Morgan v. Furniture Industries*, 126.

§ 85. Nature and Extent of Jurisdiction of Industrial Commission Generally.

The Industrial Commission is constituted a special or limited tribunal to hear claims under the Compensation Act. *Hodge v. Robertson*, 216. The Commission is the sole fact finding agency in those cases in which it has jurisdiction. *Morgan v. Furniture Industries*, 126.

§ 93. Prosecution of Claim and Proceedings Before Commission.

Commission's duty to hear plaintiff's application for the hearing of additional testimony applies only if good ground therefor is shown. *Eaton v. Klopman Mills*, 363.

The Industrial Commission did not abuse its discretion in denying claimant's application for the taking of an out-of-state deposition. *Hodge v. Robertson*, 216.

§ 94. Findings and Award of Commission.

The Industrial Commission must make specific findings with respect to the crucial facts upon which plaintiff's right to compensation depends. *Morgan v. Furniture Industries*, 126.

§ 96. Review in Court of Appeals.

Evidence held sufficient to support Commission's findings that all of plaintiff's disability resulted from an injury while working for defendant employer. *Lewis v. Diamond Mills Co.*, 400.

Finding by the Industrial Commission that plaintiff's hernia was not an injury arising out of and in the course of employment is supported by competent evidence. *Eaton v. Klopman Mills*, 363.

MASTER AND SERVANT—*Continued.*

The Court of Appeals has appellate jurisdiction to review an award of the Industrial Commission for errors of law. G.S. 97-86. *Morgan v. Furniture Industries*, 126.

The Industrial Commission's findings of jurisdictional facts are not conclusive on appeal to the Court of Appeals. *Patterson v. Parker & Co.*, 43.

§ 97. Disposition of Appeal.

Plaintiff's motion for new trial on ground of newly discovered evidence is granted by the Court of Appeals. *Shelton v. Dry Cleaners*, 528.

§ 98. Proceedings After Remand.

Upon remand of an action to the Industrial Commission, the Commission has the discretion upon a proper showing to order the taking of additional evidence. *Bailey v. Dept. of Mental Health*, 645.

§ 99. Costs and Attorneys' Fees.

Attorney now has statutory right to appeal from action of Industrial Commission with respect to his fees. *Priddy v. Cab Co.*, 331. Commission's order taxing defendant with fee for plaintiff's attorney resulting from additional hearing held at defendant's request is proper. *Lewis v. Diamond Mills Co.*, 400.

MORTGAGES AND DEEDS OF TRUST.

§ 13. Estates, Rights, and Duties of Parties to the Instrument.

In trustor's action against cestui of a deed of trust for an accounting for wrongful cutting and removal of timber from trustor's lands, the evidence is sufficient to support jury finding that the cestui wrongfully entered upon plaintiff's land and cut timber therefrom and that the value of the timber cut was sufficient to leave the deed of trust not in default. *Carroll v. Parker*, 573.

The cestui que trust of a deed of trust is liable to the trustors for timber cut on the lands secured by the deed of trust at the instance of the cestui or through his agency and for his benefit, absent a special agreement with the trustors which would relieve the cestui of such liability. *Carroll v. Parker*, 573.

MUNICIPAL CORPORATIONS.

§ 4. Legislative Control and Powers of Municipalities.

Municipality may furnish water and sewer services to nonresidents. *Randleman v. Hinshaw*, 381.

§ 9. Officers and Employees, Generally.

A municipality can require firemen employees to perform public duties other than those relating to the fighting or prevention of fires. *Civil Service Bd. v. Page*, 34.

§ 11. Discharge of Municipal Employees.

Municipal fireman is properly discharged for disobeying order of superior officer to help erect tents for a "Festival in the Park." *Civil Service Bd. v. Page*, 34.

§ 29. Nature and Extent of Municipal Police Power.

Municipal ordinances which are restrictive of the rights of property owners are to be strictly construed. *Bell v. Page*, 132.

MUNICIPAL CORPORATIONS—*Continued.*

§ 30. Zoning Ordinances and Building Permits.

The legislature may delegate to a zoning board of adjustment the authority as a quasi-judicial body to determine facts and therefrom to draw conclusions as a basis of its official action. *Jackson v. Bd. of Adjustment*, 408.

In determining the sufficiency of the standard by which a zoning board of adjustment is to be guided, the purpose and intent of the ordinance may be considered. *Ibid.*

The standards for the issuance of special permits and exceptions are usually less stringent than in the case of variances. *Ibid.*

§ 39. Issuance of Bonds and Levy of Taxes.

Operation of a public bus system is not a "necessary expense" within meaning of Art. 7, § 6 of the Constitution of N. C. for which a municipality may spend tax revenues without a vote of the people. *Cole v. Asheville*, 652.

NEGLIGENCE.

§ 1. Acts and Omissions Constituting Negligence Generally.

Negligence defined. *Lanier v. Roses Stores, Inc.*, 501.

Due care defined. *Strickland v. Hughes*, 395.

§ 2. Negligence Arising from Performance of a Contract.

To recover for injury arising out of negligent breach of contract, plaintiff must show that the breach of contractual duty was a proximate cause of his injury. *Bryan v. Elevator Co.*, 593.

§ 5. Dangerous Substances and Instrumentalities.

It is not negligence for a person to maintain an unenclosed pool on his premises. *Bell v. Page*, 132.

§ 28. Questions of Law and of Fact.

Contradictions in the evidence are matters for the jury. *Pelkey v. Bynum*, 183.

§ 31. Res Ipsa Loquitur.

The rule of *res ipsa loquitur* never applies when the facts of the occurrence merely indicate negligence by some person and do not point to the defendant as the only probable tortfeasor. *Bryan v. Elevator Co.*, 593.

In an action to recover damages for injuries arising out of an elevator accident, the doctrine of res ipsa loquitur is inapplicable to carry to the jury the issue of the elevator company's negligence in breach of contract duty to maintain the equipment in a safe operating condition. *Ibid.*

§ 34. Sufficiency of Evidence of Contributory Negligence.

Rules on contributory negligence. *Lienthall v. Glass*, 65; *Taylor v. Carter*, 78.

§ 40. Instructions on Proximate Cause, Generally.

Trial court's instruction on proximate cause did not require a jury finding that defendant must have foreseen the precise injury. *Jackson v. Jones*, 441.

Trial court's instruction that "law does not require prevision" is not error when the word "prevision" is used in the sense of "omniscience." *Ibid.*

NEGLIGENCE—*Continued.*

§ 51. Attractive Nuisances and Injury to Children.

Evidence is insufficient to show that the drowning of a nine year old child was proximately caused by defendant's negligence in failing to comply with municipal ordinance relating to swimming pools. *Bell v. Page*, 132.

§ 53. Duties and Liabilities to Invitees.

Duties of proprietor to his customer invitees to keep the premises in a reasonably safe condition. *Lanier v. Roses Stores, Inc.*, 501; *Colclough v. A & P Tea Co.*, 504; *Brady v. Coach Co.*, 174.

§ 57. Sufficiency of Evidence and Nonsuit in Actions by Invitees.

There is sufficient evidence to go to jury on store owner's negligence in improperly applying oil to wooden floor. *Lanier v. Roses Stores, Inc.*, 501. Evidence is insufficient to show store owner's negligence in maintaining grocery cart which jammed and caused injury to plaintiff's little finger. *Colclough v. A & P Tea Co.*, 504.

In plaintiff's action for injuries caused by slipping on restaurant floor, there is insufficient evidence to go to jury on the issue of proprietor's negligence. *Brady v. Coach Co.*, 174.

NUISANCE.

§ 7. Damages and Abatement of Private Nuisance.

Plaintiff's allegations in nuisance action failed to allege facts showing substantial grounds for anticipating immediate danger from construction of concrete plant, and therefor injunctive relief is properly denied. *Dorsett v. Development Corp.*, 120.

PARENT AND CHILD.

§ 6. Right to Custody of Child.

The rule that in custody cases the welfare of the child should guide the court's decision is now codified by statute. *In re Custody of Pitts*, 211.

§ 7. Duty to Support and Right of Child to Sue for Support.

Husband has an obligation to support a child born of a bigamous marriage. *Rehm v. Rehm*, 298.

PARTIES.

§ 1. Necessary Parties, Generally.

Trustee was necessary and proper party to determine real property claim under Declaratory Judgment action. *York v. Newman*, 484.

Court properly denied defendant's motion to join as additional defendants persons who had agreed to indemnify defendants. *Casualty Co. v. Hall*, 198.

§ 3. Parties Defendant.

Where plaintiff was in doubt as to which one of three defendant insurers was liable on judgment, the defendants were properly joined under G.S. 1-69. *Torres v. Surety Co.*, 208.

PARTITION.

§ 4. Plea of Sole Seisin.

Where respondents in a proceeding for partition deny that petitioners own any interest in land, the proceeding is converted into a civil action to try title. *Yancey v. Watkins*, 672.

PLEADINGS.

§ 2. Statement of Cause of Action in General.

In a civil action the complaint must contain, among other things, "a plain and concise statement of the facts constituting a cause of action;" if not, it is demurrable. G.S. 1-122. *Highway Comm. v. Matthis*, 233.

§ 3. Joinder of Causes of Action, Generally.

The joinder of causes of action and parties is permissible under G.S. 1-69 where plaintiff is unsure as to which defendant is liable. *Torres v. Surety Co.*, 208.

§ 14. Cross-Action Against Co-Defendant.

Where plaintiff alleges that each defendant committed an act in tort and that their liability is joint and concurrent, neither defendant may maintain a cross-action against the other for indemnity arising out of breach of an express or implied warranty. *Anderson v. Robinson*, 191.

§ 19. Office and Effect of Demurrer.

The purpose of a demurrer defined. *Dorsett v. Development Corp.*, 120; *State Bar v. Temple*, 91.

All pleadings shall be liberally construed. *Auto Supply Co. v. Equipment Co.*, 531.

§ 32. Motion to Amend.

A motion to amend after the beginning of the trial is addressed to the discretion of the trial court, and its decision is not appealable. *Auto Supply Co. v. Equipment Co.*, 531.

§ 33. Scope of Amendment.

Amendment of complaint in personal injury action is properly allowed, the amendment constituting no surprise to defendant. *Inman v. Harper*, 103.

§ 37. Issues Raised by the Pleadings and Necessity for Proof.

Allegations in the complaint which are admitted in the answer need not be proved. *Lienthall v. Glass*, 65.

§ 42. Right to Have Allegations Stricken on Motion.

The granting of a motion to strike rests in the discretion of the court. *State Bar v. Temple*, 91.

PROPERTY.

§ 2. Title and Right to Possession of Personalty.

Corporation which obtained money from a bank by issuance of worthless checks acquires title to the money, but constructive trust arises in favor of the bank to follow the money and to reclaim it. *Auto Supply Co. v. Equipment Co.*, 531.

PUBLIC OFFICERS.

§ 8. Performance of Official Duties.

Acts of public officers are presumed valid. *Civil Service Bd. v. Page*, 34.

QUIETING TITLE.

§ 1. Nature and Grounds of Remedy.

Nature of and grounds for statutory and equitable remedies removing

QUIETING TITLE—*Continued.*

cloud on title to real property are defined. *York v. Newman*, 484. There is no statutory provision for quieting title to personal property. *Newman Machine Co. v. Newman*, 491.

§ 2. Actions to Remove Cloud from Title.

In Declaratory Judgment action, complaint properly stated a cause of action for removing cloud on title to real property. *York v. Newman*, 484.

RAILROADS.

§ 5. Crossing Accidents.

In railroad crossing accident case, an instruction which permits the jury to find the railroad negligent solely upon finding that it allowed plaintiff's view at the crossing to be obstructed by a growth of weeds is erroneous. *Moss v. Railway Co.*, 50.

§ 6. Warning or Protective Devices at Crossings.

In railroad crossing accident case, the evidence supports trial court's instruction that failure of automatic signals at a given moment is not sufficient of itself to constitute negligence by railroad. *Jackson v. Jones*, 441.

RAPE.

§ 18. Prosecutions.

The trial court did not err, absent a special request, in failing to define the words "carnal knowledge." *S. v. Withers*, 201.

RECEIVERS.

§ 5. Title and Control of Property and Business.

Title to all property of an insolvent corporation vests in the receiver immediately upon his appointment. *Trust Co. v. Berry*, 547.

§ 10. Filing of Claims and Actions Against Receiver.

In receivership proceedings, trial court did not abuse its discretion in denying creditor's motion to allege fraud. *Auto Supply Co. v. Equipment Co.*, 531. In receivership proceedings, trial court did not err in dismissing bank's action against insolvent corporation on ground that action was abated by appointment of a receiver for the corporation. *Trust Co. v. Berry*, 547.

§ 11. Proof of Claims, Allowance and Disallowance.

Claimant's proof of claim must be in writing and must be presented within the time prescribed by the court. *Trust Co. v. Berry*, 547; *Auto Supply Co. v. Equipment Co.*, 531.

§ 12. Liens, Priorities and Payment.

Creditor-bank does not have a preferred claim against insolvent's assets in the hands of a receiver on ground that the insolvent obtained money from the bank through fraud. *Auto Supply Co. v. Equipment Co.*, 531. Preferences are not favored. *Ibid.*

REFERENCE.

§ 3. Compulsory Reference.

Trial court did not abuse its discretion in refusing to order a compulsory reference under G.S. 1-189(1). *Britton v. Gabriel*, 213.

ROBBERY.

§ 2. Indictment.

An indictment charging robbery with firearms need not allege the exact location where the offense occurred. *S. v. Green*, 170.

§ 4. Sufficiency of Evidence and Nonsuit.

Evidence held sufficient for jury in robbery prosecution. *S. v. Richardson*, 523.

Evidence is held sufficient to show the "use or threatened use" of a firearm. *S. v. Green*, 170.

§ 5. Instructions and Submission of Lesser Degree of the Crime.

Evidence in this armed robbery prosecution did not require submission of defendant's guilt of common-law robbery. *S. v. Green*, 170; *S. v. McLean*, 460.

SALES.

§ 13. Actions or Counterclaims to Rescind and Recover Purchase Price.

In an action for goods sold and delivered, the court's conclusion that plaintiff was not indebted under defendant's counterclaim is supported by findings of fact. *Repair Co. v. Morris & Associates*, 72.

SEALS.

A court of equity can look behind the seal to see if there is valuable consideration for support of a contract. *Britton v. Gabriel*, 213.

SHOPLIFTING.

District Court has exclusive original jurisdiction over shoplifting prosecutions. *S. v. Thompson*, 508. Where defendant was convicted in District Court upon warrant charging him with shoplifting, the Superior Court upon appeal has no authority to allow the State to amend the warrant to charge defendant with a second offense of shoplifting. *Ibid.*

SOLICITOR.

Respective duties of Attorney General and solicitor in preparing record on appeal in criminal cases are defined. *S. v. Hickman*, 627.

STATE.

§ 5. Nature and Construction of Tort Claims Act.

Tort Claims Act should be strictly construed. *Bailey v. Dept. of Mental Health*, 645.

§ 8. Negligence of State Employee and Contributory Negligence of Person Injured.

In an action against the State under the Tort Claims Act for injuries received in eating wire contained in a bowl of salad greens, there is insufficient evidence to show that a university cafeteria is negligent. *Brooks v. University*, 157.

Contributory negligence by driving truck exceeding weight limitations upon highway bridge. *Shephard v. Highway Comm.*, 223.

STATE—*Continued.*

In action under Tort Claims Act, Industrial Commission did not err in finding that hospital physician was not negligent in administering shock treatment to plaintiff. *Bailey v. Dept. of Mental Health*, 645.

§ 10. Appeal and Review of Proceedings Under Tort Claims Act.

On remand of cause from Supreme Court, Industrial Commission did not abuse its discretion in denying plaintiff's motion to introduce additional evidence, since the Supreme Court directed that the Commission consider evidence in its true legal light and to make findings of fact thereon. *Bailey v. Dept. of Mental Health*, 645.

STATUTES.

§ 5. General Rules of Construction.

Statute in derogation of the common law must be strictly construed. *Bell v. Page*, 132.

TAXATION.

§ 2. Uniform Rule and Discrimination.

The broad power of a state legislature to classify and thus to discriminate for purposes of inheritance taxation has been fully established. *Rigby v. Clayton*, 57.

§ 6. Necessary Expense and Necessity for Vote.

Operation of public bus system is not "necessary expense" within meaning of Art. 7, § 6, of Constitution of N. C. for which a municipality may spend tax revenue without a vote of the people. *Cole v. Asheville*, 652.

§ 17. Inheritance and Succession Taxes.

Inheritance tax statute which made a distinction between decedent leaving property solely within State and decedent leaving property both within and without State is not unconstitutional. *Rigby v. Clayton*, 57.

TORTS.

§ 3. Rights Inter Se of Defendants Joined by Plaintiff.

Where plaintiff alleges that each defendant committed an act in tort and that their liability is joint and concurrent, neither defendant may maintain a cross-action against the other for indemnity arising out of breach of an express or implied warranty. *Anderson v. Robinson*, 191.

§ 7. Release from Liability and Covenants Not to Sue.

In action for personal injuries, evidence is insufficient to show fraud and inadequacy of consideration in obtaining a release of liability from plaintiff. *Matthews v. Hill*, 350. An injured party who can read has the duty to read a release before he signs it. *Ibid.*

Inadequacy of consideration alone is not sufficient to set aside a release, unless it be so gross and palpable as to shock the moral sense. *Ibid.*

Where plaintiff admits the execution of a release, he then has the burden to prove any matter in avoidance. *Ibid.*

TRIAL.

§ 6. Stipulations.

Contradictory stipulations nullify each other. *Smothers v. Schlosser*, 272.

TRIAL—*Continued.*

§ 8. Consolidation of Actions for Trial.

Consolidation of cases cannot be imposed upon the judge presiding at the trial by the preliminary order of another trial judge. *Pickard v. Burlington Belt Corp.*, 97.

§ 15. Objections and Exceptions to Evidence.

"Apt time" in making objection defined. *Eaton v. Klopman Mills*, 363.

§ 21. Consideration of Evidence on Motion to Nonsuit.

Rules for consideration of evidence on motion for nonsuit. *Puryear v. Cooper*, 517; *Bryan v. Elevator Co.*, 593.

Upon motion to nonsuit, plaintiff's evidence must be taken as true. *Lienthall v. Glass*, 65.

§ 23. Sufficiency of Evidence to Overrule Nonsuit, Generally.

Where plaintiff makes out prima facie case of actionable negligence in wrongful death action, the case is properly submitted to the jury. *Maynor v. Townsend*, 19.

§ 31. Directed Verdict and Peremptory Instructions.

A directed instruction in favor of the party having the burden of proof is erroneous. *S. v. Brooks*, 115.

§ 32. Form and Sufficiency of Instructions in General.

The purposes of the court's charge to the jury. *Highway Comm. v. Thomas*, 679.

Trial court must give sufficiently definite instructions on the issue of damages. *Ibid.*

Action of court in informing jury that instructions were given at request of plaintiff's attorney disapproved. *Womble v. Morton*, 84.

§ 33. Statement of Evidence and Application of Law Thereto in Instructions.

It is error for the court to charge upon an abstract principle of law which is not presented by the allegations and is not supported by any view of the evidence. *Pelkey v. Bynum*, 183.

Court is not required to define "highway" and "intersection." *Payne v. Lowe*, 369.

The court's use in the charge of the term "has offered evidence in substance tending to show" is not an expression of opinion. *Womble v. Morton*, 84. Where the court's statement of the evidence does not correctly reflect the testimony of a witness, counsel has a duty to call such misstatement to the court's attention in apt time. *Ibid.* Failure of the court to apply the law to the evidence is error. *Pickard v. Burlington Belt Corp.*, 97.

§ 36. Expression of Opinion on Evidence in Instructions.

In an action against multiple defendants, the trial court's reference to "wrongdoer" and to "defendant" held not an expression of opinion by the court that only one defendant was responsible. *Goldston v. Chambers*, 291.

§ 37. Instructions on Credibility of Witnesses.

Trial court's failure to restrict jury's consideration of evidence which had the sole effect of discrediting plaintiff's testimony is prejudicial error. *Daniels v. Causey*, 456.

TRIAL—*Continued.*

§ 38. Request for Instructions.

If a litigant desires a fuller or more detailed charge by the court to the jury, it is incumbent upon him to request it by way of prayers for special instructions. *Jackson v. Jones*, 441.

§ 42. Form and Sufficiency of Verdict.

Findings by the jury that death of plaintiff's intestate was not proximately caused by negligence of defendant held not inconsistent with the jury's further finding that defendant's injuries were not proximately caused by negligence of plaintiff's intestate. *Smith v. Dean*, 553.

Defendant's motion for new trial on the ground that the jury returned a quotient verdict in condemnation proceedings is properly denied where defendant failed to show that the jurors, prior to obtaining the quotient, had agreed to accept the figure as their verdict. *Highway Comm. v. Matthis*, 233.

§ 46. Impeaching the Verdict.

In order to impeach the verdict of a jury, the evidence must come from sources other than the jurors themselves. *Highway Comm. v. Matthis*, 233.

§ 48. Power of Court to Set Aside Verdict in General.

A motion to set aside the verdict rests in the sound discretion of the trial judge. *Randleman v. Hinshaw*, 404.

§ 51. Setting Aside Verdict as Contrary to Weight of Evidence.

A motion to set aside the verdict as being against the greater weight of the evidence is directed to the trial court's discretion. *Bell v. Page*, 132.

§ 56. Waiver of Jury Trial and Agreement to Trial by the Court.

Waiver of trial by jury vests the court with the dual capacity of judge and jury. *Repair Co. v. Morris & Associates*, 72.

TRUSTS.

§ 8. Income and Persons Entitled Thereto.

No abuse of discretion is shown by court's order distributing portion of the accumulated trust income to beneficiaries having a vested interest therein. *De Lotbiniere v. Trust Co.*, 233.

§ 14. Creation of Constructive Trusts.

Constructive trust arises where person holding title to property owes equitable duty to convey property to another on ground of unjust enrichment. *Auto Supply Co. v. Equipment Co.*, 531. Where bank could not prove that funds fraudulently obtained from it actually constituted part of insolvent's assets in hands of a receiver, bank could not have a preferred claim against assets on theory of a constructive trust. *Auto Supply Co. v. Equipment Co.*, 531.

UTILITIES COMMISSION.

§ 3. Carriers.

Granting of permit to operate as contract carrier for a specified shipper was error where applicant offered no proof that the shipper had a need for a specific type of service not otherwise available by existing means of transportation. *Utilities Comm. v. Petroleum Transportation*, 566.

UTILITIES COMMISSION—*Continued.*

§ 6. Hearings and Orders; Rates.

Revision of common motor carrier rates for the intrastate transportation of unmanufactured tobacco on the basis of operating ratios which do not reflect any actual separation of intrastate and interstate revenues and expenses or any separation of tobacco revenues and expenses is contrary to law. *Utilities Comm. v. Tobacco Assoc.*, 657.

§ 9. Appeal and Review.

Findings of fact by the Utilities Commission are conclusive on appeal when supported by competent evidence. *Utilities Comm. v. Petroleum Transportation*, 566.

VENDOR AND PURCHASER.

§ 2. Duration of Option or Contract; Performance or Tender.

Acceptance of an option must be according to the terms of the option. *Builders v. Bridgers*, 662. Purported option is held void and unenforceable for uncertainty. *Ibid.*

VENUE.

§ 5. Actions Involving Title to or Right to Possession of Property.

Action for determination of rights of parties to agreement to divide profits from real estate development does not affect title to real estate and is not removable as of right. *Mortgage Corp. v. Development Corp.*, 138.

WILLS.

§ 33. Rule in Shelley's Case.

Rule in Shelley's Case held not to apply to devise to testator's daughter for life with remainder "to the children of her body." *Summey v. McDowell*, 360.

§ 35. Time of Vesting of Estates and Whether Estate is Vested or Contingent.

Where property is devised to testator's grandson for life "and then to go to his nearest kin," a child of the grandson is merely a contingent remainderman during the life of the grandson. *Edens v. Foulks*, 325.

Where a remainder is limited to a person not *in esse* or not ascertained, it is contingent. *Ibid.*

Where there is a devise to testator's heirs, next of kin, or other relatives, members of the class are ascertained at the time of testator's death unless the terms of the will manifest a different intent; where the gift is to the heirs or next of kin of another than the testator, members of the class are ordinarily ascertained at the death of such other person. *Ibid.*

§ 44. Representation and Per Capita and Per Stirpes Distributor.

Use of the term "nearest of kin" or "nearest blood relation" does not permit representation. *Edens v. Foulks*, 325.

§ 73. Actions to Construe Wills.

G.S. 1-65.2 is held to have validated the appearance in a 1936 action to construe a will by a guardian ad litem in behalf of minor and unborn contingent beneficiaries, but did not validate his appearance in behalf of unborn persons having a vested interest in the estate. *De Lotbiniere v. Trust Co.*, 233.

WITNESSES.

§ 1. Competency of Witness.

In prosecution for second degree murder, trial court did not err in refusing to disqualify a witness who defendant contends was an alcoholic. *S. v. Fuller*, 204.

§ 7. Direct Examination.

It was error to permit an officer to contradict his sworn testimony by reading from his accident report after he had stated he could not testify thereto of his own knowledge and no other proper foundation was made for the admission of the accident report. *Rogers v. Rogers*, 668.

Fact that witness read from a written report without stating that it served to refresh his memory is not sufficiently prejudicial to warrant a new trial. *Eaton v. Klopman Mills*, 363.

Daily memoranda kept by plaintiffs of effects of automobile injuries may be used for purpose of refreshing plaintiffs' recollections when testifying. *Goldston v. Chambers*, 291.

§ 8. Cross-Examination.

Record fails to show that plaintiff's witness was "badgered" by opposing counsel. *Eaton v. Klopman Mills*, 363.

§ 10. Attendance. Production of Documents and Compensation.

Trial court properly granted motion of U. S. Government to quash subpœnas directed to U. S. Secret Service agents where defendant failed to comply with applicable federal rules. *State Bar v. Temple*, 91.